The Law of Evidence in Nigeria

by

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LONDON: SWEET & MAXWELL
LAGOS: AFRICAN UNIVERSITIES PRESS
1966

Published in 1966 *by*
Sweet & Maxwell Limited of
11 *New Fetter Lane, London*
and
African Universities Press Limited, Lagos

Printed in Great Britain
by Staples Printers Limited
of London and Rochester

PREFACE

THE object of this book is to present, in a comprehensive manner, the Nigerian law of evidence based mainly on the Evidence Act, cap. 62 of the Laws of the Federation of Nigeria and Lagos, 1958. In writing this book I have kept in view the needs of two types of readers: first, students reading for their degree examinations in Nigerian Universities and those reading for the finals examinations at the Nigerian Law School. Secondly, I have in view also the needs of legal practitioners, judges, magistrates and all others who have to do with the administration of justice anywhere in Nigeria. In order to meet the needs of these two types of readers, whose needs are not by any means identical, I have treated my subject in the following manner.

Unlike other books previously published on the Nigerian law of evidence, this book has not assumed that the reader has any previous knowledge of the subject or of the English law of evidence. Therefore, wherever it is necessary to discuss any aspect of the latter (from which much of the Nigerian law of evidence is derived), I have done so without assuming in the reader any previous knowledge of that law. I have also discussed all the provisions of the Evidence Act as well as some provisions of other Acts which I have considered necessary to give a student who has no previous knowledge of the subject a complete picture, as far as it is possible, of the law of evidence as applied in the magistrates' courts, the High Courts and in the Supreme Court.

Furthermore, I have summarised in the body of the text, the facts of a large number of leading Nigerian cases, and where Nigerian cases are not available to illustrate any particular principle of law, I have not hesitated to summarise in the same manner facts of leading English cases. I have included in footnotes all available Nigerian and, where necessary, some English and other decisions. By so doing, I hope the legal practitioner and the courts will find the book of immense help.

Anyone writing a book on the law of evidence in Nigeria (or in England for that matter) is inevitably faced with the important problem of how to arrange his subject matter. After giving this problem full consideration, I have decided, in the present circum-

stances, to follow the arrangement of the Evidence Act itself, but I have not hesitated to alter that arrangement whenever I consider an alteration is essential for a good exposition of the law.

December 1965
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NOTE

On January 15, 1966, that is, after this book had gone to the printer, a military coup took place in this country and the government of the Federation passed into the hands of the Armed Forces on January 17, 1966 after two days of uncertainty. As would be expected, the National Military Government set up by the Forces has made a number of Decrees, the most important being the series known as Constitution (Suspension and Modification) Decrees and the State Security (Detention of Persons) Decrees of 1966. A detailed study of these is not necessary for our present purpose. I should, however, refer to two important points which relate to the contents of this book which should be borne in mind:

1. The regions are suspended and a form of quasi-unitary government promulgated. Here the position is absolutely vague. Whereas the different High Courts still exist with their jurisdiction possibly limited to the old Regional boundaries, laws for all parts of Nigeria are now made by Decrees from the National Military Government in Lagos—Legislative and Executive powers having been taken away from the Regions by Decrees.

2. Some of the Fundamental Rights discussed in this book are suspended and it is now possible to detain for long periods persons under State Security (Detention of Persons) Decrees. On the other hand, the law of procedure, both civil and criminal, including the law of Evidence have not been seriously affected.

As all these are temporary measures, I have not considered it necessary to alter the substance of this book had I in fact had an opportunity to do so.

June 1966

T.A.A.

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PART I

PRELIMINARY MATTERS

CHAPTER 1

INTRODUCTION

1. The Sources of the Nigerian Law of Evidence

Before stating the present basis of the law of evidence in Nigeria it is necessary to say a few words on the position prior to the first day of October, 1960, on which date Nigeria became a sovereign state under a constitution which provides for the entrenchment of some fundamental human rights. Before the establishment of the British Courts, the courts in Nigeria were customary courts and the rules of evidence in those courts were the applicable customary rules of evidence. To a very large extent the same rules are still applicable in those courts, but with these we are not concerned in this book. Our concern here is with the rules of evidence applicable in the magistrates' courts and the superior courts.

Up to the year 1945, Nigerian law of evidence in those courts established by the British Government was the English common law of evidence, as there was no local legislation dealing with that matter previous to that year. Indeed, section 10 of the Provincial Courts Ordinance of 1914,[1] beyond which we need not go here, had provided that subject to the terms of that or other Ordinance, the common law of England should be, as far as applicable, in force in what was then known as the Colony and Protectorate of Nigeria. This provision was repealed but was substantially re-enacted, by section 12 of the Protectorate Courts Ordinance of 1933.[2] Similar provisions were contained in section 14 of the Supreme Court Ordinance[3] which replaced the Protectorate Courts Ordinance, and in section 80 of the Magistrates' Courts Ordinance[4] both of 1948.

In the same year, 1948, an Evidence Ordinance[5] based largely on Stephen's *Digest of the Law of Evidence*, 12th edition, was passed, but it was not brought into operation until 1945 and until that year the law of evidence applicable in those courts continued to be the English common law of evidence.

On June 1, 1945, the Evidence Ordinance was brought into

[1] Ordinance No. 7 of 1914 (Cap. 4 of the 1923 Laws of Nigeria).
[2] Ordinance No. 45 of 1933.
[3] Ordinance No. 23 of 1943.
[4] Ordinance No. 24 of 1948.
[5] Ordinance No. 27 of 1948.

operation,[6] and has, until the present day, remained almost the same in substance and in form although it has been amended from time to time. Before dealing further with this Ordinance it is essential to show how far it is now valid for the whole of the Federation of Nigeria or any part of it. On October 1, 1960, Nigeria became a sovereign state as a Federation.[7] In any Federation, the distribution of legislative powers among its component parts is always of paramount importance and so it was with the Federation of Nigeria. The problem is as to which Legislature could legislate for each region with respect to the law of evidence. The position under the 1960 Constitution, which has remained substantially the same under the Republican Constitution of 1963,[8] in so far as the power to legislate on the law of evidence is concerned, is as provided in the 1960 Constitution:

> "Parliament[9] may make laws for Nigeria or any part thereof with respect to evidence in regard to matters not included in the Legislative Lists:
>
> Provided that an Act of Parliament enacted in pursuance of this section shall have effect in relation to any Region only to the extent that provision in that behalf is not made by the legislature of that Region."[10]

The effect of this provision of the Constitution is that the Evidence Ordinance which is now incorporated in the Laws of the Federation of Nigeria and Lagos, 1958,[11] as the Evidence Act,[12] though in existence before the introduction of the 1960 Constitution and is deemed to have been made under it,[13] can claim validity under it to the following extent. In so far as its provisions touching upon matters on the legislative lists[14] are concerned there can be

[6] See Notice 618 in Gazette 33 of 1945.
[7] See the Nigeria (Constitution) Order in Council, 1960 (S.I. 1960 No. 1652).
[8] See the Constitution of the Federation of Nigeria Act 1963, Act No. 20, which will be referred to hereafter simply as "the 1963 Constitution."
[9] "Parliament" in the Constitution refers only to the Federal Legislature. The legislatures of the Regions are referred to simply as "the Legislatures."
[10] S. 77 of the Constitution of the Federation of Nigeria, Second Schedule to the Nigeria (Constitution) Order in Council, 1960; re-enacted by s. 83 of the 1963 Constitution.
[11] To be referred to hereafter simply as "the 1958 Laws of Nigeria."
[12] Cap. 62. "Cap." when used throughout this book indicates the Chapter in the 1958 Laws of Nigeria unless otherwise stated. This method of citation is the one prescribed by law: see s. 20 of the Interpretation Act, 1964 (No. 1).
[13] See s. 3 of the Nigeria (Constitution) Order in Council, 1960.
[14] See s. 64 and the Schedule to the Second Schedule to the Nigeria (Constitution) Order in Council, 1960; and s. 69 and the Schedule to the 1963 Constitution.

no doubt of the validity and applicability of those provisions to the whole of the Federation. But with regard to those provisions of the Act touching upon other matters, usually referred to as residuary matters, those provisions are valid and applicable to the whole of the Federation only, and in so far as the Regions have not passed any legislation touching upon those matters. So far, no such legislation has been passed by any of the Regions and, consequently the Evidence Act[15] is applicable generally throughout the Federation, to all matters except to the extent that there are special provisions, with regard to the law of evidence in individual Regional laws touching matters within the legislative competence of the Region. It must be remembered, however, that the responsibility to enact laws on all matters for the Federal territory of Lagos is vested in Parliament, and that therefore all the provisions of the Act are valid and applicable to that territory without any qualifications whatsoever.

2. The Evidence Act

We should now turn our attention to the Evidence Act as the main source of our law of evidence. At the moment the greatest bulk of our general law relating to evidence is to be found in the Act which is mainly the subject of this book. The Act, however, contains a provision which needs clarification at this stage. Section 5 (*a*) states that nothing in the Act shall: "prejudice the admissibility of an evidence which would apart from the provisions of the Act be admissible."

The effect of this provision is twofold: first, it is to give room for the admission of evidence which is admissible under any other statutory Nigerian enactment. Secondly, it is to allow the admission of evidence which would have been admissible had the Act not been passed, that is, under the rules as existed by June 1, 1945. It is in the same terms as section 6 (2) (*a*) of the English Evidence Act, 1938,[16] and under both Acts it has been held that this provision is to allow the admission of evidence under the rules of the English common law. In *R.* v. *John Agaragariga Itule*,[17] in considering whether a confession which tells in favour of an accused person is admissible as evidence in favour of the accused, Brett Ag. C.J.F., said that "the matter is not dealt with expressly in sections

[15] To be referred to hereafter simply as "the Act."
[16] 1 and 2 Geo. 6, c. 28.
[17] [1961] All N.L.R. 462.

27 to 32 of the Evidence Ordinance,[18] and the common law rule therefore applies by virtue of section 5 (*a*)." It should be emphasised, however, that no evidence can now be excluded under the common law. This section is not meant to allow the exclusion of evidence otherwise than under the Act and the rules of the common law governing the exclusion of evidence are no longer applicable here except those that have been incorporated into the Act. Nigerian courts can look up to English decisions only as guides to the correct interpretation of the provisions of the Act where there are provisions similar to these under the common law or under an English statute. As Mbanefo F.J., pointed out in *Jimo Amoo & Ors.* v. *R.*,[19] where there is a conflict between the provisions of the Act and a decision of a court in England, the courts in this country would be bound to follow the Act. But unfortunately the courts have continued to support their decisions by reference to English decisions as if they are bound by them. There can be little doubt that the duty of a Nigerian court is to interpret the Evidence Act, but in so doing it is proper for the court to seek guidance from English decisions where the provision in the Act is similar to a provision of an English statute or of the common law. Where the Act is silent then the court can make use of the common law to admit the evidence in question provided it is relevant, but any evidence which is declared to be inadmissible by the Act cannot be admitted by any rules of the common law. Neither can the rules of the common law be made use of to exclude any evidence which is admissible under the Act or under any other statute applicable in Nigeria.

Another point of importance which needs examination is in relation to the courts in which the rules of evidence as contained in the Act are applicable. Section 1 (4) of the Act itself states that the Act shall apply "to all judicial proceedings in or before any court established in the Federation of Nigeria." The only exceptions to this are (a) proceedings before an arbitrator, (b) proceedings before a court martial and (c) judicial proceedings in or before a native or customary court including the Alkali courts of Northern Nigeria. With regard to (c) however, a Region is allowed by the Act to make any or all the provisions of the Act apply to all such courts or any of them as that Region may decide. The courts to which the Act is

[18] Discussed in Chap. 3, *post.*
[19] (1959) 4 F.S.C. 113.

applicable *in toto* at the present are therefore all the magistrates' courts, the High Courts, and the Supreme Court.

A few words must be said about the Act itself. The order in which its provisions are arranged has not much to commend it, but it must be noted that the law of evidence is hardly capable of a single accepted method of classification. In spite of this criticism, however, the order in which the provisions of the Act have been discussed in this book has been the same order in which they appear in the Act itself, except where it is thought that following that order will do violence to the topic under discussion and not lead to a clear exposition of it.

3. Fundamental Human Rights: Provisions of the Constitution Relating to the Law of Evidence

It is necessary here to state briefly the provisions of the Constitution which bear upon the law of evidence. The first one to note is section 22 (1) and (2) which provide that every citizen of Nigeria, and indeed every one appearing in any court in Nigeria, including native and customary courts, as a party to a civil suit or as an accused person, is entitled to a fair hearing within a reasonable time. Any rule of evidence (or procedure) which is contrary to this must be void and of no effect. The problem is as to what amounts to a fair hearing. A few illustrations will suffice. For example, it will be contrary to these provisions to refuse to hear the evidence of a party to a case and that of his witnesses.

In *Malam Sadau of Kunya* v. *Abudul Kadir of Fagge*,[20] Jibowu F.J. (as he then was) said:

> "It is a fundamental principle of the administration of natural justice that a defendant and his witnesses should be heard before the case against him is determined, and it is, in my view, a denial of justice to refuse to hear a defendant's witnesses."

In the case, the plaintiff sued the defendant for a sum of money in the Chief Alkali's court. At the trial the defendant admitted signing a document which the plaintiff said that he had in his possession in support of his claim. The defendant stated that he was forced to sign the document and gave the names of his witnesses who could bear out his allegation. The court did not allow the de-

[20] (1956) 1 F.S.C. 89 at 41.

fendant to call his witnesses but entered judgment against him. It was held by the Federal Supreme Court that the Alkali's court was wrong not to have allowed the defendant to call his witnesses. The principle that a party to a case must be allowed to call his witnesses is of general application, and is applicable to trials not only under Nigerian statutory law but also under Moslem Law. Similarly, Ademola C.J.F. said in *Kano Native Authority* v. *Raphael Obiora*[21] that "natural justice requires that an accused person must be given the opportunity to put forward his defence fully and freely and to ask the court to hear any witnesses whose evidence might help him." And it is the duty of the court to ask an accused person if he has witnesses he wishes to call in support of his defence, and it is desirable that the relevant question and answer should be recorded;[22] but it cannot be said that an opportunity to call a witness is denied to an accused person only because he has not been specifically told that he has a right to call witnesses or been asked if he wishes to call witnesses.[23]

Under the provisions of the Constitution quoted above a court must act only on the evidence produced before it. In *Ibrahim Mai Abinkumi* v. *Kasimu*,[24] a case part-heard in one native court was transferred to another. The other court besides hearing witnesses, read the record of evidence of a witness who had testified before the former court and who did not testify before it, and acted upon it. It was held that this trial was irregular and could not stand.[25] All these cases would come under the section of the Constitution referred to above.

Whilst on these provisions it is essential to mention another provision of the Constitution, the non-compliance with which, it has been argued in one case, resulted in not having a fair trial. The provision is that contained in section 22 (5) (*d*) of the Constitution.[26] It is to the effect that:

> "every person who is charged with a criminal offence shall be entitled to examine in person or by his legal representatives the witnesses called by the prosecution before any court and to

[21] (1959) 4 F.S.C. 226 at 230.
[22] *Per* Foster-Sutton C. J., in *Danjuma Dan Buhari Rimin Auzinawa* v. *Kano Native Authority*, (1950) 1 F.S.C. 27.
[23] (1959) 4 F.S.C. 226 at 230.
[24] 1962 N.N.L.R. 26.
[25] See also *Chief Yaw Damoah* v. *Chief Koji Tailul* (1947) 12 W.A.C.A. 167.
[26] Originally s. 21(5) (*d*) of the Second Schedule to Nigeria (Constitution) Order in Council, 1960.

obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to the witnesses called by the prosecution."

In *Olawoyin & Ors.* v. *Commissioner of Police*[27] there was nothing on the record of the case to show that an opportunity was given to the appellants to give their evidence on oath. It was argued that the above quoted provision of the Constitution entitled each appellant to give his own evidence on oath and that having not been given such an opportunity they were not given a fair hearing within the meaning of section 22 (2). It was, however, held that the question whether there has been a fair hearing is one of substance, not of form, and must always be decided in the light of the realities of any particular case. In this case the appellants had failed to establish any prejudice to them from the omission to give them an opportunity to give evidence on oath. They had therefore failed to show that in fact the hearing was unfair.

Also reference must be made to section 22 (5) (*e*) of the Constitution which provides that "every person who is charged with a criminal offence shall be entitled to have without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence." This provision is similar to the one contained in section 21 (5) (*e*) of the 1960 Constitution which was considered in *Buraima Ajayi & Anor.* v. *Zaria Native Authority*.[28] The proceedings at the trial of the appellants in the Native Court were conducted in the Hausa language which the appellants neither spoke nor understood. They were Yoruba speakers by birth and understood English, but not perfectly. The proceedings were interpreted by five different interpreters at successive stages. In this appeal, it was argued that whilst the evidence of the appellants were interpreted to the trial court sentence by sentence, the evidence in chief of the witnesses for the prosecution was not so interpreted to them and that all they received was a summary of so much of the evidence as the interpreter remembered or thought important, and that all the interpreters were selected at random, and that none of them was an experienced interpreter and that there must be serious doubt as to their ability to interpret satisfactorily. It was held that it was essential to be satisfied that the

[27] 1962 N.N.L.R. 20.

[28] 1964 N.N.L.R. 61 (F.S.C.).

appellants had a fair opportunity to defend themselves, and in particular that they were accorded in full the right conferred by section 21 (5) (e) of the Constitution and that this requires that there shall be adequate interpretation to an accused person of anything said in a language that he does not understand, and that there shall be adequate interpretation to the court of anything said by the accused in a language that the court does not understand. The burden of showing that an interpretation is incorrect or incomplete rests on the accused, but that burden can be satisfied if the accused can show that a reasonable person, who was present at the trial, might have supposed that the interpretation was defective to such an extent as to deny the appellants a fair trial. The interpretation must be done even though the accused person is represented by counsel, unless he waives his right personally, but an appeal court will not quash a conviction solely on the grounds that the proceedings had not been interpreted, unless the court is satisfied that it has occasioned a substantial miscarriage of justice, and where he is represented by counsel, that the accused had claimed at the proper time his right to have the proceedings interpreted to him.[29]

Finally reference must be made to section 22 (9) of the Constitution which provides that "no person who is tried for a criminal offence shall be compelled to give evidence at the trial," and also to section 22 (3) which provides that proceedings of a court, with some exceptions, shall be held in public. There can be little doubt that an appeal court will allow the appeal of a person who has been convicted of a criminal offence on evidence which he has been compelled to give in disregard of section 22 (9), but wrongly holding a court proceeding in private in contravention of section 22 (3) can at the best lead to the proceeding being declared a nullity.

4. Meaning of Judicial Evidence

Having disposed of the above preliminary matters it is now essential to examine the meaning of "evidence" in connection with proceedings in court.

A court, faced with the problem of the determination of a suit before it, can solve such a problem only after making an inquiry into the facts of the case, drawing inferences from those facts, and listening to arguments of parties to the case or of their counsel.

[29] See *R. v. Imadebhor Eguabor* [1962] All N.L.R. 287.

Evidence is the means by which facts are proved, but excluding inferences and arguments. It is common knowledge that a fact can be proved by the oral testimony of persons who perceived the fact, or by the production of documents, or by the inspection of things or places—all these will come within the meaning of judicial evidence. On a very broad view it is sometimes permissible to include in this list such other means of proving a fact as admissions and confessions, judicial notice, presumptions and estoppels. All these will be discussed in detail later but it is necessary to direct attention to another use of the word "evidence." Sometimes the word "evidence" is used in connection with admissibility, for example, when it is said that something is not evidence, it may mean that that thing is not admissible evidence. Before we can proceed further it is necessary to define some other words.

At the onset it is necessary to define what we mean by "a fact." According to section 2 (1) of the Act, "a fact" includes:

> "(*a*) any thing, state of things, or relation of things capable of being perceived by the senses;
> (*b*) any mental condition of which any person is conscious."

It is of course clear that a court is not expected to pronounce on every fact which is disclosed before it at the trial of a case. It is only the facts in issue between the parties and also facts which are relevant to the facts in issue that a court is bound to pronounce upon. Leaving aside the definition of "relevant facts" at the moment, it is necessary to examine the meaning of "facts in issue." According to the same section of the Act,

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

As we shall have occasion to examine this meaning more fully in the next chapter, it is sufficient meanwhile to state that in any proceeding, all facts in issue must be proved by the person who has, in law, the burden of proving those facts.[30]

> "A fact is said to be proved when after considering the matters before it, the court either believes it to exist or con-

[30] The question of "burden of proof" will be discussed in Chap. 15.

siders its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does exist."

On the other hand a fact is said to be disproved when

"after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist."

When a fact is neither proved nor disproved, it is said to be "not proved" (s. 2 (2)).

As it has been said above, evidence does not include inferences and arguments. But a court is called upon several times to infer the existence of certain facts in issue from the existence of some proved facts. This has led to the creation of presumptions which will be discussed in great detail in Chapter 16. But whereas inferences and judicial presumptions are means adapted towards arriving at the finding of facts in a case, they can by no means be regarded as evidence. Similarly, most of the arguments by a counsel in a case is directed towards persuading the court of the truth of his client's case and in like manner cannot be regarded as part of evidence.

One point which must be touched upon here is that judicial evidence cannot include whatever the trial judge or even a jury may discover on their own outside the court proceedings.

As it has been pointed out by Bate J., in *Muhammandu Duriminiya* v. *Commissioner of Police*,[31]

"a trial is not an investigation, and investigation is not the function of a court. A trial is the public demonstration and testing before a court of the cases of the contending parties. The demonstration is by assertion and evidence, and the testing is by cross-examination and argument. The function of a court is to decide between the parties on the basis of what has been so demonstrated and tested."

In this case the accused was charged with fraudulent false accounting and stealing. The prosecution put the accused's books of account in evidence, but only a few out of numerous relevant entries in the books were brought to notice in the court by oral evidence or by

[31] 1902 N.N.L.R. 70 and 73–74.

examination of the books in court. It was held that the entries which had not been the subject of oral evidence or examined in court were not in evidence, and that the defect could not be cured by an examination of the books by the trial court outside the court proceedings. It is not part of the duty of a trial court to do cloistered justice by making an inquiry into a case outside court, not even by the examination of documents which are in evidence, but which have not been examined in court.[32] Whatever the judge discovers as a result of such an enquiry or examination will not be judicial evidence.

5. Classifications of Judicial Evidence

The main division of judicial evidence under the Act is into oral evidence, real evidence and documentary evidence. Oral evidence and real evidence are discussed in Part IV of the Act whilst documentary evidence is discussed in Part V. Oral evidence or "testimonial evidence" is no more than "the assertion of a human being offered as proof of the truth of that which is asserted."[33] This is the most common type of judicial evidence and "all facts, except the contents of documents, may be proved by oral evidence" (s. 75).

The next type of evidence is one usually referred to as real evidence. The production before the court of any material thing including even human beings, may be ordered by the court for its inspection, or the court itself may inspect or permit a jury to inspect any movable or immovable property which is in dispute (s. 76, proviso (ii)). This is called real evidence.[34] It should be noted that the production and inspection of documents is excluded from this proviso and will therefore not come under real evidence but will come under the next heading namely, documentary evidence. Documentary evidence is the statement made in a document which is offered to the court in proof of any fact in issue. Such a statement can as a rule be proved only by the production of the document itself (s. 95) (this is called primary evidence) but in exceptional circumstances to be discussed in paragraph 91 below, certified or other copies, counterparts and oral accounts of the contents of the documents are allowed in proof of the contents of the documents (s. 96). This is called secondary evidence.

[32] See also *R.* v. *Gabriel Adaoju Wilcox* [1961] All N.L.R. 681.
[33] Cross, *Evidence*, 2nd ed., p. 6.
[34] This is discussed in detail in §61, *post*.

It is usual to say that one type of evidence is circumstantial evidence. By this is meant evidence offered to the court for the purpose of the court inferring therefrom the existence of a fact in issue. It is generally in the form of oral evidence. It is usually contrasted with "direct evidence" which is evidence offered by a witness in proof of the truth of the fact asserted by him. Direct evidence includes real evidence. This division of evidence into direct and circumstantial is not made in the Act nor is the other usual one, namely, original and hearsay evidence. Generally, statements—written or oral—made by persons who are not called as witnesses are not admissible in evidence but are relevant and admissible in the circumstances mentioned in section 33 of the Act, which will be discussed in Chapter 4 below. When evidence of such statements is offered only in proof that the statements were made irrespective of whether they are true or false, such evidence is called original evidence. But when the statements are repeated by a third party in proof of the contents of the statements that will be regarded as hearsay evidence and generally speaking, inadmissible.[35]

It is pertinent here to make reference to the old "best evidence rule" of the English common law. This requires that the best evidence must be given. In 1744 Lord Hardwicke said:[36] "The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow." This rule was made use of in excluding copies or counterparts of agreements and in excluding oral evidence of articles in dispute.[37] In the former case the original agreement was required to be produced and in the latter case the article itself must be produced. The insistence of the courts on direct oral evidence as opposed to hearsay evidence is sometimes supposed to have had its basis on the best evidence rule. There is, however, considerable doubt about this because the rule against hearsay had its origin much earlier than the best evidence rule and at all events the rule against hearsay excludes hearsay evidence even though no other or better evidence was available.

Not much more about the best evidence rule need be said here as

[35] For a discussion on the English common law rule against hearsay evidence, see §21, *post*.

[36] *Omichund* v. *Barker* (1744) Willes 538–550.

[37] *Omichund* v. *Watson* (1729) Peake Add. Cas. 123; 170 E.R. 217; *Williams* v. *East India Co.* (1802) 3 East 192; 102 E.R. 571. Cf., *R.* v. *Francis* (1874) L.R.2 C.C.R. 128; *Hocking* v. *Ahlquist Brothers, Ltd.* [1944] K.B. 120.

its use in the modern English law is strictly limited, being confined almost entirely to the proof of private documents. The rule is certainly not applicable in Nigeria where the exclusion of evidence, as we have seen, is governed entirely by the Evidence Act.

6. Functions of the Judge and Jury

In this country most trials take place before a judge or a magistrate without a jury and it is only in trials before a High Court judge that a jury is ever empanelled—never in trials in magistrates' courts.[38] Even then it is only in a very small percentage of trials before the High Court that the jury is empanelled. Generally the laws establishing the various High Courts provide that "civil and criminal causes shall be tried by a judge alone except where express provision to the contrary is made" by any other law.[39]

Where the judge sits with a jury, the whole of the evidence must be given in the presence of the jury but arguments by counsel as to the admissibility or non-admissibility of evidence will have to be done in the absence of the jury, at least in criminal cases, otherwise the accused may be prejudiced if ultimately the evidence is ruled to be inadmissible.

There is nothing in the Evidence Act to indicate the English common law traditional division of functions between the judge and the jury where the judge sits with a jury, but it is clear from a reading of the whole Act (see for example section 57 (2) to be discussed below) that this division is taken for granted by it, and it is clear also from the judgment of the courts that the division is applicable here. By that traditional division, matters of law are determinable by the judge whilst matters of fact (with the exceptions to be discussed presently) are determinable by the jury. Thus the credibility of evidence of any kind is a question for the jury and not for the judge unless he sits without a jury.[40] As further illustrations, it must be noted that in an action of negligence, the question whether negligence can be inferred from the facts proved is one of

[38] See the Jury Act (Cap. 90); the Jury Law (Cap. 53 of the Laws of Western Nigeria, 1959, Cap. 68 of the Laws of Eastern Nigeria, 1963 and Cap. 54 of the Laws of Northern Nigeria, 1963).

[39] See *e.g.*, s. 65 of the High Court of Lagos Act (Cap. 80); s. 89 of the Western Nigeria High Court Law (Cap. 44 of the Laws of Western Nigeria, 1959); s. 53 of the Eastern Nigeria High Court Law (Cap. 60 of the Laws of Eastern Nigeria, 1963); and s. 79 of the Northern Nigeria High Court Law (Cap. 40 of the Laws of Northern Nigeria, 1963); and also s. 335 of the Criminal Procedure Act (Cap. 43).

[40] *Edet Obosi* v. *The State*, 1965 N.M.L.R. 119 at 123.

law for the judge to decide whilst the further question whether negligence ought to be inferred from the facts is one of fact for the jury.[41] And in libel actions the question whether the words complained of are capable of the meaning alleged or of bearing any defamatory meaning at all is for the judge whilst it is for the jury to decide if in fact the words bear that meaning.[42] All these illustrations although drawn from the English common law are nevertheless illustrative of the position under our law. Under the common law it has also been decided that the question whether articles supplied to an infant are suitable to his condition in life and whether there is evidence that the articles were suitable to his actual requirements when they were supplied are questions of law for the judge whilst the question whether they were in fact necessary when they were supplied is a question of fact for the jury.[43] Also the question whether a prima facie case has been made out at the close of evidence for the plaintiff or the prosecution is one for the judge. It must be pointed out that the submission of no case to answer by a defendant at the end of the case for the plaintiff is not usual as it bars the defendant from calling evidence after a ruling against him. On the other hand, a submission of no case to answer is common in criminal cases as the accused still has a chance of calling evidence in support of his defence if a ruling on the no case submission goes against him. We shall now discuss the exceptions to the rule that matters of law are for determination by the judge whilst matters of fact are determinable by the jury.

(1) *Foreign Law*

Although the Evidence Act does not specifically provide for the division between the functions of the judge and the jury, section 57 (2) provides that:

> "Any question as to the effect of the evidence given with respect to foreign law shall, instead of being submitted to the jury, in the case of trial with a jury, be decided by the judge alone."

The Act does not contain a definition of "foreign law" but it obviously includes the laws of all countries without and within the

[41] See *Metropolitan Ry.* v. *Jackson* (1877) 3 App. Cas. 193 at 197 (H.L.).
[42] See *Capital & Counties Bank, Ltd.* v. *George Henly & Sons* (1882) 7 App. Cas. 741 (H.L.).
[43] *Nash* v. *Inman* [1908] 2 K.B. 1 at 13.

Commonwealth excluding, of course, Nigeria. The position of English law needs some clarification. Strictly speaking, English law is foreign law in this country, if not before, but certainly after, October 1, 1963, with the exception of that part of the English common law or statutory law which has been incorporated into our law either by statute or by judicial decisions. Judges and lawyers in this country tend to treat English law as part of domestic law for the present purpose only because of the fact that until quite recently almost the entire members of the legal profession in Nigeria are people trained in English law and called to the English Bar.

Another aspect of this matter is the problem whether the law of a Region can be treated as foreign law in another Region. It will be contrary to every principle of law to treat laws passed in one Region as foreign law in another Region, more so as all Nigerian lawyers now have to pass through the same Nigeria Law School and be enrolled in the Supreme Court. After all, Nigeria is a federation with one nationality and one Region cannot be regarded as a "foreign" land in another Region even though the specific laws may differ considerably from one Region to another.

Where the question of foreign law arises in the court, evidence of it has to be given by witnesses who are learned in that foreign law. But according to this section of the Act, the effect of such evidence must not be submitted to the jury as a matter of fact but must be decided by the judge alone.[44]

(2) *Customary Law and General Custom*

As we shall see later,[45] when a court has to form an opinion as to customary law, or as to the existence of any general custom or right, evidence of the opinions of certain persons is admissible. Any question as to the effect of such evidence is a question for decision by the judge and not for the jury.[46]

(3) *Perjury*

In English law, the question whether a statement on which the charge of perjury is based is material is, under section 11 (6) of the Perjury Act, 1911,[47] one of law to be determined by the judge. But

[44] See also §36, *post*.
[45] See §§40, 41, *post*.
[46] See s. 21 of the Eastern Nigeria High Court Law (Cap. 61 of the Laws of Eastern Nigeria, 1963).
[47] 1 & 2 Geo. 5, c. 6.

there is nothing in our law[48] similar to this provision. And in the absence of such a provision it may be safely said that in cases of this nature, materiality of the statement must be a question of fact for the jury.

(4) *Facts affecting the admissibility of evidence*

When the admissibility of a piece of evidence depends upon the existence of certain facts, the question whether those facts exist or not is for the judge to decide. This is a principle of the English common law which has been incorporated into our law by the Courts. For example when a witness claims to be privileged from answering a particular question, it is for the judge and not for the jury to determine that disputed fact.[49] So also it is the duty of the judge to decide whether a particular statement was made by a deceased person without hope of recovery so as to make it admissible in evidence as a dying declaration.[50] And where an accused person objects to the admissibility of a confession on the ground that it was not given voluntarily it is for the judge and not the jury to decide the issue.[51] Usually this is done by the parties calling witnesses in support and in rebuttal of the allegation of the voluntariness of the statement in a separate trial. This issue is first decided before the case itself is proceeded with. It is doubtful if this will apply to a case where the accused denied making a statement at all. In *R.* v. *Nwangbo Igwe*,[52] however, it was held that in a case tried by a judge alone and a confession is challenged on the ground that the accused never made it, then it is a matter to be decided by the judge, but that the statement may be admitted when tendered whilst the question of its admissibility is left over until the conclusion of the case.

[48] See ss. 117 and 156 of the Criminal Code (Cap. 42), and the Penal Code (Cap. 89 of the Laws of Northern Nigeria, 1963), respectively.
[49] *Slace* v. *Griffith* (1869) L.R. 2 P.C. 420 at 427–428.
[50] *Bartlett* v. *Smith* (1843) 11 M. & W. 483.
[51] *R.* v. *Chadwick* (1934) 24 Cr. App. R. 138.
[52] (1960) 5 F.S.C. 55.

PART II

RELEVANCY

CHAPTER 2

RELEVANCY OF FACTS

7. Relevance and Admissibility

The entire law of evidence is dependent, in the main, on the rules governing admissibility and inadmissibility of evidence, and whether a piece of evidence is admissible or not is dependent upon whether the fact to be established by the evidence is relevant to the facts in issue, relevancy being judged by the provisions of the Act and not by any rules of logic. Although it is obvious that the rules of relevancy under the Act are, generally speaking, based upon logical relevancy as will be seen in the discussion that follows, yet logic is not the determining factor but the provisions of the Act.

At this stage it is necessary to say a few words about "fact in issue" as it is the main basis of the present topic. The Act defines "fact in issue" as including

> "any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows."[1]

In other words facts in issue are all such facts that a plaintiff in a civil case must prove in order to establish his claim if they are not admitted expressly or by implication by the defendant; and also such facts as the prosecutor in a criminal case must prove in order to secure a conviction. Facts in issue also include what a defendant must prove in order to establish his defence. It is therefore clear that the decision whether a fact is a fact in issue must be determined by the substantive law on the subject matter of the action and also by the pleadings.

As a general rule it is only facts which are relevant to the fact in issue or some other fact relevant to the fact in issue that can serve as the foundation for the admissibility of a piece of evidence. In other words evidence will be admitted only in proof of facts in issue, facts relevant to the facts in issue, and facts relevant to some other facts which are relevant to the facts in issue. "One fact is said

[1] S. 2 (1).

to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts" (s. 3). All these provisions will be subject to discussion in the remaining chapters of this Part, but meanwhile we shall focus our attention on the question of relevance and admissibility.

The basic principle is that facts which are irrelevant are inadmissible, but the reverse is not to be taken as generally true. Not every relevant fact is admissible. This is clear from the provisions of section 6 of the Act. The section provides that:

> "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others: Provided that—
>
> (*a*) the court may exclude evidence of facts which though relevant or deemed to be relevant to the issue, appears to it to be too remote to be material in all the circumstances of the case; and
>
> (*b*) this section shall not enable any person to give evidence of a fact which he is entitled to prove by any provision of the law for the time being in force."

It is clear from this provision that the court may exclude evidence of a fact, even though it is relevant, if in the opinion of the court, it is too remote to be material when all the circumstances of the case are taken into consideration.

8. Facts which are Relevant

As we have seen, every fact which is in issue is a relevant fact, of which evidence can be given. For example, in an action for slander whether the defendant uttered the words alleged to be slanderous is a fact in issue. A person who heard the defendant utter the words can give evidence of what he heard the defendant say. Also facts which though not in issue, but are so connected with a fact in issue as to form part of the same transaction, are also relevant facts irrespective of whether they occurred at the same time and place or at different times and places (s. 7). In determining whether a particular fact is so connected with a fact in issue as to form part of the same transaction, resort must be had to the normal reasoning power of the tribunal. Two types of facts will come under this

heading: (a) facts which occurred at the same time and place with the fact in issue and (b) facts which occurred at a different time or place from the fact in issue, but in both cases, the facts must be so connected with the fact in issue as to form part of the same transaction.

With (a) there can be but little difficulty, as it is not difficult to decide the relationship between two different facts occurring at the same time and place. It is very tempting to discuss the English doctrine of *res gestae* under this heading,[2] but it is erroneous to say that that doctrine applies to this country by virtue of section 7. If the doctrine is applicable at all, it is applicable by virtue of section 5 (*a*) and only for the purposes of admitting evidence and not for the purposes of excluding any evidence which is declared to be relevant by the Act. The correct position is that once the Act declares a fact to be relevant it cannot be excluded merely because it does not fulfil the requirements of admissibility under the doctrine. But any evidence which is admissible under the doctrine will be admissible here by virtue of section 5 (*a*) even though it would not otherwise have been admissible. For this reason, a short discussion of the doctrine is necessary but before embarking upon this, it is necessary to discuss the second arm of section 7.

Now turning to (b) above, it must be noted that difficulties may arise under this heading. It may be difficult to decide whether a fact which has occurred at a different time or place from the fact in issue is nevertheless so connected with it as to form part of it. In deciding this issue the court must make use of logical reasoning and no fast rules can be laid down.

Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, and facts which constitute the state of things under which relevant facts or facts in issue happened are all relevant facts. Similarly, facts which afforded opportunity for the occurrence or transaction of relevant facts or facts in issue are also relevant facts (s. 8). Any fact which shows or constitutes a motive or preparation for any relevant fact or fact in issue is also a relevant fact, and the conduct of any party or of his agent, to any proceeding, in reference to such proceeding, or in reference to any relevant fact or fact in issue in the proceeding is a relevant fact. When the subject of a proceeding is the commission of an offence against any person, the conduct of such a person is

[2] See Rudd, *The Nigerian Law of Evidence* (1964), p. 75.

relevant if such conduct influences or is influenced by any fact in issue or relevant fact and whether it was previous or subsequent. "Conduct" in this connection will not include statements, except where a statement accompanies and explains some acts (not being other statements). And when the conduct of any person is relevant, any statement made to him in his presence and hearing which affects such conduct is relevant (s. 9). Thus if the question is whether it was A who assaulted B (A's defence being an alibi), then a declaration by B in the presence of A that it was A who assaulted him is relevant under this provision.[3]

Facts necessary to explain or introduce a fact in issue or a relevant fact, facts which support or rebut an inference suggested by a fact in issue or a relevant fact, facts which establish the indentity of any thing or person whose indentity is relevant, and facts which fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, are all relevant in so far as they are necessary for each particular purpose (s. 10).

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of the conspirators in execution or furtherance of their common intention after the time when such intention was first entertained by anyone of them, is a relevant fact as against each of the alleged conspirators for the purpose of proving the existence of the conspiracy and for the purpose of showing that any of the alleged conspirators was a party to it. In the English case, *R.* v. *Blake & Tye*,[4] the accused were conspiring to defraud the Customs. One of the conspirators had made entries in two books, one of which was a necessary part of the fraud whilst the other was entirely for his own convenience. It was held that the former entry was admissible against both conspirators as it tended towards the furtherance of their common intention.

It should be noted, however, that statements made by individual conspirators as to measures taken in the execution or furtherance of any such common intention are not deemed to be relevant as such as against any conspirators, except those by whom or in whose presence such statements are made (s. 11). In *Balogun* v. *Police*,[5]

[3] See *e.g.*, *R.* v. *Christie* [1914] A.C. 545.
[4] (1844) 6 Q.B. 126.
[5] (1953) 20 N.L.R. 148.

A, B and C were charged with conspiracy to steal some bags of cement and with stealing the same bags of cement. They were convicted of the offences and A appealed. B and C had made statements to the police in the absence of A which statements incriminated him in the conspiracy. There was however, some other evidence which tended to show that A was party to the conspiracy. It was held that although the statement could not be used against A in proof of the conspiracy, other acts of B and C done in execution or furtherance of the conspiracy could be used.

It should also be noted that evidence of such acts or statements which are relevant under this provision is not admissible until the court is satisfied that apart from them, there are prima facie grounds for believing in the existence of the conspiracy to which they relate. In other words facts which are made relevant under this heading cannot be made use of in proving the conspiracy itself. That must be shown to exist by proving some other facts.

Facts which are not otherwise relevant may become relevant under certain circumstances. These are: (a) if the facts are inconsistent with any fact in issue or a relevant fact; (b) if by themselves or in connection with other facts, the facts make the existence or non-existence of any fact in issue or relevant fact probable or improbable (s. 12). In *Oloyede Akingbade* v. *Oyeyipo Elemosho*,[6] the plaintiff sued the defendant for a declaration of title to a piece of land which was a plot of land out of many other plots on a layout. In order to establish the identity of the land in dispute, the plaintiff tendered deeds of conveyance with plans attached in respect of other plots of land on the same layout which were executed in favour of other purchasers by the same person who sold the land to the plaintiff. The trial judge rejected these conveyances as being irrelevant. On appeal, however, the Supreme Court held that these conveyances were relevant under this provision. (c) In proceedings in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded (s. 13). (d) Every fact which tends to show how, in the particular instances, a matter alleged to be a custom was understood and acted upon by persons then interested is a relevant fact (s. 15).[7] It is by virtue of (a) and (b) above that facts from which a disputed

[6] Unreported, but see Supreme Court, Appeal No. F.S.C. 353/62 decided on April 9, 1964.

[7] Admissibility and method of proof of "custom" will be discussed in Chap. 7, *post*.

fact can be inferred, that is, circumstantial evidence, is relevant and admissible.

A fact showing the existence of any state of mind or showing the existence of any state of body or bodily feeling, is relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant. State of mind in this connection includes intention, knowledge, good faith, negligence, rashness, illwill or goodwill towards a particular person, and a fact relevant as showing the existence of a relevant state of mind must be one which shows that the state of mind exists, not generally, but in reference to the particular matter in question (s. 16). This section cannot be made use of in admitting statements by a person with regard to his physical or mental condition as were admitted in the English case *R.* v. *Johnson.*[8] In that case, on a trial for murder by poisoning, statements made by the deceased in conversation shortly before the time at which the poison was supposed to have been administered were held admissible to prove the state of health of the deceased at the time.[9] Whilst the principle in this case relates to admissibility of statements, section 16 of the Act deals with relevance of facts not statements.[10]

> "When there is a question whether an act was accidental or intentional, 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 the act was concerned, is relevant."[11]

In *R.* v. *Griliopoulos & Ors.*[12] the accused were charged with receiving stolen tin from P, and evidence was given to show that they received on the same day and also a week earlier stolen tin from other persons. It was held that evidence of the other instances of receiving stolen tin could not be used to prove the act of receiving charged: that act must be proved *aliunde*. If the particular act of receiving is proved, the other instances would then show that the receiving was accompanied by guilty knowledge that the tin

[8] (1847) 2 C. & K. 354; 175 E.R. 146.
[9] The earlier case of *Averson* v. *Lord Kinnaird* (1805) 6 East 188; 102 E.R. 1258, was virtually overruled in *Stobart* v. *Dryden* (1836) 1 M. & W. 615; 150 E.R. 581.
[10] S. 17.
[11] *Cf.*, Rudd, *op. cit.*, p. 78. The relevant provision is contained in s. 23 (*b*).
[12] (1953) 20 N.L.R. 114.

received was stolen. In *Samuel Thomas* v. *Commissioner of Police.*[13] the appellant was issued with books of "tote" tickets for sale to the public at a race meeting. It was proved that he had removed a few tickets from the bottom of each of some of the books, instead of from the top downwards serially. Evidence was given that, on a former occasion on which tickets had been entrusted to him for the same purpose, some had been found to have been removed from the bottom of the books as in the present case. It was held that this evidence was both relevant and admissible.

If there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is relevant (s.18). This principle is the same under the English common law. Thus if it is necessary to prove that a particular letter was posted evidence that it was delivered to a clerk who in the habit of taking all letters to the post office for posting, even though he cannot remember the particular letter, is relevant.[14] In *Lucas* v. *Novoslieski*[15] the question was whether D had paid his workman, P, his wages. The proof that it was D's practice to pay his servants wages every Saturday, that P was seen going with other workmen to the place where D usually paid his workmen on a Saturday when payments were usually made and that P was not heard to complain afterwards, was held relevant and admissible.

9. Res Gestae

As was pointed out above, the English common law doctrine of *res gestae* is not directly applicable under the Evidence Act. The correct position, as has been pointed out, is that the doctrine can be made use of in admitting evidence which would not otherwise have been admissible (s. 5 (*a*)), but cannot be made use of in excluding evidence which is declared relevant under the Act.

When a fact becomes relevant to a fact in issue because it throws light on it as a result of its proximity to it in point of time, place or circumstance, the first mentioned fact is usually said to form part of the *res gestae*. The term *res gestae* (or the singular *res gesta*) has been used in different senses and hence it has been said to provide "a respectable legal cloak for a variety of cases to which no formula

[13] (1949) 12 W.A.C.A. 400.
[14] See *Hetherington* v. *Kemp* (1815) 4 Camp. 193; 171 E.R. 62; *Trotter* v. *Maclean* (1879) 13 Ch. D. 574.
[15] (1795) 1 Esp. 206; 170 E.R. 363.

of precision can be applied."[16] The facts which are admissible as forming parts of the *res gestae* are usually declarations and acts which constitute, accompany or explain the fact in issue.

As for acts which are admissible under the doctrine of *res gestae*, these are admissible here under the provisions of the Act discussed in the last section. What is not admissible under those provisions but is admissible under the doctrine of *res gestae* are declarations. Before a declaration or a statement can be admissible as forming part of the *res gestae* it must fulfil three conditions:

(a) It must be nearly contemporaneous with the fact in issue. As the Judicial Committee of the Privy Council has said, it is essential that it should be so associated with the action or event which it accompanies in time, place and circumstances, that they are part of the thing being done.[17] In *R.* v. *Bedingfield*,[18] the accused was charged with murder of a woman. The woman had rushed out of a house with a cut throat where she and the accused had been together and exclaimed: "Oh, aunt, see what Harry has done to me!" This statement was held inadmissible as it was something stated by her after it was all over! But anything uttered by her at the time the act was being done would have been admissible. This case was followed by the West African Court of Appeal in *R.* v. *Bang Weyeku*.[19] In that case the accused was charged with murder and the only important evidence against him was the statement of the deceased shortly after he had been stabbed that "Bang has shot me" which he made in the absence of the accused. It was held that this statement was inadmissible as forming part of the *res gestae*. The principle of *R.* v. *Bedingfield* was reaffirmed in *R.* v. *Christie*.[20] In that case the accused was charged with assaulting a boy P, and his defence was an alibi. A few minutes after the alleged act of assault, P had returned to the spot with his mother and in the presence of her mother and a police constable had touched the accused and said "This is the man." On being asked what the accused had done P described the assault. It was held that although the statement "this is the man" is admissible as being part of the act of identification, since it accompanied and explained it, his explanation as to how the assault took place was inadmissible. In the light of the decisions above cased ,thc correctness of the

[16] *Per* Lord Tomlin in *Homes* v. *Newman* [1931] 2 Ch. 112 at 120.
[17] *Teper* v. *R.* [1952] A.C. 480 at 487.
[18] (1879) 14 Cox C.C. 341.
[19] (1943) 9 W.A.C.A. 195.
[20] [1914] A.C. 545.

decision in *Olubi Oyename* v. *Oyedele*[21] on the present topic is very much in doubt.[22] In that case after a collision had occurred between the plaintiff and defendant's motor vehicles, the defendant's driver told the plaintiff that his brakes had failed and that he had to choose between falling into a river or colliding with the plaintiff's motor vehicle. It was held that the statement was sufficiently contemporaneous with the collision as to be admissible as forming part of the *res gestae*. But the statement in this case was probably admissible as an admission.[23]

(b) The statements to be admissible must explain the fact in issue. This is aptly illustrated by *R.* v. *Christie*, supra. In *Agassiz* v. *London Tramway Co., Ltd.*[24] the plaintiff sued the defendant company for negligence as a result of collision by the defendant's tram in which the plaintiff was injured. After the collision a passenger said of the driver, "this fellow's conduct ought to be reported" and the conductor replied that "he has already been reported for he has been off the line five or six times today—he is a new driver." It was held that this statement was inadmissible as the collision was over and as it referred not to the *res* but to the past acts of the driver.

(c) It has been suggested that the statement must have been made by the actor[25] and reliance has been placed on *Honel* v. *Malkin*.[26] In that case a statement made by a person concerning the boundaries of property contemporaneously with the performance of some act on the land by some other persons was held inadmissible because the declaration was by one person and the accompanying act was performed by another person. But this cannot be taken as a general proposition of law because at least in criminal cases declaration by victims and by assailants are often received in evidence under this heading.

10. Facts Relevant in Special Circumstances

Some facts which would not have been relevant may become relevant by reason of the special circumstances of the situation. For example, where title to interest in family or communal land is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant (s. 44). Although this principle is now incorporated into the Evidence Act, there is no doubt that it developed as a result of practice of the courts in admitting such

[21] 1957 L.L.R. 37.
[22] But see *The Schwalbe* (1861) 4 L.T. 160.
[23] See Chap. 3, *post*.
[24] (1873) 21 W.R. 199.
[25] See Cross, *op. cit.*, at 468.
[26] (1878) 40 L.T. 196.

evidence. In *Commissioner of Lands* v. *Kadiri Adagun*,[27] the West African Court of Appeal said:

> "It is the undoubted practice in this country to accept as admissible in cases as to title to family land evidence of the tradition of the family ownership. Literacy among the people of this country does not go back very far, and the oral tradition is generally the only evidence available as to ownership of land earlier than the memory of living witnesses. The weight to be given to traditional evidence is of course another matter, depending on how far it is supported by other evidence of living people of facts within their own knowledge.[28]

Another example is that provided by section 45 of the Act. The section provides as follows:

> "Acts of possession and enjoyment of land may be evidence of ownership or of a right of 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 therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land."

This particular section is so well known and made use of so frequently that reported cases on it are rare. Reference must, however, be made to the case of *Nathan Okechukwu & Ors.* v. *Frederick Okafor & Ors.*[29] In that case the plaintiffs were granted a piece of land under customary law by the owners in 1916. They exercised acts of ownership over the area by building schools etc. on it. The defendants came to occupy the land east of the area and adjoining it in about 1940, and began systematically to encroach upon it. About the same year, 1940, the plaintiffs erected pillars to demarcate the boundary of their land some of which were alleged removed by the defendants in 1955. The defendants denied the existence of the pillars, but when the trial judge inspected the lands he was shown pillars which were outside the lands claimed by the defendants but inside the lands claimed by the plaintiffs. The defendants joined issue as to a portion only of the lands claimed in the action. The trial judge found that the precise area granted to the plaintiffs was

[27] (1937) 3 W.A.C.A. 206.
[28] See also *Lajide Onamogba Akuru* v. *Olubadan-in-Council* (1954) 14 W.A.C.A. 523.
[29] [1961] All N.L.R. 685 (F.S.C.).

not clear but that it did include an undefined portion of the disputed lands and that the alleged acts of possession of the disputed lands by both parties more or less cancel each other out and dismissed the plaintiffs' claim. It was held by the Federal Supreme Court that by virtue of section 45, judgment should be given for the plaintiffs because the plaintiffs' acts of possession and enjoyment of the lands adjoining the disputed lands claimed and possessed under the same grant as that under which the plaintiffs claimed the lands in dispute, together with the erection by them of boundary pillars, constituted sufficient evidence to support the plaintiffs' claim of title to the disputed vacant and unenclosed lands under the grant. It should be remembered that evidence which is relevant and admissible under the section only raises a probability not a presumption of ownership of the land.[30]

Lastly reference must be made to section 46 of the Act under which a certain type of evidence is relevant in charges of receiving stolen property. The section provides that:

> "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—
>
> (*a*) the fact that other property stolen within the period of twelve months preceding 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."

In the case of (*b*), however, there are two conditions which must be fulfilled before the evidence can be admitted. These are (1) that seven days' notice in writing must have been given to the offender that proof of such previous conviction is intended to be given, and (2) that evidence must have been given that the property in respect of which the offender is being tried was found or had been in his possession. The provisions of this section are identical with those of section 43 (1) of the English Larceny Act, 1916.[31] Under this latter

[30] See *Ededem Archibong V* v. *Ntoe Asim Ita* (1954) 14 W.A.C.A. 520.
[31] 0 & 7 Geo. 5, c. 50.

Act, it has been held that the finding of the other property may be proved before evidence is given that the property subject of the charge is stolen, but if this evidence is not given later in the proceeding, the whole matter must be withdrawn from the jury.[32] In *Odutade* v. *Police*[33] the appellant was charged with others with stealing and receiving stolen property, by himself with being a rogue and vagabond. Evidence of convictions over ten years old was given. He was acquitted on the vagrancy charge but convicted of receiving. It was argued on appeal that the previous convictions were inadmissible as evidence of guilty knowledge under section 46 (*b*). For the police it was argued that the convictions were put in for the vagrancy charge and that it was only on that charge that the magistrate mentioned them. It was held that section 46 (*b*) was inapplicable and that the appellant did not have a fair trial.[34]

[32] *R.* v. *Smith* [1918] 2 K.B. 415.
[33] (1952) 20 N.L.R. 81.
[34] See *R.* v. *Davies* [1953] 1 Q.B. 489.

CHAPTER 3

ADMISSIONS AND CONFESSIONS

11. Admissions

Admissions are either formal or informal. A formal admission is usually contained in a pleading; and facts admitted in a pleading "may be taken as established without proof thereof."[1] Formal admissions are discussed in Chapter 10, paragraph 68, below and nothing more about them need be said here, the purpose of the present discussion being the informal admission.

An informal admission (which will be referred to throughout the following discussion as simple admission) for the present purpose is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by certain person and in certain circumstances to be discussed later (s. 19). Although an admission may operate as an estoppel,[2] it should, however, be noted that it is not conclusive proof of the matters admitted (s. 26). Such an admission, provided it complies with the conditions to be discussed presently, is a relevant fact and therefore admissible. This is usually regarded as an exception to the hearsay rule under the English common law but as we shall see that rule is not as such part of Nigerian law and nothing more about it need be said here.[3]

On general principles, although it is not so stated in the Act, if an admission is to have much weight it must be a conscious act. There is authority to say that an admission by a drunken person may be admissible under English law[4] and it is most likely that a Nigerian court will follow this and admit in evidence an admission by a drunken person (cf. section 31). The person to whom an admission is made is generally immaterial. So that a statement made by a person to himself if over-heard by someone else may be received in evidence if it amounts to an admission.[5]

[1] See Supreme Court (Civil Procedure) Rules, O. 32, r. 12; Western Nigeria High Court (Civil Procedure) Rules, O. 13, r. 12; Eastern Nigeria High Court Rules, O. 31, r. 5. [2] See Chap. 17, *post*. [3] See §21, *post*.
[4] See *R.* v. *Spilsbury* (1835) 7 C. & P. 187.
[5] See *R.* v. *Simons* (1834) 6 C. & P. 540. *Cf.*, *John Shaw, Ltd.* v. *Shaw* [1935] 2 K.B. 113 at 135.

Although the Act does not say that an admission can be by conduct, yet in many cases the courts have held that an admission may take that form. In *Chief Akinbiyi* v. *Raliatu Anike*,[6] the plaintiff sued to recover a sum of money alleged to have been paid by him on behalf of the defendant, and the defendant counter-claimed for the return of some of her goods wrongly detained by the plaintiff. In support of her claim, the defendant tendered in evidence a list of the goods which also contained their value. The list was admitted in evidence by the trial magistrate without objection by the plaintiff who did not cross-examine the defendant as to the accuracy of the list. It was held that failure to cross-examine her as to the accuracy of the list was an admission that it was correct. In this case it would have been otherwise if the plaintiff had tendered another list materially different from that produced by the defendant. This case should be contrasted with *Modupe Oloko* v. *Simeon Olatunde Oloko & Anor.*[7] In that case, the respondent cross-petitioned for the dissolution of the marriage between himself and the petitioner on the ground of adultery. The respondent had made an allegation of adultery by the petitioner to a police officer in her presence and to her hearing. The petitioner did not deny it. It was held that this could not be taken to be sufficient proof of an admission of the adultery by the petitioner.

Reference must be made to a few leading English cases on admission by conduct. In *Bessela* v. *Stern*,[8] the plaintiff sued the defendant for breach of promise of marriage, and called her sister who deposed to the fact that she heard the plaintiff say to the defendant, "you know you always promised to marry me, and now you don't keep your word," to which the defendant made no answer beyond giving her money to induce her to go away. It was held that the defendant's silence amounted to an admission of the promise to marry the plaintiff. But in *Wiedemann* v. *Walpole*,[9] the defendant's failure to reply letters from the plaintiff in which the plaintiff stated that the defendant had promised to marry her was held not to amount to an admission of the promise to marry her. In this case the judges drew a distinction between business and other correspondence. In the case of a business letter, it is usual to expect a reply, and failure to answer such a letter may be regarded as an admission; but in social matters it may be better on many

[6] (1959) W.R.N.L.R. 16.
[7] (1961) W.N.L.R. 101.
[8] (1877) 2 C.P.D. 265.
[9] [1891] 2 Q.B. 534.

occasions not to send replies, but the facts of each case must be looked into to determine whether failure to reply to a letter amounts to an admission.[10]

It should be remembered that when a person is formally charged by the police with an offence he is not obliged to say anything and his silence therefore can never amount to an admission.[11]

Active conduct may also amount to an admission. In *Moriarty* v. *London, Chatham and Dover Ry.*[12] it was held that evidence of the subornation of witnesses to perjure in support of a claim for damages for injury in a railway accident was admissible. One of the judges was of the view that such a conduct was an admission that the plaintiff's claim was false.[13]

In an action to recover compensation for damages done to the property of the plaintiff by the defendant the plaintiff cannot succeed by merely proving an admission of liability by the defendant if in fact no damage is suffered by the plaintiff. In *John Wilberforce Bamiro* v. *S.C.O.A.*[14] the plaintiff claimed from the defendants damages for injury caused to his house by vibrations during the building operations of the defendants. The defendants had written to the plaintiff telling him that "his house would be repaired after completion of our store and as this is not finished yet, we cannot do anything until the completion of the building." The plaintiff's counsel contended that this letter was clear admission of liability and an undertaking to repair the plaintiff's house. It was, however, held that the fact that the defendants in their letter appeared to admit some damage made no difference as no damage to the plaintiff's house was in fact proved.

12. Persons who can make Admissions

By virtue of section 20 of the Act, statements which amount to admissions must be made:

(1) *By a party to the proceeding*

Under the English common law, a distinction is made between statement made by a party against his own interest and one made by him in his favour. Whilst the former is admissible as an admission the other is not. Similarly under section 23 admissions are

[10] See *Gaskill* v. *Skene* (1850) 14 Q.B. 664.
[11] See *R.* v. *Whitehead* [1920] 1 K.B. 99; *R.* v. *Leckey* [1944] K.B. 80.
[12] (1870) L.R. 5 Q.B. 314.
[13] See also *R.* v. *Watt* (1005) 20 Cox C.C. 852. [14] (1941) 7 W.A.C.A. 150.

relevant and admissible against the person making them, but they are not admissible in his favour.

(2) *By an agent of a party to a proceeding*

The Act recognises that an agent may under certain circumstances make admissions which will bind his principal. Thus a shipowner may be bound by admissions by the captain but not by those by the crew.[15] It is not every admission by an agent that will bind the principal. For this purpose, the agent must be a person whom the court regards, in the circumstances of the case, as expressly or impliedly authorised by him to make the statement. And on general principles any statement contained in a report by an agent to his principal cannot be regarded as an admission to a third party.[16] Before an admission by an agent can be admissible against the principal it must have been made by the agent during the continuance of the agency.[17]

(3) *By a person suing or sued in a representative character*

Any statement made by a party to a suit who sues or is sued in a representative character will amount to an admission only if it was made by him at the time he was acting in that character. When he sues in a representative capacity, admissions which will affect him in his personal capacity cannot be proved against him.[18]

(4) *By a person having proprietary or pecuniary interest*

Any statement made by a person who has a propriety or pecuniary interest in the subject matter of a proceeding may amount to an admission if it was made in the character of a person having such an interest. But it must be a statement made during the continuance of such an interest.

(5) *By a predecessor in title*

Any statement made by a person from whom a party to a suit has derived his interest in the subject-matter of the suit may also amount to an admission if it was made during the continuance of such an interest.[19] Two other positions are provided for by the Act.

[15] *The Earl of Dumfries* (1885) 10 P.D. 31.
[16] See *Re Devala Provident Gold Mining Co.* (1883) 22 Ch. D. 593.
[17] *Peto* v. *Hague* (1804) 5 Esp. 134; 170 E.R. 763.
[18] See *Legge* v. *Edmonds* (1855) 25 L.J. Ch. 125 at 141.
[19] See *Falcon* v. *Famous Players Film Co.* [1926] 2 K.B. 474.

(6) *Admissions by persons whose position must be proved as against a party to a suit*

Under section 21 (which does not err on the side of clarity) where it is necessary to prove the position or liability of X as against A in a suit between A and another, any statement made by X may amount to an admission if such a statement would be relevant as against X had a suit been brought against him, and if he made the statement at the time he occupied such position or was subject to such liability.

(7) *Admissions by persons expressly referred to by a party to a suit*

The other position is that provided for in section 22. Under that section any statement made by a person to whom a party to a suit has expressly referred for information in reference to a matter in dispute is an admission. In *Williams* v. *Innes*[20] the defendants, executors of a deceased person, referred the plaintiff to one R for information concerning the assets of the deceased. It was held that what R said could be proved against the defendants.[21]

Although a legal practitioner can make a formal admission on behalf of his client he cannot normally do so in the case of an informal admission. Similarly an admission by a wife cannot bind her husband, or vice versa, except the relation between them comes within any of those discussed above.

Apart from the exceptions just discussed, an admission is admissible in evidence only against the person making it, and not against a third party. In *Olubi Oyename* v. *Oyedele*,[22] immediately after a collision had occurred between the plaintiff's and the defendant's motor vehicles, the defendant's driver told the plaintiff that his brake had failed and that he had to choose between falling into a river or colliding with the plaintiff's vehicle. Subsequently the driver made a statement to the police in which he admitted negligence and eventually pleaded guilty to a charge of driving with inefficient brakes. It was held that the driver's statement to the police and his plea of guilty although evidence against the driver were not admissible in evidence against the defendant.

13. Proof and Relevance of Admissions

Admissions are relevant and may be proved as against the person

[20] (1808) 1 Camp. 364.
[21] See also *R.* v. *Mallory* (1884) 13 Q.B.D. 33.
[22] 1957 L.L.R. 37.

who has made them or his representative in interest but they cannot be proved by or on behalf of the person who has made them or by his representative in interest. In the following cases, however, an admission can be proved by or on behalf of the person who has made it or by his representative in interest:

(a) When the admission is of such a nature that, if the person making it were dead, it would be relevant as between third parties under section 33 (discussed in the next chapter).

(b) When the admission consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable. For example statements made by a workman to his wife of his sensations at the time about pains in his body are relevant to prove the existence of those sensations;[23] but statements as to how the pains were caused would not be relevant under this provision.[24]

(c) When the admission is relevant otherwise than as an admission (s. 23).

Oral admissions as to the contents of a document are not relevant, and therefore inadmissible, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of the document[25] or unless the genuineness of the document is in question (s. 24).

If an admission is made either upon an express condition that evidence of it is not to be given, or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given, then, such an admission is deemed to be irrelevant and inadmissible (s. 25). This section is not to be taken as exempting any legal practitioner from giving evidence of any matter which he may be compelled to give under section 69.[26]

14. Nature of Confessions

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; and if the confession is voluntary it is deemed to be a relevant fact as against the person who has made

[23] *R.* v. *Johnson* (1847) 2 C. & K. 354.
[24] *Gilbey* v. *Great Western Railway Co.* (1910) 102 L.T. 733.
[25] The conditions under which this will be allowed is discussed in §90, *post.*
[26] See §146, *post.*

it only (s. 27). Usually "admission" in relation to a crime is used to denote the admission of some fact relevant to the crime, whilst "confession" is used to denote the admission of guilt.[27]

One factor of very great importance, in the definition of a confession is that it must be voluntary, otherwise it will not be a relevant fact and therefore will not be admissible. Before discussing this factor, however, a few important points must be made. For the present purpose, a confession refers to an extra-judicial admission of guilt, or an admission of guilt made in another proceeding not being the one in which it is intended to prove the confession. Such confession must be made by the person charged, and cannot be made by his counsel. In *R.* v. *Asuquo Etim Inyang*[28] the accused was resident in Calabar and went through a form of marriage in the Church there. Some eighteen months later proceedings were taken against him in the magistrate's court to enforce a maintenance order made against him by a London magistrate's court in respect of a marriage which the accused had contracted in England seven years previously. Before the Calabar magistrate's court, counsel for the accused admitted the facts of the London marriage. The accused himself merely gave evidence as to his financial circumstances. Criminal proceedings on a charge of bigamy were instituted against him at the Calabar assizes, the prosecution relying solely on the two marriage certificates and the admissions made before the Calabar magistrate. It was held that the admissions could not be treated as confessions for the purposes of proving the criminal charge as they were not made by the accused himself.

A confession must be direct and positive, not equivocal. In *Raimi Adebisi Afolabi* v. *Commissioner of Police*,[29] the accused was the storekeeper to a firm in Ibadan. When a shortage was discovered in his stores and this was brought to his notice by the manager of the firm, he told the manager that he had taken certain of the stores and sold them to assist to defray his election expenses but he did not indicate how much he had sold. During re-trial he repudiated this story. It was held that, as the alleged confession was neither direct nor positive as to the items contained in the charges, it was not admissible.[30] And in *R.* v. *Akpan Udo Essien*[31]

[27] See *Edet Obosi* v. *The State*, 1965 N.M.L.R. 119 at 122.
[28] (1931) 10 N.L.R. 33.
[29] [1961] All N.L.R. 654 (F.S.C.).
[30] See also *R.* v. *Phillip Jonah & Ors.* (1934) 2 W.A.C.A. 120.
[31] (1939) 5 W.A.C.A. 70.

it was held that a statement amounting only to a confession of implication in the crime cannot be regarded as a confession under this heading.

The point has also been raised whether by section 27 (1) which speaks of "an admission made at any time by a person charged," it is intended that a confession if it is to be admissible must have been made subsequent to the accused being charged with an offence. In *R.* v. *Udo Aka Eka Ebong*[32] it was held that a statement may amount to a confession even if made before the accused was charged with the offence.

The fact that an accused has denied making the confession does not necessarily make it inadmissible. In *R.* v. *John Agagariga Itule*,[33] soon after the appellant was arrested for murder, he made a statement to the police in which he admitted killing the deceased, but described circumstances which, if true, would amount to legal provocation. The next day he denied having made the statement and made a new one in which he repudiated all responsibility for the deceased's death. His evidence at the trial was substantially in conformity with his second statement. Brett Ag. C.J.F., said:[34]

> "A confession does not become inadmissible merely because the accused person denies having made it and in this respect a confession contained in a statement made to the police by a person under arrest is not to be treated differently from any other confession. The fact that the appellant took the earliest opportunity to deny having made the statement may lend weight to his denial,[35] but it is not in itself a reason for ignoring the statement."

15. "Voluntary" in the Definition of Confession

According to section 27 (2) a confession is relevant only if it is voluntary. The position is similar to that obtaining under the English common law. As Parke B., pointed out in *R.* v. *Baldry*,[36] in order to render a confession admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority vitiates a confession." The word "voluntary" is not de-

[32] (1947) 12 W.A.C.A. 1.
[33] [1961] All N.L.R. 462 (F.S.C.).
[34] *Ibid.* at 465.
[35] See *R.* v. *Omerewure Sapele & Anor.* (1957) 2 F.S.C. 24.
[36] (1852) 2 Den. 480.

fined in that section of the Act and as a result some judges have relied on the English common law in deciding when a confession is voluntary. This would appear to overlook the provision of section 28 which, it is submitted, is meant to enumerate cases of confessions which are not voluntary. Although this may be an inelegant way of drafting a piece of legislation, it is nevertheless doubtful if the proper approach to the matter is to hold that the admissibility of a disputed statement under this heading "must be determined in the first instance by the common law rule," as was said by Charles J., in *R.* v. *Isaac Ajia*.[37] Section 28 provides that 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. Such inducement, threat or promise must, however, have proceeded from a person in authority, and must be such that in the opinion of the court it is sufficient 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. This section clearly enumerates the conditions under which a confession will not be relevant, and therefore inadmissible. The proper approach is to hold that any confession not coming within any of those conditions will be relevant and admissible under section 27 (2) as being voluntary.

(1) *Inducement*

The first condition under which a confession will not be admissible is if it was obtained as a result of an inducement. To be effective an "inducement" for the present purpose need not be one to make the accused speak the truth. It is sufficient if it is an inducement to make him make a statement at all. When section 28 speaks of an inducement, threat or promise which has caused a confession to be made, what is in contemplation as having been caused to be made is no more than a statement stating or suggesting a certain fact, irrespective of whether what is stated or suggested is the truth or otherwise. The question raised by section 28 is not "was the confession preceded by an inducement to confess the truth?" nor is it "was the confession preceded by an inducement calculated to make the confession an untrue one?" It is "was the confession preceded by

[37] (1960) W.N.L.R. 196 at 200.

an inducement to make a statement?" In *R.* v. *Nimiel Viapbong*,[38] a police sergeant in cautioning an accused person had said to him: "you should bear in mind that any statement you make shall be written down by me and taken before the court so that it may be your evidence" or "so that it may be evidence for you." After hearing this the accused made a confession of the offence with which he was charged. Hurley S.P.J. (as he then was) said:

> "The caution was clearly an inducement to speak. An accused person can hardly be expected to keep silent when told that he need not say anything, but that anything he says will be written down and taken before the court to be his evidence, or evidence for him; he is being given amply sufficient grounds for supposing that by speaking he will avoid the evil of being condemned unheard."

In *R.* v. *Nyinya Kwaghbo*,[39] after the accused had been apprehended, he made a statement to a police constable who at the trial said that he had "obtained" the statement from the accused who had "agreed" to make it. It was not shown that the prescribed caution had been administered. It was held that there were strong indications that the accused had been induced to make the statement and as there was no satisfactory evidence that the statement was voluntary, it was not accepted in evidence.

Any promise of an advantage or avoidance of any evil will be regarded as an inducement for the present purpose and any confession made as a result of such a promise will not be admissible. In England such a promise has been held to include "tell me where the things are and I will be favourable to you"[40] and "if you don't tell me you may get yourself into trouble and it will be worse for you."[41] The advantage or evil must, however, be one of a temporal nature. A mere moral adjuration to speak the truth would not be regarded as an inducement for this purpose. In *Madu Fatumani* v. *R.*[42] the appellant was caught soon after killing the deceased in an attempt to steal from him. He was taken back to the scene of the killing and told by the Village Head that he should not trouble his fellows, and that if he was the one who did the killing he should say so. Defence counsel's submission that any statement which the accused made

[38] 1961 N.N.L.R. 47. [39] 1962 N.N.L.R. 4.
[40] *R.* v. *Thompson* (1783) 1 Leach. 291.
[41] *R.* v. *Coley* (1868) 10 Cox C.C. 536.
[42] (1950) 13 W.A.C.A. 39. *Cf.*, *R.* v. *Ajege & Anor.* (1935) 2 W.A.C.A. 353.

after that was inadmissible was rejected as "the remark of the Village Head was . . . merely a moral adjuration."

The promise or the mere suggestion of a free pardon will be regarded as an inducement, but if the accused on his own volunteers a confessional statement on the assumption that he may get a free pardon, such a statement will be admissible.[43]

(2) *Threats*

A statement made as a result of the use or the threat of the use of actual violence to the body of the accused will clearly render the statement inadmissible as a confession. But section 28 only speaks of threat and it is safe to assume that mere threat of something less than actual violence to the person will be sufficient, for example, threat of imprisonment.[44] In *R.* v. *Baba Haske*,[45] the accused was charged with murder. When the body of the deceased was found there were circumstances giving cause for suspecting the appellant. The Head Chief summoned the villagers and said to them: "all of you will be in the case and will be gaoled if you do not tell the truth." He told the accused that he would inform the police of the circumstances of suspicion against him and added: "I hear that you followed this man with a gun; if you shot him please let me know." It was held that the confession later made by the accused was not admissible as it was given as a result of threats.

The threat of harm by metaphysical means has, however, been held not sufficient threat for this purpose. In *R.* v. *Udo Aka Eka Ebong*,[46] the investigation of the murder of the deceased had proved abortive and the local chief in the area invited the eighteen villages in the vicinity for purposes of investigating the death of the deceased. "Juju" was invoked for the purpose and it was believed by the people that the person who caused the death would go mad and confess. Eleven months later the accused went to the chief and said that he had killed the deceased. The Court said:

> "In our opinion the confession in this case is voluntary from the legal point of view and was properly admitted . . . to find otherwise would be getting perilously near to the fallacious

[43] See *R.* v. *Blackburn* (1853) 6 Cox C.C. 333; *R.* v. *Godinho* (1911) 7 Cr. App. R.12.
[44] See *R.* v. *Parratt* (1831) 4 C. & P. 570; *R.* v. *Luckhurst* (1853) 6 Cox C.C. 243; and *R.* v. *Smith* [1959] 2 Q.B. 35.
[45] [1961] All N.L.R. 330.
[46] (1947) 12 W.A.C.A. 139.

theory that a genuine belief in witchcraft might be a possible defence to a charge of murder. . . ."

The first sentence of this quotation would appear, with the greatest respect, to overlook the fact that the question of fear is always a subjective one and that when a person is frightened by any object whatsoever, his action or utterance thereafter becomes one done or uttered under a threat or fear. The argument contained in the second sentence of the quotation would appear, with respect, to be *non sequitur*.

(3) *Person in authority*

The inducement, threat or promise must have proceeded from a person in authority. The term "person in authority" is not defined anywhere in the Act but there is no doubt, it covers all persons in the police forces and other persons who have the powers of the police with respect to the investigation of offences. It will also include magistrates, justices of the peace, etc. In *Madu Fatumani* v. *R.*,[47] and in several other cases it has been held that a Village Head is a person in authority for this purpose.[48]

(4) *Confession made after threats, etc. have ceased to exist*

If a confession is made after the impression caused by an inducement, threat or promise has, in the opinion of the court been fully removed, such a confession is relevant (s. 30). In *R.* v. *Baba Haske*,[49] it was held that if the threat or inducement under which a first confession was obtained still persisted at the time of the taking of a second confession, then the latter would also be inadmissible, unless the trial judge after properly directing himself as to the inadmissibility of the first statement nevertheless comes to the conclusion that the threat or inducement had dissipated at the time of the second confession.

(5) *Confession made under promise of secrecy or in consequence of deception*

A confession which is relevant does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in

[47] (1950) 13 W.A.C.A. 39.
[48] See *R.* v. *Baba Haske*, *supra*.

[49] *Supra*.

answer to questions which he need not have answered whatever may have been the form of those questions, or because he was not warned that he was not bound to make such statement and that evidence of it might be given (s. 31). In *R.* v. *Michael Adedapo Omisade & Ors.*[50] it was held that a statement taken from an accused person in answer to questions put by a police officer taking the statement is receivable in evidence under this section provided it is voluntary, but if in any particular case it should appear to the court that the taking of such a statement is not truly voluntary, the court would refuse to receive it in evidence.

(6) *Confession made in the course of another proceeding*

Finally reference must be made to section 32 which stipulates the condition under which a confession made in the course of another court proceeding cannot be regarded as voluntary. The section stipulates that:

> "Evidence amounting to a confession may be used as such against the person who gives it although it was given upon oath, and although the proceeding in which it was given had reference to the same subject matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him; but if, after refusing to answer any such question the witness is improperly compelled to answer it, his answer is not a voluntary confession."

16. Confessions of Other Offences in Addition to Those Charged

Where an accused person has made a voluntary confession both of the offences charged and other offences the portion of the statement relating to the other offences must not be admitted in evidence. In *R.* v. *Eraruwomi Otedia*[51] the statement made to the police by the accused person charged with murder was tendered in evidence. The statement contained confessions of other and similar offences. Morgan J. (as he then was), held that only that portion of the accused's statement which dealt with the charge should be tendered.[52] This can be done under section 47 of the Act which stipulates that when any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an

[50] 1964 N.M.L.R. 67.
[51] (1950) W.R.N.L.R. 43.
[52] See *R.* v. *Knight* (1946) 31 Cr. App. R. 52, which was relied upon by Morgan J.; and *R.* v. *Evans* (1950) 34 Cr. App. R. 72.

isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence is allowed to be given only of so much and no more of the statement, conversation, document, etc. as the court considers necessary to the full understanding of the nature and effect of the statement, and of the circumstances in which it was made. The decision in *R.* v. *Salami Esologba & Ors.*[53] to the effect that such a statement should be rejected entirely is now of very doubtful authority except the statement is such as is not separable.

17. The Judges' Rules in England

The judges of the King's Bench Division in England, at the request of the Home Secretary in 1912 formulated some rules, which were enlarged from 4 to 9 in 1918, principally for the guidance of the police in taking statements, including confessional statements from persons in custody especially in the custody of the police. These Rules were operated up to early 1964 when they were replaced by new Rules made by the judges of the Queen's Bench Division.[54] These new Rules came into operation on Monday January 27, 1964 and not much case law has been built around them yet. The old Rules were never made applicable to this country by any legislation but the judges consistently held in favour of their application here: it is therefore a matter of conjecture if the judges will hold in favour of the new Rules. It should be noted, however, that the Rules are rules of administrative practice, and not rules of law, and hence the judges in this country may as well hold in favour of applying them here. For the same reason that the Rules are rules of administrative practice, failure to observe any of them in the taking of a statement will not necessarily render the statement inadmissible in evidence, although it may do so.[55] The Rules are as follows:

I. When a police officer trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it. In *R.* v. *Straffen*[56] it was held that "in custody" meant in custody

[53] (1943) 17 N.L.R. 24.
[54] See Home Office Circular No. 31/1964.
[55] See *R.* v. *Voisin* [1918] 1 K.B. 531.
[56] [1952] Q.B. 911.

of the police and that it did not refer to persons in "Broadmoor". This Rule is meant to allow the police to question a person in custody with regard to offences other than that for which he is in custody. In *R.* v. *Buchan*,[57] Lord Parker C.J., said:

> "It is always permissible for a police officer to question a person in custody with regard to offences other than that for which he is held. This was the position under the old Rules. It is no different under the new Rules."

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence. Under the old Rules (Rule 2), which were abrogated by the 1964 Rules, the duty to caution did not arise until the police officer had made up his mind to charge a person with a crime.

The caution is to be in the following terms:

> "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III. (a) Where a person is charged with or informed that he may be prosecuted for an offence he should be cautioned in the following terms:

> "Do you wish to say anything? 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."

This Rule replaces Rules 3, 4 and 5 of the Rules existing before 1964. The fact that an accused person has made a statement in reply to a question put to him by a police officer after he has been taken into custody without the usual caution being first administered to him does not of itself render the statement inadmissible, although the judge has a discretion to exclude such a statement.[58]

[57] See *The Guardian*, January 28, 1964.

[58] See *R.* v. *Best* [1909] 1 K.B. 692; *R.* v. *Voisin, supra*; *R.* v. *Cook* (1918) 34 T.L.R. 515; *R.* v. *Booker* (1924) 18 Cr. App. R. 47 and *R.* v. *Straffen* [1952] 2 Q.B. 911. See also *R.* v. *Bass* (1953) 37 Cr. App. R. 51.

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement. Before any such questions are put the accused should be cautioned.

Any questions put and answer given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner:

(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts this offer, the police officer shall, before starting, ask the person making the statement to sign, or make his mark to the following:

"I . . . wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

(c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

"I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence."

(d) Whenever a police officer writes the statement, he shall take

down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him.

(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following certificate at the end of the statement:

> "I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will."

(f) If the person who has made a statement refuses to read it or to write the above mentioned certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like to correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

V. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by Rule III (a).

VI. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these Rules.

18. Application of the Judges' Rules in Nigeria

Of these Rules and their application in this country the West

African Court of Appeal in *R.* v. *Anya Ugwuogo & Anor.*[59] had this to say:

> "The so-called 'judges' Rules' which lay down *inter alia* that persons in custody should not be questioned without the usual caution being first administered, are rules of caution laid down by the judges in England as the procedure to be followed in that highly civilized country. They should be followed *mutatis mutandis*, so far as is possible and practicable in this country. But it would, in our view, be impossible and impracticable to require, in the case of primitive and unintelligent accused, positive evidence not only that the necessary caution was given but also that it had been understood by them before statements voluntarily made could be admitted as evidence.
>
> In England, if a caution is administered then the person to whom it is administered is presumed to have understood it, until the contrary is shown. In our opinion the same principle applies. . . .
>
> What is essential in cases of this nature is that the Court, before admitting the evidence, should be satisfied that the statement was really made voluntarily and was not prompted by any promise or inducement or threat or by actual violence. When the Court cannot be certain that the words of the caution could be understood or were actually understood, the onus upon the court is all the heavier to be fully satisfied that the statement was really made voluntarily before admitting it."

Rule 8 of the old Rules (see now Rule V) was perhaps the most difficult of these Rules in its application. In *R.* v. *Afose & Ors.*[60] one of the persons made a statement mentioning some other accused persons. The police officer who took the statement later read it to him in the presence of two other accused persons. These were not cautioned but said that the statement was correct. It was subsequently read over to yet other accused persons mentioned in it and they said nothing. It was held that the statement was inadmissible except against the person who made it.[61] In *Johny Evbuomwan & Ors.* v. *Commissioner of Police*,[62] the Assistant Super-

[59] (1943) 9 W.A.C.A. 73 at 74.
[60] (1934) 2 W.A.C.A. 118.
[61] See also *R.* v. *Akinpelu Ajani & Ors.* (1936) 3 W.A.C.A. 3.
[62] (1961) W.N.L.R. 257.

intendent of Police investigating a criminal charge called the accused persons together and read to them the confessional statement made by one of them. The trial magistrate in convicting the accused persons said: "If they were innocent one would have expected them to deny them (the allegations made against them in the statement) but they kept mute." In allowing the appeal the High Court held this to be a misdirection, and that the procedure adopted by the police officer was contrary to the Judges' Rules. Adejumo Kester J., said:[63]

> "The police should not interrogate prisoners with reference to any charge against any one of them, or invite from one defendant a statement against a co-defendant; and they should not obtain evidence by confronting prisoners with one another."

In *R.* v. *Jackson Akpon Umo & Ors.*[64] a police officer after taking a statement from the first accused, took statements from the others in sequence, and as each came into the room he read to him the statements made by others. The trial judge being satisfied that the statements were free and voluntary, admitted them in evidence. It was held that statements obtained from prisoners contrary to the Judges' Rules are not *ipso facto* inadmissible, such statements may be admitted if the trial judge, exercising his discretion judicially, is satisfied that they were made voluntarily.

In so far as an illiterate person is concerned the West African Court of Appeal has held that Rule 8 (of the old Rules) must be read subject to this limitation:

> "that when the person charged is an illiterate, the statement may be read over or interpreted to him apart by some person other than a policeman. Anything said to such a 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."[65]

A practice has grown up in this country which is not provided for in the Judges' Rules nor in any local legislation but which is

[63] *Ibid.* at 259.
[64] (1944) 10 W.A.C.A. 254.
[65] See also *R.* v. *Afose & Ors.* (1934) 2 W.A.C.A. at 119.

highly admirable. It is the practice of taking an accused person who has made a confessional statement as soon as possible to a superior police officer or an administrative officer in order that the accused may deny or admit making the statement. In *R.* v. *Omerewure Sapele*,[66] Abbott F.J., said:

> "We consider that this course is eminently fair to such an accused—it gives him an early opportunity of alleging if he wishes to, before a responsible person, that his statement has been improperly obtained, and we do not think it necessary for any fresh caution to be administered even if corrections are made. We think however, that such an accused ought to be asked to sign or make his mark against such corrections."

Later the Federal Supreme Court in *Nwangbo Aba Nwigboke & Ors.* v. *R.*[67] again commended this practice and went further to say that

> "although the practice is approved by this Court we are not prepared to go to the length of laying down as a general rule that where it is not observed the statement should be viewed with suspicion. . . . In a serious case such as murder the judge may want to know why the practice has not been followed and, where he is not satisfied with the reasons given, may even comment on them. But the fact that the practice is not followed should not cast any suspicion on the statement as such. Where the practice is followed it may add to the weight to be attached to the statement, but failure to observe it does not in our view reduce the weight which normally attaches to any statement proved to have been made voluntarily."

When an illiterate accused person is taken before a superior police officer or other officer for confirmation or denial of a confessional statement written down in a language not being English the proper procedure is to read the statement in its original form, and not the English translation, to the accused person.[68] Another point to mention is that the police officer who wrote the original statement must sign it as the recorder but failure to do this does not make the statement inadmissible. Similarly although it is desir-

[66] (1957) 2 F.S.C. 24.
[67] (1959) 4 F.S.C. 26.
[68] See *R.* v. *Nwangbo Igwe* (1960) 5 F.S.C. 55.

able for the interpreter to sign or mark the statement failure to do so does not render the statement inadmissible.[69]

The spirit of the Judges' Rules has also been made use of in deciding the admissibility of a piece of evidence not being a statement by the accused. In *Edene Ugarma* v. *R.*[70] a photograph taken by the police sometime after the commission of a murder showed the accused person, one of his co-accused, and the accomplice who gave evidence at the trial, all standing in a group and all pointing towards the same particular spot which they were said to have identified as the place where the murder was committed. It was held that before a person under arrest would be invited to pose for a photograph which may tend to strengthen the case against him, it would be in accordance with the spirit of the Rules for him to be cautioned again and told that he is not obliged to pose.

19. Effect of Confessions

Although it is desirable to have, outside a confession, some evidence, be it slight, of circumstances which make it probable that the confession was true, yet a voluntary confession of guilt, if it is fully consistent and probable, is usually regarded as evidence of the highest and most satisfactory nature if there is an independent proof that a criminal act has in fact been committed by someone.[71] In *R.* v. *Abraham Erumesi*[72] the accused was charged with the murder of a woman. He had made a statement to the police confessing to the commission of the offence but beyond this there was very little else known by the prosecution of the facts and circumstances surrounding the death of the deceased. As there were other circumstances which showed beyond any reasonable doubt that a criminal act had been committed by someone and as the accused's confession was fully consistent and probable, it was held that he could be convicted on such a confession.[73] The position is similar under Moslem law. Under that law a person could be convicted on his own confession, and also on the evidence of a confession made in the presence of two witnesses of good character, even though he retracts his confession.[74] Although a conviction can be based on a

[69] *R.* v. *Baba Haske* [1961] All N.L.R. 330 at 333.
[70] (1959) 4 F.S.C. 218.
[71] *Phillip Kanu & Anor. R.* (1952) 14 W.A.C.A. 30 at 32.
[72] (1950) W.R.N.L.R. 258.
[73] See also *R.* v. *Ajayi Omokaro* (1941) 7 W.A.C.A. 146.
[74] See *Idi Wonaka* v. *Sokoto N.A.* (1956) 1 F.S.C. 29; 1956 N.R.N.L.R. 19.

confession, the degree of credit due to confessions must be estimated according to the particular circumstances of each case. The fact that an alleged confession, in writing, has been admitted in evidence does not preclude the court from estimating what weight it will put on the document as evidence against the accused; the whole circumstances of the case must be taken into consideration.[75]

Lastly reference must be made to section 27 (3) of the Act which provides that where more persons than one are charged jointly with a criminal offence and a confession made by one of such accused persons in the presence of one or more of the other accused persons 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 accused persons unless he adopted the said statement by words or conduct.[76]

20. Facts Discovered in Consequence of Information Given by an Accused

Where information is received from an accused person, whether he is in custody or not, and as a consequence of such information any fact is discovered, the discovery of that fact, together with evidence that such a discovery was made in consequence of the information, may be given in evidence even though such information itself would not be admissible in evidence (s. 29). Although this provision has its basis in a long time of English common law decisions dating from early 18th century,[77] yet the English law on the subject today is far from clear. What can be said with confidence is that facts discovered as a result of an inadmissible confession can be proved in evidence if their relevance can be established without resorting to any part of the confession. But the point whether any part of the confession showing the accused's knowledge of those facts is admissible is unsettled. In *R.* v. *Warickshall*[78] a woman who was charged as an accessory after the fact to theft and as a receiver of stolen goods made a confession which under the circumstances was inadmissible. In the course of the confession he said that the goods in question were in her lodgings

[75] See *R.* v. *Emmanuel Jegede & Ors.*, 1955–56 W.R.N.L.R. 33 at 34, *per* Ademola C. J. (West, as he then was).
[76] See *Johny Evbuomwan & Ors.* v. *Commissioner of Police* (1961) W.N.L.R. 257.
[77] See *R.* v. *Warickshall* (1783) 1 Leach 263; *R.* v. *Mosey* (1784) 1 Leach 265n; *R.* v. *Griffin* (1809) Russ. & Ry. 151; *R.* v. *Gould* (1840) 9 C. & P. 364; *R.* v. *Garbett* (1847) 2 Car. & Kir. 474; *R.* v. *Berriman* (1854) 6 Cox C.C. 388 and *R.* v. *Barker* [1941] 2 K.B. 381.
[78] *Supra.*

where they were in fact found. It was held that evidence of the finding of the goods in her lodging was admissible and that no part of the confessional statement was admissible. Since this case was decided in 1783 it has been regarded as settled law that facts discovered in consequence of inadmissible confessions may be received in evidence. The real difficulty that has arisen since then is as to how much, if any part of the inadmissible confession should be allowed to be given. As it should be expected, it is usually unhelpful to the prosecution to allow only the mere proof of the facts discovered without allowing a reference to be made to the confession leading to the discovery. In *R.* v. *Griffin*,[79] the accused was charged with larceny. He made a confession, which was inadmissible, that he had stolen the money from the prosecutor. He later handed him a note stating that it was part of the property which he had stolen. It was held that the Crown could prove both the production of the money and the statement made by the accused with reference to it. In *R.* v. *Gould*,[80] the accused was charged with burglary. Although the report was not clear on the point, it would appear that he made a confessional statement which was inadmissible, but which included a statement that he had thrown a lantern into a pond. This latter statement and the finding of the lantern in the particular pond were allowed to be given in evidence. In the later case of *R.* v. *Berriman*[81] it was held that no part of a confession is rendered admissible by the discovery of any fact to which it may refer.[82]

It is clear that our law, under section 29 of the Act, follows *R.* v. *Griffin* and *R.* v. *Gould*, in that both the fact discovered and the evidence that the discovery was made as a result of the information supplied by the accused are admissible.

[79] *Supra.*
[80] *Supra.*
[81] *Supra.*
[82] See also *R.* v. *Barker*, *supra.*

CHAPTER 4

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES

21. The Rule Against Hearsay

Under English law, the evidence of a statement made to a witness by a person who is not himself called as a witness is called "hearsay" if the object of the evidence is to establish the truth of what is contained in the statement. Generally speaking such evidence is inadmissible. The rule against hearsay has been briefly stated thus:[1] "oral or written assertions of persons other than the witness who is testifying are *inadmissible as evidence of the truth of that which was asserted.*" A large number of exceptions to this rule have been developed by the courts whilst others have been created by statute. Strictly speaking and for reasons to be given later neither the rule nor the exceptions are part of our law. It is, however, essential to discuss the rule, even though briefly, but in doing so it is unnecessary to say anything about the exceptions here as those of them for which our law make similar provisions will be discussed in their proper places.

The rule against hearsay is a rule governing inadmissibility of evidence. It is well stated by the Judicial Committee of the Privy Council in *Subramaniam* v. *Public Prosecutor*[2] 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."

From this two points emerge very clearly: (1) When A said something, not in the present proceeding, B cannot give evidence of it in proof of the allegation contained in the statement, but he can repeat what A has said to establish the fact that A in fact made the

[1] Cross, *Evidence*, 2nd ed., p. 3.

[2] [1956] 1 W.L.R. 965 at 969.

statement. In the *Subramaniam* case, S was charged with being in possession of ammunition without lawful authority contrary to some emergency regulations in Malaya during terrorist activities there, and his defence was that he was acting under duress as a result of threats uttered by the terrorists. The trial judge did not allow the accused to state what had been said to him by the terrorists. On final appeal to the Judicial Committee, it was held that what the terrorists said to the accused was receivable in evidence as original evidence, and that the conviction should be quashed.

The rule against hearsay evidence had been well established by a large number of cases dating from the early part of the last century. In *Stobbart* v. *Dryden*,[3] the plaintiff brought the suit for payment of money but on a mortgage deed and the defence was that the document had been fraudulently altered by one of the witnesses to the document who had since died. The defendant proposed to call a witness to depose to the fact that the dead man had orally admitted some improper dealing with the dead, but it was held that this evidence would be hearsay and therefore inadmissible. In *Gilbey* v. *Great Western Railway*,[4] a widow brought an action for claim for workmen's compensation. It was held that her evidence about statements made by her husband concerning the cause of the injuries which resulted his death was inadmissible.[5]

As it has been pointed out in Chapter 2, any fact which is declared to be irrelevant by the Evidence Act is inadmissible and no fact which is declared to be relevant by the Act can be held to be inadmissible by virtue of any rule of English law. For this reason the English common law rule against hearsay is not part of our law. But this is not to be taken to mean that what amounts to hearsay under that law will be admissible here. If the evidence which is being tendered is oral evidence, then it may offend against section 76 if it is the sort of evidence that will be classified as hearsay under English law. That section provides that oral evidence must, in all cases whatever, be direct. Expatiating on this provision the section says that (a) if oral evidence refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact; (b) if it refers to a fact which could be heard, it must be the evidence of

[3] (1836) 1 M. & W. 615 at 621; 150 E.R. 581 at 588.
[4] (1910) 102 L.T. 202.
[5] See other cases like *Robinson* v. *Markis* (1841) 2 M. & R. 375; 174 E.R. 322; *Haines* v. *Guthrie* (1884) 18 Q.B.D. 818; and *Wright and Webb* v. *Annandale* (1930) 46 T.L.R. 280.

a witness who says he heard that fact; (c) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner; and (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 section contains two provisos which are not relevant to the present discussion.[6] If the evidence which is being tendered is written evidence it will not be admissible unless it can be shown to be admissible under one of the sections of the Act.

22. Dying Declarations

One of the most important exceptions to the English hearsay rule is in respect of statements made by deceased persons. It is clear that statements made by persons who are dead must be proved, if they are to be proved at all, by some other persons. Section 33 of the Act prescribes the cases in which such statements if they relate to relevant facts are themselves relevant and therefore admissible in evidence. These are six in number, but before discussing them it is necessary to say that these cases are similar to those under the English common law but with differences which will be pointed out in their proper places. It may be mentioned in passing that admissibility of dying declarations is not confined to the common law and the Evidence Act alone. According to the Moslem law of the Maliki school a conviction for murder can properly be had on proof of a dying declaration but it must be supported by the Kasama Oaths.[7]

Although the marginal note to subsection (a) of the section speaks of "dying declarations" there is nothing in the subsection itself stipulating that there must be a formal declaration before it is applicable. What is actually required is a mere statement. The subsection provides that a statement written or verbal, of relevant facts made by a person who is dead is itself a relevant fact:

> "when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question; such statements are rele-

[6] See Chap. 9, *post.*
[7] See *Kawule Dan Tukur Indabo* v. *Kano Native Authority* (1957) 2 F.S.C. 4.

vant only in trials for murder or manslaughter of the deceased person and only when such person at the time of making such declaration believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery."

The rationale of this rule was stated in 1789 by Eyre C.B., in *R.* v. *Woodcock*[8] as follows:

> "The general principle on which this 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 which is imposed by a positive oath administered in a court of justice."

How far this is psychologically correct is not part of our duty here—but it is certain that the rule is not dependent on the religious belief or disbeliefs of the declarant.

The following are the conditions of relevancy of declarations under this heading:

(a) The declaration itself which may be written or verbal must be of relevant facts.

(b) The declarant must have died before evidence of the declaration is required to be given.

(c) The declaration must relate to the cause of the death of the declarant or as to any of the circumstances of the transaction which resulted in his death; and the cause of the declarant's death must be in question in the trial.

(d) The declaration is relevant only in trials for murder or for manslaughter of the declarant.

(e) The declarant must have believed himself to be in danger of approaching death, although he may have entertained at the time of making the declaration hopes of recovery. This is the only difficult point in this matter and on it there is a number of judicial decisions. The English common law requirement in this regard is that the deceased must have made the statement under "a settled

[8] (1789) 1 Leach 500 at 502; 168 E.R. 353.

hopeless expectation of death."[9] There can be doubt that there is a distinction between the condition of a person who has "a settled hopeless expectation of death" and that of a person who only believes himself to be in danger of approaching death who at the same time entertains hope of recovery. Therefore not much reliance can be put on English common law decisions in this regard. Cases decided in Nigeria prior to the Evidence Act, such as *R.* v. *Harry & Ors.*[10] and *R.* v. *Daniel Bebesebe*[11] are for the same reason no more of much importance.[12] A few cases decided under the Act, must therefore be discussed. In *R.* v. *John Ogbuewu*[13] the deceased who was in hospital weak and in pain, was asked by a police officer the following day after he had been wounded, whether he could make a statement. He said he could. The police officer then asked him if he thought he was going to die, to which he replied, "I don't know whether I am going to die." The deceased then made a statement as to the cause of his injuries which was taken down in writing. It was held that this statement was not admissible as a dying declaration as there was no proof that the deceased when making it, believed himself to be in danger of approaching death. Any declaration made after the deceased has abandoned the belief of being in danger of approaching death will not be admissible under this heading. In *Momo Garba & Anor.* v. *R.*,[14] after suffering an attack which ultimately caused his death, the deceased told the first person who found him injured that he was going to die, that he had been beaten, and that one Momo had instigated the beating. It was held that this evidence was properly admissible under this heading. After the deceased had been taken home and given water, he made a further statement as to how he received his injuries, in the presence of two persons. According to them the deceased then said nothing about his expectation of death. In spite of objection to this evidence, the trial judge admitted it taking the view that the first statement made this second statement admissible as the former had contained words showing an expectation of death. He said "that is a sufficient belief in impending death to support further declarations made the same evening." The Federal Supreme Court,

[9] *R.* v. *Peel* (1860) 2 F. & F. 21; 175 E.R. 941, *per* Willes J. These words were approved by the Court of Criminal Appeal in *R.* v. *Perry* [1909] 2 K.B. 697.
[10] (1938) 4 W.A.C.A. 37.
[11] (1938) 4 W.A.C.A. 67.
[12] See also *R.* v. *Bang Weyeku* (1943) 9 W.A.C.A. 195.
[13] (1949) 12 W.A.C.A. 483.
[14] (1959) 4 F.S.C. 162.

however, held that that was too wide an expression because of the possibility that the expectation of death might have been, owing to his being at home and among friends, removed from the mind of the deceased; and that therefore the evidence of the latter declaration was wrongly admitted.

23. Declarations Made in the Course of Business

Section 33 (*b*) provides that certain statements made in the course of business by deceased persons are relevant facts. The sub-section provides that a statement written or verbal, of relevant facts made by a deceased person, is itself a relevant fact:

> "when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him or 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."

The following conditions of admissibility under this heading should be noted:

(a) and (b) are the same as under the last heading and nothing more need be said about them here.

(c) The statement must have been made by the deceased in the ordinary course of business, and in particular the statement may consist of any entry or memorandum made by the deceased in books kept in the ordinary course of business or in the discharge of professional duty. There have not been many reported judicial decisions on this aspect of the matter but since there is nothing in this provision to stipulate that there must be a duty owed by the declarant to another person, the courts may not read into this provision this condition which is applicable under the English common law.[15] The courts may interpret the provision to include not only statements made in relation to a duty owed to another but also

[15] See *R.* v. *Worth* (*Inhabitants*) (1843) 4 Q.B. 132; *Massey* v. *Allen* (1879) 13 Ch. D. 558; *Simon* v. *Simon* [1930] P. 17; and *cf.*, *Rawlins* v. *Rickards* (1860) 28 Beav. 370; 54 E.R. 408.

statements made by a person in the course of his own business or his own professional duties.

(d) It has been judicially decided that the statement may relate to acts performed by the deceased person himself or performed by third parties provided the performance of the acts is within his knowledge. In *R.* v. *Taoridi Lawani*,[16] at the trial of the accused for manslaughter, the prosecution sought to tender in evidence a police "Accident Report" book in which entries were made by a police officer since dead both from and outside, his own personal knowledge. It was held that although the book was not a "public or other book" under section 38 (to be discussed in the next chapter), the entries in the book made within the knowledge of the deceased police officer were admissible under section 33 (*b*) on the ground that they were made in the course of his professional duty, even though he did not personally perform the acts he recorded. The position under the English common law is different. Under that law, such entries are admissible only where it is clearly shown that the entries relate to an act or acts done by the deceased person and not by third parties.[17]

It is doubtful if the other requirement of the English common law, that the statement should be contemporaneous with the acts which it records,[18] is necessary for relevancy under this heading. There is little doubt, however, that the courts may refuse to admit statements which were not made contemporaneously with the acts which they are supposed to record. Even if such statements are admitted under this heading, the weight to be attached to them may be quite insignificant.

(e) The statement may be an acknowledgment of property, for example, the receipt of money, goods securities or other property; or an acknowledgment of a document used in commerce written or signed by the deceased. The statement may also consist of the date of a letter, for example, if the date of the letter is a relevant fact, or it may consist of other document usually dated, written or signed by the deceased.

(f) It has been suggested that under the English common law, absence of a motive to misrepresent is one of the conditions of admissibility under this heading. This cannot of course be so under

[16] 1959 L.L.R. 97.
[17] See *The Henry Coxon* (1878) 3 P.D. 156.
[18] See *The Henry Coxon*, *supra*.

the Act as it is not specifically made a condition precedent under the subsection unlike under the next subsection where it is specifically laid down that the declarant must have "had no interest to misrepresent."

24. Declarations Against Interest

A statement of a relevant fact made by a deceased person may under certain conditions be a relevant fact if the statement is against the interest of the person making it (s. 33 (*c*)). The conditions of relevancy are as follows:

(a) and (b) are the same as under the heading "dying declarations" (above) and nothing more need be said about them here.

(c) The statement must be against the pecuniary or proprietary interest of the deceased. If it was made against any other type of interest it will not be relevant under this heading. This condition is the same as under the English common law. In the *Sussex Peerage Case*[19] it was held by the House of Lords that a statement by a clergyman since deceased, which exposed him to criminal prosecution would not be admissible under this heading. But if the interest involved is of a pecuniary or proprietary nature, the statement will be relevant and therefore admissible. In *Higham* v. *Ridgway*[20] the question in dispute was as to the date of the birth of A. An entry made by a deceased male midwife in his own book of the payment of his charges for making the delivery of A, was admitted in proof of the date of the birth of A, as it tended to show that the deceased's claim had been met. An acknowledgment by a creditor since deceased of the receipt by him of the debt owed him before the expiration of the period of limitation would be admissible under this heading.[21] A statement by a person since deceased that he was an illegitimate child would also be admissible under this heading as being against his pecuniary or proprietary interest.[22] On the other hand a statement by a deceased man promising to marry a woman and at the same time admitting the paternity of the woman's posthumous child would be inadmissible as not being against interest.[23] If the statement is in fact not a statement against interest

[19] (1844) 11 Cl. & F. 85; 8 E.R. 1034.
[20] (1808) 10 East 109; 103 E.R. 717.
[21] See *Briggs* v. *Wilson* (1854) 5 De G.M. & G. 12; 43 E.R. 772.
[22] See *Re Perton* (1885) 53 L.T. 707.
[23] See *Lloyd* v. *Powel Duffryn Steam Coal Co., Ltd.* [1918] 2 K.B. 180 (C.A.); [1914] A.C. 733 (H.L.). The statement in this case was, however, held admissible on another ground.

then it will not be admissible under this heading. In *Crease* v. *Barnett*,[24] in order to prove that a particular spot was not within the waste of a minor, a declaration made by the lord of the manor, since deceased, that he was entitled to the waste up to a certain point (which did not include the particular spot) and no further was held inadmissible because the deceased was not in possession of the disputed waste and also that the declaration was not against his proprietary interest, but was in fact a claim to such an interest. It is clear from the language of the subsection that the interest involved must be a present not a future or contigent, interest.

(d) The declarant must have had a peculiar means of knowing the matter upon which he made the declaration. There is no doubt about this condition in Nigerian law unlike under the English common law where it is still doubtful if this is a condition precedent under this heading. In *Sturla* v. *Freccia*[25] Lord Selbourne said that "declarations made against interest involve as a necessary element that the subject matter of the declaration must have been within the direct personal knowledge of the person making the declaration."[26] But in *Re Perton*[27] a declaration by a deceased person as to his being illegitimate was held admissible even though no person can have a personal knowledge of his paternity.[28]

(e) The declarant must have had no interest to mis-represent the matter upon which he has made the declaration. If he had any motive to mis-represent the matter upon which he made the declaration then the declaration will not be relevant under this heading.

25. Declarations as to Public and General Right

A statement of a relevant fact made by a person who is dead is itself a relevant fact and therefore admissible if the statement given the opinion of the deceased as to the existence of any public right or custom or matter of public or general interest, of the existence of which if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen (s. 33 (*d*)). The conditions of relevancy under this heading are as follows:

[24] (1835) 1 Cr. M. & R. 919.

[25] (1880) 5 App. Cas. 623 at 632–633.

[26] See also *Roe d. Lord Trimlestown* v. *Kemmis* (1834) 9 Cl. & Fin. 749 at 780; 8 E.R. 601 at 613; the *Sussex Peerage case* (1844) 1 Cl. & Fin. 85 at 112; 8 E.R. 1034.

[27] *Supra.*

[28] See also *Percival* v. *Nanson* (1851) 7 Exch. 1; 155 E.R. 830; and *Pearson* v. *Att.-Gen.* (1885) 53 L.T. 707.

(a) and (b) are the same as under the heading "dying declarations" (above) and nothing more need be said about them here.

(c) The declaration must be a statement of opinion made by the deceased as to the existence of a public right or custom or matter of public or general interest. Sometimes it may be difficult to distinguish between a public and a private right but it can be safely said that a public right is one enjoyed by an individual as a member of the public or as a member of a clearly defined class, for example, the right of use of a highway, or of fishing in tidal rivers. Declarations as to these by a deceased person will be relevant under this heading. So also declarations as to the boundaries of a council area, a town or village will be admissible under this heading,[29] but not declarations as to the boundaries between two private estates,[30] nor declarations as to a waste over which some tenants only of a manor claim a right of common.[31]

(d) The deceased declarant must be a person who was likely to have been aware of the existence of such a public right, custom or matter of public or general interest, if it existed at all. In the case of a public right every member of the public must be presumed to be likely to be aware of such a right and such knowledge needs not be proved. On the other hand it would be reasonable to require proof that the declarant had knowledge of matters which are only of public and general interest about which he has made his declaration.[32]

(e) The declaration must have been made before any controversy as to such right, custom or matter had arisen. Statements concerning the existence of the matters under this heading are not relevant in proof of those matters if they are made after the controversy to which they are tendered arose,[33] but the fact that the declarant was an interested party would not prevent the statement from being admissible under this heading.

26. Pedigree Declarations

A statement of relevant facts made by a deceased person is itself relevant (under certain circumstances to be discussed presently)

[29] See *Nicholls* v. *Parker* (1811) 14 East. 331n; 104 E.R. 629.
[30] See *Clothier* v. *Chapnan* (1805) 14 East. 331n; 104 E.R. 629.
[31] See *Dunraven* v. *Llewellyn* (1850) 15 Q.B. 791.
[32] See *The Duke of Newcastle* v. *The Hundred of Broxtowe* (1832) 4 B. & Ad. 273; 110 E.R. 458; *cf.*, *Rogers* v. *Wood* (1831) 2 B. & Ad. 245; 109 E.R. 1134.
[33] *Moseley* v. *Davies* (1822) 11 Price 162 at 178; 147 E.R. 434 at 440.

when the statement relates to the existence of any relationship, marriage or adoption between persons, if the person making the statement had special means of knowledge of such relationship (s. 33 (*e*)). The conditions of relevancy under this heading are as follows:

(a) and (b) are the same as under the heading "dying declarations" (above) and nothing more need be said about them here.

(c) The statement must relate to the existence of any relationship, marriage or adoption of some persons. Declaration in relation to the birth and death of a person and his blood or marriage relationship to other persons will come under this heading. Under it also will be included related matters such as time and place these events took place, and also the celibacy or childlessness of the person.

(d) The statement is deemed to be relevant only in a case in which the pedigree to which it relates is directly in issue, but not to a case in which it is only relevant to the issue. So that if an infant is sued on a contract and he pleads infancy, a declaration by his deceased father as to his age, will not be held to be relevant under this heading.[34]

(e) The statement must have been 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. Thus in *Johnson* v. *Lawson*[35] a declaration by a deceased woman who had for twenty-four years been the house-keeper in the family was excluded. To this, however, there are two main exceptions. First, a declaration by a deceased parent that he or she did not marry the other parent until after the birth of a child is relevant to the question of the illegitimacy of such a child upon any question arising as to the right of the child to inherit real or personal property under the Legitimacy Act.[36] Secondly, in proceedings for the legitimacy of any person, a declaration made by a person who, if a decree of ligitimacy were granted, would stand towards the petitioner in any of the relationship mentioned above will be deemed to be relevant to the question of the identity of the parents of the petitioner.[37]

(f) The statement must have been made before the question in re-

[34] See *Haines* v. *Guthrie* (1884) 13 Q.B.D. 818.
[35] (1824) 2 Bing. 86; 130 E.R. 237.
[36] Cap. 103. See *Re Jenion, Jenion* v. *Wynne* [1952] Ch. 454.
[37] See *Re Davy* [1935] P. 1; and *Battle* v. *Att.-Gen.* [1949] P. 358.

lation to which it is to be proved had arisen.[38] "Question" here it is suggested, means "controversy" or "dispute," which has arisen before the institution of an action. Once the statement is made before the question arose, it does not matter even if it was made for the purpose of preventing the question from arising. It will nevertheless be deemed relevant provided the other conditions are present. Whether the declarant is aware of the controversy or dispute or not is immaterial, once the statement is made after the controversy or dispute has arisen, it ceases to be relevant under this heading.

Finally it is necessary to make reference to the provisions of section 5 (*b*) of the Act. The section provides that nothing in the Act shall:

> "enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this Act had not been passed."

In other words no documentary declaration is to be held to be relevant if such a declaration would not have been admissible under the English common law.

27. Declarations by Testators

The declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will are, under certain circumstances, deemed to be relevant. The circumstances are as follows:

(a) When the will of the testator has been lost, and there is a question as to what were the contents of the will, then any such declaration, will be deemed to be relevant. This provision can be said to have had its root in the English common law decision of *Sugden* v. *Lord St. Leonards.*[39] On the death of the famous lawyer and judge (Lord St. Leonards) it was discovered that his will, which he had kept in a box, was missing. Most of the contents of the will were well known to his daughter who was able to recite most of it from memory. She and some other witnesses testified as to statements made by the deceased before and after the execution of the will concerning the contents of the will. It was held by a

[38] See *Berkeley Peerage Case* (1811) 4 Camp. 401; 171 E.R. 127.
[39] (1876) 1 P.D. 154.

majority of the Court of Appeal that the statements made by the deceased after he had executed the will were admissible as an exception to the hearsay rule. This decision has been doubted in subsequent cases,[40] criticised by legal writers[41] but approved more lately in *Re Macgillivray*.[42] Whatever doubt that existed or in fact still exists in English law as to the present topic, it is clearly the law in Nigeria that such statements will be considered relevant under this heading.

(b) The same principle applies where the question before the court is whether an existing will is genuine or was improperly obtained. In this event any statement by the deceased touching upon the question, will be considered relevant and therefore admissible.

(c) Similarly when the question is whether any and which of more existing documents than one constitute a will, any statements by the testator will be relevant.

In all these cases, it must be noted, it is immaterial whether the statements or declarations were made before or after the making or loss of the will.

28. Relevancy of Certain Evidence Given in a Previous Judicial Proceeding

Under section 34 (1) of the Act, evidence given by a witness in a judicial proceeding or before any person authorised by law to take evidence may be relevant for the purpose of proving in subsequent judicial proceeding, or in a later stage of the same judicial proceeding the truth of the facts it states if the following conditions are fulfilled,

(a) if the witness is dead, or

(b) cannot be found, or

(c) incapable of giving evidence, or

(d) is kept out of the way by the adverse party, or

(e) when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable. For the evidence of a witness in one judicial proceeding to be deemed relevant in a subsequent proceed-

[40] *Woodward* v. *Goulstone* (1886) 11 App. Cas 469; *Atkinson* v. *Morris* [1897] P. 40.
[41] See Thayer in 2 Harv. L.R. 94.
[42] [1946] 2 All E.R. 301.

ing one or the other of the conditions enumerated must be present. If none of them is present then the evidence will not be considered relevant under this heading and will therefore be inadmissible.[43] In *R.* v. *Adiaha Nwa Ikpe*,[44] the accused was committed for trial in the High Court after a preliminary investigation. At the trial two of the witnesses who had given evidence at the preliminary investigation were absent. One was dead, and the other was on leave abroad and would not be back until the end of July. The trial was taking place in June and the accused had been in custody for about nine months. The trial judge accepted the depositions of both witnesses. It was held that the trial judge was quite right in accepting the depositions of both witnesses under the circumstances. It is clear from this judgment that under (e) above, the trial judge has a lot of discretion in deciding whether the presence of a witness cannot be obtained without an unreasonable amount of delay or expense. It must be noted, however, that the application of the subsection is subject to some other over-riding conditions which counsel for the defence has no right to waive.[45]

These are the following:

(i) That the proceeding was between the same parties or their representatives in interest. In *R.* v. *Enebieni Ijoma*[46] three of the witnesses who gave evidence at the preliminary investigation were in the United Kingdom during the trial they having been brought to Nigeria for purposes of giving evidence at the investigation. It was contended that as the complainant at the preliminary investigation was the Inspector-General of Police whilst the present proceeding was between the Queen and the accused persons, section 34 (1) was not applicable. It was, however, held that by the mere substitution of the Queen for the Inspector-General of Police, it could not be said that there had been a change of parties so as to bring it outside the section. Furthermore it was held that the court has a discretion to admit or refuse to admit the deposition of a witness under section 34. If the former proceeding was clearly *res inter alios acta*, evidence given in it will not be admissible under this heading. In *Omidokun Owoniyi* v. *Omotosho*,[47] A and B were in

[43] See *Joseph Nahman* v. *J. A. Odutola* (1935) 14 W.A.C.A. 361.
[44] (1960) 5 F.S.C. 180.
[45] See *Kubua Burkie Odu* v. *The State* 1965 N.M.L.R. 129.
[46] [1961] All N.L.R. 518.
[47] [1961] All N.L.R. 304 (F.S.C.).

occupation of a piece of land. B, with A's consent, sued D for trespass and got judgment. In a subsequent action brought by A against B for a declaration of title to the piece of land, it was held that the evidence given in the former proceeding could not be used in the subsequent action.

(ii) That the adverse party in the first proceeding had the right and opportunity to cross-examine the witness. This does not necessarily mean that the adverse party must have cross-examined the witness provided he had the right and opportunity of doing so.

(iii) That the questions in issue were substantially the same in the first as in the second proceedings.

It should be noted that a criminal trial or inquiry is, under the section, deemed to be a proceeding between the prosecutor and the accused (subs. (2)).

Whether a witness is dead, or cannot be found, or incapable of giving evidence, or kept out of the way by a party to the proceeding, or incapable of being brought to give evidence without unreasonable delay or expense must be proved by the party who wishes to tender the evidence of such a witness. The usual mode of proof is to call other witnesses to testify to the relevant facts. But in the case of a person employed in the public service[48] who is required to give evidence for any purpose connected with a judicial proceeding, it is sufficient to account for his non-attendance at the hearing of the proceeding by the mere production of either an official Gazette, or a telegram or letter purporting to emanate from the head of his department, sufficiently explaining to the satisfaction of the court his apparent default (s. 34 (3)). A letter emanating from and signed by the Permanent Secretary of the appropriate Ministry will be sufficient for this purpose.[49] This method of proof of the reason for the absence of a witness is confined to persons employed in the public service and will not be extended to other persons, for example, persons employed in trading firms.[50] But once it is proved that the witness was a person employed in the public service, it is sufficient proof to produce a Gazette showing that the witness is dead, or has gone overseas on leave.[51]

[48] For the definition of "person employed in the public service" see s. 1 (1) of the Criminal Code, Cap. 42.
[49] See *R.* v. *Mbam Iziogo*, unreported, F.S.C. 451/1962.
[50] *Reuben Shofoluwe* v. *R.* (1951) 13 W.A.C.A. 204.
[51] *Adebiyi Majekodunmi* v. *R.* (1952) 14 W.A.C.A. 64.

Apart from relevancy and admissibility of evidence given in a former proceeding under section 34, such evidence is not admissible under any other section of the Act although it may be used for purposes of cross-examining as to credit.[52]

Under the provisions of the Criminal Procedure Act,[53] a magistrate may take evidence of a person dangerously ill under section 290 of that Act without complying with the provisions relating to the taking of evidence at summary trials in the magistrate's court, provided he complies with the provisions of that section and those of section 291. Also under section 319 of the same Act a magistrate is empowered to take the deposition of a witness at a place where he is if he is unable to attend at the usual place of sitting of the court. Similar powers are contained in section 244 of the Northern Nigeria Criminal Procedure Code.[54] Evidence taken under these provisions:

> "may be used in evidence on the trial of any person accused of an offence to which the same relates, if the person who made the statement be dead, or the court be satisfied that for any sufficient cause his attendance cannot be procured, and if reasonable notice of the intention to take such statement was served upon the person against whom it is to be read in evidence and he had or might have had if he had chosen to be present full opportunity of cross-examining the person making the same."[55]

Finally, it must be noted that section 36 provides that any statement made by an accused person at a preliminary investigation or at a coroner's inquest may be given in evidence.

[52] *Babatunde Jemi Alade* v. *Lawani Aborishade* (1960) 5 F.S.C. 107.
[53] Cap. 43.
[54] Cap. 30 of the Laws of Northern Nigeria, 1963.
[55] S. 35. See: The Adaptation of Legislation Order in Council, 1960 (N.R.L.N. 120 of 1960).

Chapter 5

STATEMENTS MADE IN SPECIAL CIRCUMSTANCES

29. Entries in Books of Account

Under certain circumstances, statements made in certain documents will be considered relevant and may be admissible. The documents to be considered under this heading include books of account, public and official books, maps, charts or plans made under the authority of Government. A brief reference will also be made to statements contained in recitals contained in Acts of Parliament etc.

Entries in books of account, regularly kept in the course of business are relevant and admissible if they refer to a matter into which the court has to enquire (s. 37). The section goes further to provide that "such statements shall not alone be sufficient to *charge any person with liability.*"[1] It is not quite clear whether the italicised words refer to criminal liability only or to both civil and criminal liability. It is submitted however, that had the legislature intended to confine the provision to criminal liability, it would have expressly said so. Therefore, by virtue of the section, neither a criminal charge nor a civil suit can be proved by the mere statements in such books of account. Some other evidence tending to establish the liability of the accused or the defendant will be required in addition to the mere entries in such a book. Relevancy under this section should be distinguished from relevancy under section 33 (*b*) (discussed in the last chapter). Under the latter section although entries in books of account may become relevant, yet the conditions laid down under that section must be satisfied, namely, that the maker is dead, that such entries were made in the ordinary course of business etc., conditions which are unnecessary under section 37. Finally the point must be made that where entries in such a book of account (under section 37) are relevant, the court cannot act on such entries except those as are brought into notice in court by oral evidence or by examination of the books in court.[2]

[1] Italics supplied.
[2] *Muhammadu Duriminiya* v. *Commissioner of Police*, 1961 N.R.N.L.R. 70.

30. Entry in Public Records

An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially imposed on him by the law of this country in which such book, register or record is kept, is itself a relevant fact and therefore admissible (s. 38). The section does not contain the definition of "public or other official book" but it has been held that the definition of "public documents" under section 108 of the Act must be adopted. And section 108 defines public documents as documents forming the acts or records of the sovereign, public officers, legislative, judicial and executive, whether of Nigeria or elsewhere, and also public records kept in Nigeria of private documents. At the trial of the accused in *R.* v. *Taoridi Lawani*[3] for manslaughter the prosecution sought to tender in evidence a police "Accident Report" book in which entries were made by a police officer, since dead, both from and outside his personal knowledge. Bellamy J., said:

> "As to the first condition (of section 38) the question arises: is Police Book A/67 a 'public or other official book, register or record' within the section? It cannot possibly be said to be a 'register or record.' Is it a 'public or other official book'? I have no hesitation in answering that question in the negative. Public documents are defined in section 108 of the Evidence Ordinance. The relevant words are 'documents forming the acts or records of the acts' of public officers. In my view the kind of acts which section 108 has in view is indicated in section 112 of the Evidence Ordinance. In my opinion, it does not cover the inquiries which a police officer may make, whether under the Criminal Procedure Ordinance or otherwise, which may or may not result in action. Therefore, I rule that the entries are not admissible on this ground."[4]

31. Maps, Charts and Plans

Under section 39,

> "statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in

[3] 1959 L.L.R. 97.
[4] For further discussion on public documents see §78, *post.*

maps or plans made under the authority of Government as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts"

and are admissible. Thus in boundary and other disputes, positions of towns, rivers and other places shown on any survey map of Nigeria or any part of it made under the authority of the Government are relevant for purposes of proving those positions. The relevant map must be tendered in evidence. There is no provision similar to this under the English law. Under that law such statements will not be admissible[5] but, old maps may be admissible as public documents[6] and "where it is important to ascertain ancient facts of a public nature, the law does permit historical works to be referred to."[7]

32. Statements Contained in Recitals in Acts of Parliament etc.

When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any enactment or in any proclamation or speech of the President in opening Parliament or any legislation of the United Kingdom still applicable to Nigeria or in any proclamation or speech of a Governor in the opening of a Regional Legislature or in any statement made in a government or public notice appearing in the *Gazette* or in a Regional notice or a Regional public notice appearing in a Regional gazette or in any printed paper purporting to be the *London Gazette* or the government gazette of any part of the Commonwealth is a relevant fact (s. 40).

33. Certificates of Certain Government Officers

In criminal cases, either the prosecution or the defence may produce certificates signed by certain named Government officers, and the production of such certificates may be taken as sufficient evidence of the facts contained in them. The officers concerned are the following:

(*a*) the Government Chemist, a Deputy Government Chemist and an Assistant Government Chemist;
(*b*) a Government Pathologist, or Entomologist;

[5] *R.* v. *Berger* [1894] 1 Q.B. 823; *Att.-Gen.* v. *Horner* (*No.* 2) [1913] 2 Ch. 140.
[6] *Att.-Gen.* v. *Antrobus* [1905] 2 Ch. 188.
[7] *Read* v. *Bishop of Lincoln* [1892] A.C. 644 at 653.

(*c*) the Accountant-General (whether any such officer is known by that or any other title in the service of a Regional or of the Federal Government);

(*d*) the Governor, the Deputy Governor or the General Manager of the Central Bank of Nigeria.

When a certificate signed by any of the named officers is produced, it is unnecessary to call the officer to give evidence. But the court has power on the application of a party to the proceeding, or on its own motion, to direct that any such officer shall be summoned to give evidence before it if the court is of the opinion that, either for the purpose of cross-examination or for any other reason, the interests of justice so require (s. 41 (1)).

Soon after the introduction of the first Evidence Ordinance it became necessary to amend the law in respect of the Government Pathologist. At that time there was only one Government Pathologist in the whole of Nigeria and he had his laboratory in Oshodi, in Western Nigeria. As it would be expected it soon became the practice for the court to exercise its power under the section to call the Government Pathologist to give evidence concerning the matters contained in certificates issued and signed by him under the section. The result was the passing in 1955 of an amendment designed to reduce the calls made upon the Government Pathologist to put up appearance personally before the numerous courts in Nigeria where certificates issued under this section might be required. The amendment is now subsection (2) of the section. Under this subsection the Federal Minister of Health may, by notice in the *Federal Gazette*, declare that any person named in such notice, being an officer in the public service of the Federation employed in a forensic laboratory in a rank not below that of Medical Laboratory Technologist, shall for the purposes of subsection (1) be empowered to sign a certificate relating to any subject specified in the notice. But such a certificate is not admissible in evidence if, in the opinion of the court, it does not relate wholly or mainly to a subject specified in the notice.

When any certificate under section 41 is intended to be produced by a party to a criminal proceeding, a copy of it must be sent to the other party at least ten clear days before the day appointed for the hearing of the case (s. 42). In practice this means ten clear days before the date the report is being tendered in evidence. The

section does not state the consequence if the period between serving the report and the date it is to be tendered is less than the statutory period, but on general principles, such a report is inadmissible only if the other party objects to its admission. As the whole purpose of the section is to give sufficiently long notice of the contents of the certificate to the adverse party so that he may prepare his defence to it, for example, by employing the services of another expert, it is submitted that the admission of such a certificate by consent of both parties where the ten days notice provision is not complied with, will not necessarily lead to a reversal of the judgment on appeal. In any case there is power in the court, in the event of failure to comply with the statutory notice period, if it considers it necessary in the interest of justice, to adjourn the hearing of the case on such terms as may seem proper.

A party tendering a certificate under this heading need not prove the signature on it, as under section 43 the court is bound, in the absence of evidence to the contrary, to presume that the signature to such a certificate is genuine and that the person signing it held the office which he professed at the time when he signed it.

CHAPTER 6

JUDGMENTS OF COURTS OF JUSTICE

34. Previous Judgment: When Relevant

A judgment of a court of justice is conclusive as to the settlement effected by it. No legal system properly so called can be administered under a contrary rule. But no judgment can be conclusive against the whole world as to the facts proved before the court upon which the judgment is based. It is equally true that parties and their privies to a case must be bound by the finding of facts in the case. The principle applicable to this latter case is the principle of estoppel which is discussed in Chapter 17 below. The problem to be discussed here is how far a judgment of a court can, in a subsequent proceeding, be regarded as relevant for the purpose of proof of the facts upon which it was founded.

One important point to note is that

> "the existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial."[1]

For example, under the Constitution of the Federation, section 22 (8):

> "No person who shows that he has been tried by any competent court 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."

Leaving aside a discussion on the very dubious application of the phrase "save upon the order of a superior court" (a discussion on which is not properly within the purview of this book), this section would appear to make provisions similar to the special pleas known as *autrefois convict* and *autrefois acquit* in the English common law. Detailed provisions relating to these are to be found in sections

[1] S. 48.

181–185 of the Criminal Procedure Act[2] and sections 223 and 224 of the Criminal Procedure Code.[3] Although it is not part of the purpose of this book to discuss these special pleas, it is necessary to state that they are not applicable as such in this country. When a person has been previously convicted or acquitted of the charge for which he is presently brought before the court, he will have to show that his case comes within the relevant provisions of the Constitution and of the Criminal Procedure Act or Criminal Procedure Code, as the case may be. Where these special pleas are raised under the relevant provisions of the law, the judgment in the previous case will be regarded as relevant under section 48 of the Evidence Act and will be admissible in proof of the conviction or acquittal. But such a judgment must be one capable of preventing the court from taking cognizance of the suit before it, or holding the trial. In consequence therefore if, for example, the tribunal who heard the previous case had no jurisdiction to try criminal offences, any judgment, order etc. given by it cannot be regarded as relevant under this provision. Such a judgment, order etc. will be regarded as a nullity.[4] In *R.* v. *Lasisi Jinadu*[5] a police officer was charged before an "orderly room" under police regulations, with using unnecessary violence to a person in his custody, tried and acquitted. He was subsequently charged in the then Supreme Court with assault under the Criminal Code. It was held that he could not raise the special plea under sections 181–185 of the Criminal Procedure Act.

A previous judgment declaring a special status is relevant when the existence of such a special status is relevant. Under section 49 (1) the following will be relevant:

> "a final judgment, order or decree of a court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely,"

when the existence of any legal character as aforesaid, or the title of any person aforementioned to any such thing is relevant. Any

[2] Cap. 43. [3] Cap. 30 of the Laws of Northern Nigeria, 1963.
[4] See *R.* v. *Governor in Council, Western Nigeria, ex p. Laniyan Ojo* [1962] All N.L.R. 147; and *Re Gilmore's Application* [1957] 1 Q.B. 574 at 588.
[5] (1948) 12 W.A.C.A. 368.

other types of judgments, orders or decrees other than the above are relevant only if they relate to matters of public nature relevant to the suit under trial (s. 50). As an example of this can be mentioned the old English case of *Petrie* v. *Nuttall.*[6] The defendant was sued for trespass to a piece of land and in answer he alleged that he was exercising a public right of way. He then tendered in evidence a conviction of the plaintiff's predecessor in title for public nuisance by obstructing the way. It was held that although this did not operate as an estoppel, it was admissible in proof that the land was a highway. But such judgments, orders, decrees etc. are not conclusive proof of that which they state. It should be noted, however, that such a judgment, order or decree mentioned under section 49 will be conclusive proof:

> "(*a*) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;
>
> (*b*) that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
>
> (*c*) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease; and
>
> (*d*) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."[7]

In all cases of relevancy under above sections (ss. 48, 49 and 50), however, any party to the suit or the proceeding may show that any such judgment, order or decree which has been proved by the adverse party was delivered by a court without jurisdiction or was obtained by fraud or collusion (s. 52).

35. Previous Judgment: When Irrelevant

Judgments, orders or decrees other than those discussed above (that is those covered by ss. 48–50) are irrelevant in any subsequent proceeding unless the existence of such a judgment, order or decree is a fact in issue or is relevant under some other provision of the Act or of some other law (s. 51). This is deemed to embrace the

[6] (1856) 11 Exch. 569; 156 E.R. 957.

[7] S. 40 (*a*).

well known English common law rule in *Hollington* v. *Hewthorn & Co., Ltd.*[8] In that case it was held that the conviction of one of the drivers of the defendants for careless driving was not admissible as evidence of his negligence in a civil claim for damages brought against the driver and his employers.

In a judgment coming before *Hollington* v. *Hewthorn* and the first Evidence Ordinance, the West African Court of Appeal had taken an opposite view. In *Peter Ezeani & Ors.* v. *Nneli Ezene & Ors.*,[9] the plaintiffs claimed special damages being the value of their properties alleged wilfully damaged and looted by the defendants. The trial court refused to admit a certified copy of the criminal proceeding in which the defendants were convicted of riot in which the plaintiffs' properties were damaged. Following *Re Crippen*[10] and *Marsh* v. *Darley*,[11] the West African Court of Appeal held that the document ought to have been accepted not only to prove the fact of the convictions but as presumptive proof of the commission of the offences. There can be no doubt that this cannot now, after the Evidence Act came into operation, be regarded as a correct statement of the law. In a large number of cases decided after the Evidence Act had come into operation, the rule in *Hollington* v. *Hewthorn* has become well established. In *Okunoren* v. *United Africa Co., Ltd.*,[12] the plaintiff was charged with stealing a certain sum of money from his employers the defendants, and convicted. The plaintiff later brought this action for recovery of some arrears of salary whilst the defendants counter claimed for the amount which the plaintiff was convicted of stealing and offered no evidence beyond the fact of the conviction. It was held under section 51 that the result of the criminal case could not be used to establish the civil claim. In *Gabriel Agu* v. *Nwakama Atuagwu*,[13] the defendant was prosecuted for theft of the plaintiff's property on a complaint lodged by the plaintiff, but acquitted. The plaintiff then sued the defendant for damages in connection with the goods he had lost. It was held that the record of the criminal proceedings was not admissible.[14] Lastly reference must be made to the case of *Dan Boyi Gyel Zang* v. *Commissioner of Police*.[15] In that case the appellant, the holder of a mining lease, was convicted on a charge laid under

[8] [1943] K.B. 587.
[9] (1935) 2 W.A.C.A. 342.
[10] [1911] P. 108.
[11] [1914] 1 K.B. 1.
[12] (1951) 20 N.L.R. 25.
[13] (1955) 21 N.L.R. 83.
[14] See also *Bello Adeleke* v. *Benjamin Adewusi* [1961] All N.L.R. 37 especially at p. 39.
[15] 1960 N.R.N.L.R. 86.

section 3 (2) of the Minerals Act,[16] which makes it an offence to mine on any lands in Nigeria except as is provided in the Act. To prove the charge, the prosecution sought to prove that labourers employed by the appellant had committed an offence against section 14 (2) of the Act which prohibits mining on certain lands, and after offering proof of that invoked section 104 of the Act, which provides that upon proof that an offence against the Act has been committed by a person employed by the holder of the mining lease such holder shall be held liable for the offence and to the penalty provided therefor, unless he proves that the offence was committed without his knowledge or consent and that he had taken all reasonable means to prevent the commission of the offence. It was held that the fact that the workmen had been convicted was not admissible evidence that they had committed the offence. It was evidence that another court considered that they had committed it, and the opinion of that other court, like all opinions, except expert opinion was irrelevant.[17] The court was of the opinion that the convictions might have been admissible under section 54 of the Act if the appellant's relationship to the workmen had been that of a privy, but as it was not, the convictions were therefore not admissible even under that section.

[16] Cap. 121.
[17] See also *A.T.M.N., Ltd.* v. *Chief Inspector of Mines* (1950) 19 N.L.R. 69.

CHAPTER 7

OPINIONS OF THIRD PERSONS

36. The General Rule

The general rule is that a witness cannot be allowed to give his opinion as to the existence or non-existence of a fact in issue or relevant fact. Such evidence of opinion will be irrelevant and therefore inadmissible. As a general rule a witness is only allowed to testify to facts known to him. "The fact that any person is of opinion that a fact in issue or relevant to the issue, does or does not exist is irrelevant to the existence of such fact" (s. 65) since it is the duty of the jury and not that of a witness to draw inferences and conclusions from proved facts. Some exceptions dictated by expediency have, however, been created by the Act (ss. 56 to 64) but before discussing these it is necessary to make some general remarks upon them.

The exceptions to the general rule can be broadly divided into two: (a) opinions of experts and (b) opinions of non-experts. The experts may be experts in foreign law, customary law, science or art, handwriting or finger impressions. In these cases opinions of such experts are regarded as relevant and therefore admissible. Similarly opinions of certain persons with respect to general custom or right, or with respect to certain usages and tenets, or as to the existence of the relationship of one person to another, are regarded as relevant even though such persons are not "experts". All these will be discussed in the remaining sections of this chapter.

It should be noted that facts, which are not otherwise relevant, become relevant and admissible if they support or are inconsistent with the opinions of experts when such opinions are relevant (s. 59). Although the section does not say so, there is no doubt that this provision will apply equally to the opinions of non-experts. Any facts which tend to support or contradict the opinions of experts or non-experts, where these are relevant, will also be relevant and admissible. Furthermore, whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant (s. 64). So that the charts used by a writing expert to compare a disputed writing with that of the accused and upon which

the expert bases his opinion as to the ownership of the disputed writing, are relevant and admissible. Similarly, the facts upon which a medical expert bases his opinion that the death of the deceased was self-inflicted, or that a person is insane, or was drunk at a relevant point of time, must be given to the court. Indeed the court may not attach much weight to the opinions of such experts if the factual basis of such opinions are not produced before it.

The exceptions to the general rule that opinion evidence is not relevant will now be discussed in detail.

37. Opinions of Experts: Competence of the Expert

The first exception, and perhaps the more important exception to the general rule stated above, is that opinions of experts are, generally speaking, regarded as relevant and therefore admissible. Under section 56 of the Act, when the court has to form an opinion upon a point of foreign law, customary law, or of science or art, or as to identity of handwriting or finger impressions the opinions of experts in those fields are relevant and admissible. An expert is a person who is specially skilled in the field in which he is giving evidence and whether or not a witness can be regarded as an expert is a question for the judge to decide.

A person can be regarded as an expert in a particular field even though he did not acquire his knowledge after a systematic tutoring in the particular field, provided that he has had, in the opinion of the court, sufficient practice in the particular field of knowledge as professional or as amateur, to make his opinion reliable. At the trial of the appellant in *Michael John Aouad & Anor.* v. *Inspector-General of Police*[1] for an offence under section 427 of the Criminal Code, a witness gave evidence that he was an inspector of mines appointed under the Minerals Act[2] and that he made certain tests in order to ascertain the nature of the ores in question. He was not cross-examined as to his personal qualifications, as to his ability to make these tests or as to the accuracy of the conclusions he drew therefrom. He was put forward by the prosecution as an expert and he was accepted as such by the magistrate. It was held that the nature and duties of the witness's public office and the technical or scientific tests he made, which were not challenged, constituted prima facie evidence of his qualification to be admitted as an expert witness. In the English case of *R.* v. *Silverlock*,[3] it was held that a

[1] (1954) 14 W.A.C.A. 449. [2] Cap. 121. [3] [1894] 2 Q.B. 766.

solicitor who has acquired knowledge of handwriting as an amateur could be treated as an expert in that field.

The expert must be called as a witness and he must give his qualifications and experience before he begins to give evidence at all;[4] and where the adverse party wants to challenge either of these, he must cross-examine on them with a view to discrediting the witness as an expert witness. If the adverse party fails to do this, he may find it difficult to challenge the status of the witness as an expert on appeal.[5]

The court is not bound to accept the opinion of an expert and act on it but, where there is expert evidence, which is unchallenged and uncontradicted by any other evidence, the court is bound to accept such expert evidence and act on it.[6] Where there is conflict in the opinions of experts it is the duty of the court to come to a conclusion in the case by resolving such a conflict, and can do so by rejecting the opinion of one or the other of such experts.[7]

Generally speaking the court will not allow an expert to testify as to the ultimate issue in the case[8] but it is sometimes impossible to stick to this rule. In *R.* v. *Mason*,[9] the defence of the accused to a charge of murder is that the deceased had committed suicide. A doctor who did not see the deceased but had heard the evidence in court was asked whether in his opinion the wound which caused the death of the deceased was inflicted by someone other than the deceased. He said that in his opinion the wounds were not self-inflicted, and this opinion was held by the Court of Criminal Appeal to be admissible, it being an opinion based on an assumed state of facts, although it was the ultimate issue in the case.[10]

38. Opinions as to Foreign Law

When a question as to foreign law arises during the trial of a case, the opinion of an expert who, in his profession is acquainted with the foreign law in question, is relevant and admissible. From what has been said above, it is clear that an expert in foreign law needs

[4] *Ado Kofar Wambai & Anor.* v. *Kano Native Authority*, 1965 N.M.L.R. 15.
[5] *Michael John Aouad's* case, *supra.*
[6] See *R.* v. *Matheson* (1958) 42 Cr. App. R. 145 at 151.
[7] See *John Wilberforce Bamiro* v. *S.C.O.A.* (1941) 7 W.A.C.A. 150.
[8] See *Malton* v. *Nesbit* (1824) 1 C. & P. 70; 171 E.R. 1100; *Sills* v. *Brown* (1840) 9 C. & P. 601; 173 E.R. 974; and *Fenwick* v. *Bell* (1844) 1 Car. & Kir. 312; 174 E.R. 825.
[9] (1911) 7 Cr. App. R. 67.
[10] See also *R.* v. *Holmes* [1953] 1 W.L.R. 686.

not be one who is qualified to practise in the courts of the foreign country, although more weight is likely to be put on the evidence of opinion of a person who has had much practice in the law of the country in question than that of a person who is not so qualified or who is so qualified but has not practised that law.[11] A reader in Roman–Dutch law to the Council of Legal Education in London has been held by an English court to be an expert in Roman–Dutch law.[12]

As has been said in paragraph 6 of Chapter 1, *ante*, the Act does not define "foreign law" but it must include the laws of all countries both without and within the Commonwealth. For this purpose English law, that part of it which has not been incorporated into our law, must be regarded as foreign law, if not before, but certainly after, this country became a republic on October 1, 1964. This point has been well discussed in Chapter 1 and nothing more need be said here except to say that it is extremely doubtful if all Nigerian legal practitioners who were called to the English bar can be regarded as experts in English law.[13]

It should, however, be remembered that a court in this country will assume the law in any foreign country to be the same as the law in this country if no evidence to the contrary is tendered before it. In *Joseph Adeniyi Ogunro & Ors.* v. *Christiana Ajoke Ogedengbe*[14] the deceased owned land in Lagos and in Ghana and the applicants took out a summons for directions as to who were entitled to his estate and for an order of distribution. Counsel for the other side contended that the court had no jurisdiction to deal with property in Ghana, but failed to produce evidence on the Ghanaian law of succession. It was held that the trial court was correct in assuming that the Ghanaian law in respect of the subject matter of the action was the same as our law and consequently applying our law in the case.

The witness put forward as an expert in foreign law need not be a person of the legal profession if his official position makes him conversant with the particular branch of the foreign law. In *Said Ajani* v. *Comptroller of Customs*,[15] the appellant was caught in

[11] See *Barford* v. *Barford and McLeod* [1918] P. 140.
[12] *Brailey* v. *Rhodesia Consolidated, Ltd.* [1910] 2 Ch. 95.
[13] See *Cartwright* v. *Cartwright & Anderson* (1878) 26 W.R. 684; and *Wilson* v. *Wilson* [1903] P. 157 as to whether an English barrister who has practised before the Privy Council can be regarded as an expert in that law (a particular foreign law).
[14] (1960) 5 F.S.C. 137. [15] (1952) 14 W.A.C.A. 34; [1954] 1 W.L.R. 1405.

Kano on the point of leaving the country in an aeroplane, with a large quantity of French Colonial franc notes in his suitcase. To prove that the notes were legal tender in neighbouring French West Africa, the Comptroller of Customs called the manager of the Barclays Bank, Kano, who testified that he had had thirty-two years' experience of banking business, twenty-four years of it being in Nigeria and that to the best of his knowledge, the notes were French Colonial franc notes, and that they were legal tender in French West Africa on the material date. It was held that his evidence of opinion was rightly admitted, because the witness had, by virtue of his banking experience in Nigeria, peculiar means of knowledge of the subject, and as the manager of a branch of an authorised dealer in foreign currency had important and responsible public duties in relation to such currency and was bound to make himself acquainted with the subject. In their advice in the final appeal in the case, the Judicial Committee of the Privy Council, after quoting sections 56 and 57 of the Evidence Act, said:

> "The Ordinance enacts that the evidence of a person 'specially skilled' on a point of foreign law is admissible as expert evidence. The knowledge which entitles a person to be deemed 'specially skilled' on some points of foreign law may, in their Lordships' opinion, be gained in appropriate circumstances by a person whose profession is not that of law."

Experts on foreign law may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself. Any question as to the effect of the evidence of an expert on foreign law shall, instead of being submitted to the jury in the case of trial with a jury, be decided by the judge alone (s. 57). This, as we have seen in Chapter 1 is an example of the exceptional cases where questions of facts are for determination, not by the jury, but by the judge.

39. Opinions of Men of Science or Art

When the court has to form an opinion upon a point of science or art the opinions of persons specially skilled in that branch of science or art is relevant as being that of an expert. The same principles as govern relevancy under paragraph 37, *ante*, also govern relevancy under this heading. The subjects which will

come under this heading include medical, physical and other sciences, art. Science and art in this connection must be given very wide meanings. They will embrace the flying of aeroplanes, sailing of ships, valuation of rare jewellery, valuation of rare paintings and other works of art etc. But a matter of science which today calls for the opinion of an expert may become such a commonplace thing in the near future as not to require such an opinion.

A man of science or art who is put forward as an expert must show evidence of special skill in the particular branch of science or art in which he is called to give opinion. In *Yau Tittidabale* v. *Sokoto Native Authority*,[16] the appellant was convicted of culpable homicide on the basis of the testimony of an unnamed "dispenser" that death resulted from the appellant's blow. The High Court reversed the conviction holding that this testimony was inadmissible opinion evidence since the dispenser was not shown to be specially skilled in determining causes of death. It would, however, have been a different matter altogether had the witness been a medical practitioner who must then be presumed to be specially skilled in determining causes of death. In the case, the court stressed the point that even if the evidence had established the dispenser as an expert his testimony would have been entitled to very little weight since he had not revealed the factual basis for his opinion.

It must be noted that when an expert is testifying, his opinion evidence must be confined to the matter in which he is specially skilled. As Porter J., pointed out in the Canadian case, *R.* v. *Kusmack*,[17]

> "the subject on which the witness is testifying must be one upon which competency to form an opinion can only be acquired by a course of special study or experience. It is upon such a subject and such a subject only that the testimony is admissible."[18]

40. Customary Law

In deciding questions of customary law, the opinions of local chiefs or other persons having special knowledge of customary law

[16] Unreported, but noted at (1964) 1 *Nigerian Law Journal*, p. 123.
[17] (1955) 20 C.R. 365 at 376.
[18] See also *Ramadge* v. *Ryan* (1832) 9 Bing. 333; 131 E.R. 640; and *Greville* v. *Chapman* (1844) 5 Q.B. 781.

are relevant (s. 58). As Taylor F.J., pointed out in *Liadi Giwa* v. *Bisiriyu Erinmilokun*[19]

> "it is a well established principle of law that native law and custom is a matter of evidence to be decided on the facts presented before the court in each particular case, unless it is of such notoriety and has been so frequently followed by the courts that judicial notice would be taken of it without evidence required in proof."

Furthermore under the same section, section 58, any book or manuscript recognised by Nigerians as a legal authority on customary law will be relevant. A.K. Ajisafe's *Laws and Customs of the Yorubas* (1921) which is recognised by the Yorubas as a legal authority is a good example of such a book. It is however, clear from the language of the section which makes such a book relevant that it must be put in as evidence in the case. In *Bello Adebibu* v. *Gbadamosi Adewoyin & Anor.*[20] the respondents sought a declaration that the appellant was not entitled to be appointed Mogaji (*i.e.*, head) of the House to which the parties belong in accordance with Yoruba customary law. In finding for the respondents, the trial judge relied on a book described as Mr. Ward Price's *Memorandum of land Tenure in the Yoruba Province*, which was not put in evidence. The West African Court after quoting section 58 said:

> "In my view this involves two postulates, firstly that the memorandum must form part of the evidence in the case, and secondly that it must be shown that it is a book or manuscript recognised by natives as a legal authority. The learned judge appears to have referred to it as though it were a legal authority as would warrant its citation to the court, which it certainly is not, for native law and custom is a matter of evidence and not of law. Moreover, whatever may be the respect due to the results of the writer's researches, they are only relevant as evidence if shown to be recognised by natives as a legal authority, which again was not done in the present case."

For the present purpose, Moslem law is regarded as customary law which must also be proved by evidence.[21] The requirement that customary law and Moslem law must be proved by evidence does

[19] [1961] All N.L.R. 294 at 296.
[20] (1951) 13 W.A.C.A. 191.
[21] *Sulia Ayoola & Ors.* v. *Muritala Folawujo & Ors.* (1942) 8 W.A.C.A. 39.

not apply to trials in native courts, customary courts, and Alkali courts presided over by persons learned in these laws; *Nana Gyebi Ababio II* v. *Kweku Nsemfoo*.[22] Taylor J. (as he then was), however, took a different view from this in *Asani Fijabi* v. *Amudatu Odunola*.[23] On a claim by the appellant against the respondent in an Ibadan native court for a debt, the court gave judgment for the appellant. The respondent appealed to the judicial native court of appeal, Ibadan, where the appeal was allowed on a proposition of a rule of customary law which was not referred to by any of the witnesses in the court of first instance nor by the only witness called in the Court of Appeal. On further appeal to the High Court, Taylor J., held, in a very short judgment, that the judicial Native Court of Appeal was wrong in deciding the case on a point of customary law upon which evidence was never led. With respect, this can hardly be regarded as a correct approach to the matter. It is most unlikely to be followed by the courts as it is a judgment given *per incuriam* having overlooked the decision of the West African Court of Appeal in the *Ababio II* case, referred to above. Indeed, the case itself was not presented by counsel. It should be remembered that the Evidence Act is not applicable to native and customary courts without special provisions in another law, and there was no evidence to show that the Act had been made applicable to the particular native court when it gave the judgment. It would be clearly contrary to general principles to expect a litigant in a customary court to call witnesses as to customary law in which the court is supposed to be learned. But if the customary court, before whom a rule of customary law comes for determination, is presided over by a person not specially learned in that law, then evidence on the point must be given. In *Iyamuse Ehigie* v. *Gregory Ehigie*,[24] the President of the Benin Grade "A" Customary court, himself a Benin man and a lawyer, decided a point of Benin customary law of inheritance from his own personal knowledge, without evidence, and gave judgment for the respondent. In allowing the appeal in the High Court, Fatayi-Williams J., held that the President was wrong to have acted on his own personal knowledge of the law since the President "is not required by statute either to be a native of the area of jurisdiction of the

[22] (1947) 12 W.A.C.A. 127.
[23] 1955–56, W.R.N.L.R. 133.
[24] [1961] All N.L.R. 842; (1961) W.N.L.R. 307.

customary court or to have any special qualification in the customary law of the area."

41. General Custom or Right

When the court has to form an opinion as to the existence of any general custom or right, that is, one common to any considerable class of persons, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant (s. 61). At this juncture reference must be made to section 14 of the Act. That section stipulates that a custom may be adopted as part of the law governing a particular set of circumstances if it is one which is permitted by law to be noticed judicially or otherwise proved by evidence. Even where a particular custom is proved by evidence it will nevertheless not be enforced as law if it is held to be contrary to public policy[25] or is not in accordance with natural justice, equity and good conscience. And where the alleged custom is very unreasonable it may not be easily accepted by the court.[26]

As has been pointed out a custom may be judicially noticed, but only

> "if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it is assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration."[27]

Long before the Evidence Act was passed it had been held in many cases that a custom could be judicially noticed only after frequent proof in the courts. In *Fabunmi Sule Farinde* v. *Salami Ajiko & Anor.*[28] the plaintiff relied on an alleged custom in order to establish his case. In order to do so, he relied only on the decision of a court given in 1892. It was held that this was not sufficient and that what was required was frequent proofs of the custom in the courts.[29] Also in *Lawani Buraimo & Ors.* v. *Taiwo Gbamgboye &*

[25] See *Olubunmi Cole & Anor.* v. *Akinyele & Ors.* (1960) 5 F.S.C. 84.
[26] *Akinlolu Oloto* v. *Administrator-General* (1940) 12 W.A.C.A. 76.
[27] S. 14 (2).
[28] (1940) 6 W.A.C.A. 108.
[29] See also *Kobina Angu* v. *Cudjoe Attah* unreported, but see Privy Council Appeal No. 78 of 1915, followed in *Effuah Amissah* v. *Effuah Krabah* (1931) 2 W.A.C.A. 30.

Ors.[30] it was held that it is unnecessary to bring evidence to prove particular customs which have come so frequently before the courts to be well established and notorious. The real difficulty at the moment is whether section 14 (2) has effected a change in the previous position so as to allow a court to take judicial notice of a custom even if it has been acted upon only once by a court. It does not appear that there is any reported case in which a court has adverted its mind to this difficulty. On the other hand the courts today would appear to proceed on the basis that the law in this respect has continued unaltered even after section 14 (2) came into operation. In *Liadi Giwa* v. *Bisiriyu Erinmilokun*,[31] Taylor F.J., was of the opinion (as pointed out above) that customary law could be judicially notice only "if it is of such notoriety and has been so frequently followed by the courts." Section 14 (2) was not considered by the learned Federal Justice in the case and it is arguable from the wording of that section that a single decision of a superior court could be sufficient. The section speaks of the custom having been "*acted upon by a court.*" This could have been differently framed had the legislature required frequent decisions of the courts. The section, however, says that the application of the custom must have been

> "to an extent which justifies the court asked to apply it in assuming that the persons or class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration."

It is submitted that a single decision of a court on a point of custom or customary law is sufficient under this section to make a court in a subsequent case take judicial notice of the custom or customary law, provided it is clear to the court, from a proper reading of the previous judgment, that the people in that area or the particular class of persons concerned in that area, look upon the custom or the rule of customary law as binding on them in relation to circumstances similar to those under consideration. This view has some support in the decision of the Federal Supreme Court in the well-known case of *Olubunmi Cole & Anor.* v. *Akinyele & Ors.*[32] In that case the deceased was married under the Marriage Act. He also had two children by another woman, one born during his wife's

[30] (1940) 15 N.L.R. 139.
[31] [1961] All N.L.R. 294 at 296.
[32] (1960) 5 F.S.C. 84.

lifetime and the other after her death. He acknowledged both as his children. They sued for a declaration that they were the legitimate children of the deceased and entitled to share in his estate, he having died intestate. Brett F.J., said:

> "No attempt was made to call any evidence as to any rule of native law and custom which might apply in this case, but the court was invited to take judicial notice under section 14 (2) of the Evidence Ordinance, of the rule under native law and custom of the Yoruba which was held proved by Jibowu J., and the West African Court of Appeal in *Alake* v. *Pratt*[33] to the effect that if paternity of children is acknowledged by a man during his lifetime they are to be regarded as legitimate and entitled to share in his estate with the children born of a marriage contracted under the Marriage Ordinance. . . . I would accept the decision in *Alake* v. *Pratt* as one of sufficient authority to enable the courts to take judicial notice of the rule of Yoruba law and custom which was there proved."

And it should be noted that in arriving at his decision on the relevant customary rule, Foster Sutton P., in *Alake* v. *Pratt* based his judgment on the facts proved before the lower court and cited no other cases in which that custom had been previously proved. It would appear therefore that in *Cole* v. *Akinyele* (*supra*), the Federal Supreme Court felt satisfied that the single decision in *Alake* v. *Pratt* was sufficient to establish a custom for purposes of judicial notice.

Lastly, the point must be made that the fact that a particular custom or even a rule of customary law has been proved and accepted by the courts to be applicable to a particular locality does not make it acceptable to a court as being applicable to another locality. Thus it was held in *Amancio Santos* v. *Okosi Industries, Ltd. & Anor.*[34] that the mere fact that a custom which was held proved before a Calabar court (Eastern Nigeria) in *Henshaw* v. *Henshaw*[35] was not necessarily applicable to the people of Epe (Western Nigeria) in a case brought before the court in that area.

42. Opinions of Non-Experts: as to Handwriting

The second exception to the rule that evidence of opinion is generally speaking, irrelevant and inadmissible, relate to certain

[33] (1955) 15 W.A.C.A. 20. [34] (1942) 8 W.A.C.A. 29. [35] (1927) 8 N.L.R. 77.

cases where expediency demand that opinions of even non-experts must be admissible if the course of justice is not to be made unduly difficult. The first of such cases relate to the opinions of certain persons as to handwriting.

> "When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact"

and therefore admissible (s. 60 (1)). A person is said to be acquainted with the handwriting of another when:

(i) he has seen that other person write, or
(ii) when he has received documents purporting to be written by that other person in answer to documents written by himself or written under his authority and addressed to that other person, or
(iii) when in the ordinary course of business, documents purporting to be written by that other person have been habitually submitted to him (s. 60 (2)).

In *Salami Lawal* v. *Commissioner of Police*[36] the trial magistrate accepted the evidence of opinion of a witness who was not an expert but who stated that he was conversant with appellant's signature as they had worked together, as proof that the appellant had made certain signatures in dispute. It was held that the trial magistrate was right in so doing.

It must be noted that evidence of opinion under this section (which is the evidence of opinion of a non-expert) must be distinguished from the evidence of opinion of experts under section 56 (1). Under that section it has been held that a police officer could be regarded as an expert witness in the case of a disputed handwriting and "handwriting" was held to include "typewriting,"[37] both of which will not be applicable to section 60. In *Sola Odulaja* v. *Inspector-General of Police*[38] it was held that it was proper for a court to reject the evidence of an expert under section 56 (1) and accept that of a witness who was familiar with the writing of the appellant under section 60.

In the case of *Salami Lawal, supra*, it was also recognised that

[36] (1960) W.N.L.R. 72.
[37] *R.* v. *Onitiri* (1946) 12 W.A.C.A. 58.
[38] 1055–56 W.R.N.L.R. 3.

apart from the above two methods of proving a disputed handwriting, the jury, or the judge where he sits without a jury may compare in court the disputed writing with an accepted writing of the accused.[39] Section 107 (1) provides that in order to ascertain whether a signature, writing, or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, or finger impression admitted or made by that person may be compared with the one which is to be proved although that signature, writing or finger impression has not been produced or proved for any other purpose. And to enable the court to carry out this comparison, the court is empowered by section 107 (2) to direct any person present in court to write any words or figures or make finger impressions. But this power cannot be used in the case of an accused person who does not go to the witness box to give evidence. But where there is expert evidence on the matter, the judge cannot disregard such evidence and resolve the matter himself by making comparison under this or any other provision. In the famous treasonable felonies trial, *R.* v. *Michael Adedapo Omisade & Ors.*,[40] to prove that one of the accused persons paid a visit to the naval base in furtherance of an alleged conspiracy the prosecution produced the visitors' book of the institution. A police handwriting expert gave evidence which would appear to favour the defence that the signature in the book alleged to be that of the particular accused person was in fact not his. The trial judge discarded the evidence of the expert, described him as in-expert, and resolved the matter himself by comparing the signature in the visitor's book with other writings of the accused and found as a fact that it was the accused who made the signature. In holding that the trial judge was in error in so doing Ademola C.J.N., said:[41] "We do not share the view of the learned judge that he can so discard the evidence of the handwriting expert, confused though it was." It would have been a different matter had there been evidence from a person familiar with the writing of the accused which contradicted that of the expert. Then in deciding the issue the trial judge would have been justified in himself comparing the disputed writing with the writing of the accused with a view to coming to a conclusion as to which of the two witnesses to believe.

[39] See also *Asei* v. *Commissioner of Police*, unreported, but see Criminal Appeal Zaria, No. Z/10CA/63 noted in (1964) 1 *Nigerian Law Journal*, p. 122.

[40] 1964 N.M.L.R. 67.

[41] *Ibid.*, at 86.

43. Opinions as to Usages, Tenets etc.

Under section 62 opinions of persons who have special means of knowledge of the following matters are relevant and therefore admissible:

(i) the usages and tenets of any body of men or family; or
(ii) the constitutions and government of any religious or charitable foundation; or
(iii) the meaning of words or terms used in particular districts or by particular classes of people.

44. Opinions as to Relationship

"When the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject; is a relevant fact."[42]

The section, however, provides that such opinion shall not be sufficient to prove a marriage in proceedings for a divorce or in a petition for damages against an adulterer or in prosecution for bigamy. But such an opinion may be sufficient to prove that a person is the child of another, or that a woman is the wife of another in proceedings other than those mentioned.

Apart from above cases there are some others where opinions of non-experts were admissible under the English common law and are admissible here by virtue of section 5 (*a*) of the Act. These will be discussed in the sections that follow.

45. Opinions as to Identity

When a witness says in court that a person shown to him resembles the person he had seen previously, this is usually an opinion which is admissible. Similarly the identification through a photograph, of a person who is absent, is a matter of opinion which is also admissible. When the identification of an accused person is in dispute, the practice of the police in this country is to conduct identification parades. In an identification parade a number of persons including the suspects, usually persons of about the same height, colour, and social status—this is usually decided by the manner of dressing—are lined up and the witness is asked to

[42] S. 63.

identify the suspect among them. The witness must not have been allowed by the police to see the suspect alone or to see his photograph previous to the parade. Neither should he have been given a description of the suspect before the parade. Similarly in an identification by photographs, the witness is asked to pick the photograph of the suspect from among some photographs.[43] Although failure to observe these precautions will not render the evidence inadmissible, this going only as to weight, the appeal court may quash a conviction if the police pointed out the suspect beforehand to a witness who was subsequently asked to identify him.[44]

In *Sunday Omega* v. *The State*,[45] there was no evidence as to what stage of the investigation to the charges a witness was shown the photographs of suspects, whether it was before or after the identification parade. Coker J.S.C., delivering the judgment of the Supreme Court said:

> "unless it was clear that the photographs were shown to the witness in order to enable him to identify the suspects at a subsequent identification parade, we cannot see how the propriety of the identification parade in the circumstances of the present can be impugned."

Another aspect of this matter is in respect of the identification of stolen goods. The owner of such goods will be allowed to state in a prosecution for larceny that the goods recovered are the same as his which have been stolen. Where such goods bear no special identification marks, the owner can only swear that the goods resemble his, which is nothing more than opinion evidence. Similarly a witness has been allowed to say that she was of the opinion that a copy of a libellous pamphlet shown to her was the one she had previously received from the defendant, although she could not swear positively that it was.[46]

46. Opinions as to whom Libels and Threats Refer

Witnesses will be allowed to give their opinions that a libel refers to a complainant. In *R.* v. *Barnard*,[47] P sued D for libel contained

[43] *R.* v. *Melany* (1924) 18 Cr. App. R. 2.
[44] *R.* v. *Dickman* (1910) 5 Cr. App. R. 135; *R.* v. *Bundy* (1910) 5 Cr. App. R. 270; *R.* v. *Varley* (1914) 10 Cr. App. R. 125; *R.* v. *Cartwright* (1914) 10 Cr. App. R. 219; *R.* v. *Dwyer* [1925] 2 K.B. 799.
[45] 1965 N.M.L.R. 58.
[46] *Fryer* v. *Gathercole* (1849) 4 Exch. 262; 154 E.R. 1209.
[47] (1879) 43 J.P. 127.

in a document which did not refer to P by name. To prove that the document referred to P, he and other witnesses were allowed to swear that upon reading of the document they understood it to refer to P. Similarly witnesses will be allowed to give their opinions that a threat refers to the complainant. In *R.* v. *Hendy*,[48] the accused was charged with threatening to burn the complainant's property. The accused had written to the complainant informing him that "you will suffer as before." It was held that the complainant could properly be asked what he understood the words to mean.[49]

47. Opinions as to Age

Where it is essential for the age of a person to be proved for purposes of proving a criminal offence, evidence of the mother or of the father or of a person who was present at his birth is essential but expert evidence may also be held sufficient in the absence of such other evidence. Similar evidence will also be required in civil cases where the age of one of the parties to the suit is a material fact, for example, where a defendant relies on the fact of his infancy in action to recover the price of goods supplied to him.[50] At times, however, a non-expert witness may be allowed to say that a particular person was of a certain age. For example, a witness who saw a person killed in a motor accident will be allowed to say that the deceased was a man of about forty years of age. And a witness may be allowed to state his own age which may be a matter of opinion or at the best hearsay. If this is challenged, however, it may be inadmissible.

48. Opinions as to Mental and Physical Health

A witness may be allowed to testify directly as to his conditions of health—mental[51] and physical, but he will in general not be allowed to testify as to the conditions of health of other persons. In such a case he will only be allowed to give details from which the condition of health of the relevant person may be inferred. But men of medical science will be allowed to give opinion evidence as expert witnesses on these issues.

[48] (1850) 4 Cox C.C. 243.
[49] See also *Du Bost* v. *Beresford* (1810) 2 Camp. 511 at 512; 170 E.R. 1235.
[50] See *Haines* v. *Guthrie* (1884) 18 Q.B.D. 818.
[51] See *Harnett* v. *Bond* [1924] 2 K.B .517; *Durham* v. *Durham* (1885) 10 P.D. 80 at 84–85.

49. Opinions as to Intoxication

On principle a witness can only be allowed to give evidence as to facts from which a court can determine whether a particular person was or was not drunk at a particular time. But in practice, in addition to this, witnesses, usually police witnesses, are allowed to make before the court an assertion that the person was or was not drunk at the material time.

50. Opinions as to Speed and Value

Frequently evidence of the opinion of laymen as to the speed a motor-vehicle was travelling at a particular time is admitted by the courts, but the weight to be attached to such evidence is a different matter altogether, as such evidence is not usually reliable.

Evidence of opinion by a non-expert as to the value of property may be admissible. In *R.* v. *Beckett*[52] the accused was charged with malicious damage to a plate glass window of a post office valued over five pounds. A witness, the assistant superintendent of the post office, who was not an expert was allowed to testify that in his opinion the glass window was of the value of about eight pounds. The difficulties which may follow upon this judgment have been pointed out by a learned writer who has said that the decision has raised insoluble problems of degree.

> "Is it confined to non-expert opinion concerning the value of commonplace objects? If so, what are commonplace objects? Does it only apply where the witness opines that the value of an article exceeds a specified sum by a considerable amount? If so, what is a considerable amount?"[53]

All that can be added is that it is extremely doubtful if a general rule can be made out of this judgment.

[52] (1913) 8 Cr. App. R. 204.
[53] See Cross, *Evidence*, 2nd ed., pp. 366–367.

Chapter 8

EVIDENCE OF CHARACTER

51. The General Rule

In general, evidence that an accused person is of bad reputation or has committed some other offences or other misconduct on other occasions is not allowed to be given in proof of the offence charged, such evidence being irrelevant under the Act. This is quite consistent with our system of justice although it may seem an attractive proposition to say that one who has a bad reputation is a person likely to commit offences. Apart from the exceptions to be discussed later each offence charged must be proved on its own without reference to the commission of another offence by the accused. This principle is derived from the English common law and and it can be aptly illustrated by the case, *R.* v. *Rodley*.[1] In that case the accused was charged with house breaking with intent to commit rape and evidence that the accused on the same night went down the chimney of another house and had sexual intercourse with one of the inmates with her consent was received, the judge considering such evidence to be of some relevance as showing lustful disposition. It was held by the Court of Criminal Appeal that this evidence was irrelevant and therefore inadmissible. Section 68 (1) provides specifically that the fact that an accused person is of bad character is irrelevant in criminal proceedings. But on the other hand, the fact that he is of a good character is always relevant (s. 67). And in general, in civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant (s. 66).

The next problem for discussion is the meaning of the word "character" in this regard. Section 71 says that "character" means reputation as distinct from disposition. And disposition means the tendency to act, think or feel in a particular way.[2] It is common knowledge that a person who has evil disposition may nevertheless have a good reputation depending on how far society is aware of his

[1] [1913] 3 K.B. 468.
[2] See Cross, *Evidence*, 2nd ed., p. 291.

evil disposition. The effect of section 71 would appear to be this: that whereas evidence of evil disposition is under no circumstances regarded as relevant, evidence of reputation under circumstances to be discussed presently is regarded as relevant. For the present purposes, bad character includes previous convictions. Section 68 (4) provides that whenever evidence of bad character is relevant, evidence of a previous conviction is also relevant. The method of proving previous convictions will be the subject of discussion in Chapter 11, *post.*

52. Evidence of Character: Civil Cases

As it has been pointed out above, the character of parties to a civil suit is not usually relevant (s. 66). For example, in an action for trespass to property or for a declaration of title to land, the character of the plaintiff or that of the defendant is irrelevant. Similarly in an action for damages for assault neither the character of the plaintiff nor that of the defendant can be relevant. The only exception made by the section is when the character appears from other facts which are otherwise relevant. Many of such occasions cannot be imagined but in a suit for defamation where the defendant pleads justification, evidence in support of the plea may elicit evidence of the character of the plaintiff which may therefore become relevant and admissible. And whether evidence of specific acts, reputation or rumours can be received is dependent upon the pleadings in each case.[3]

Where parties to a suit go into the witness box to give evidence they become witnesses in the suit and they are liable to cross-examination as to credit in that capacity. And cross-examination as to credit may involve the asking of questions relating to the character of the witness. It should be noted, however, that any answers that may be given by the witness are final and evidence to contradict them cannot be given. Section 205 of the Act provides that

> "when a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him."[4]

[3] See *Scott* v. *Sampson* (1882) 8 Q.B.D. 491; and *Plato Films, Ltd.* v. *Speidel* [1961] A.C. 1090.

[4] But he may be charged with an offence; see §180, *post.*

The only exceptions to this rule are that (1) a witness who denies previous convictions may be contradicted by evidence of such previous convictions and (2) a witness who denies his impartiality may also be contradicted by evidence of such impartiality.[5]

In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant and therefore admissible (s. 69). It should be noted, however, that the facts relating to the character of such a person must appear on the pleadings. A good illustration is *Jones* v. *James*.[6] It was an action for damages for a breach of promise of marriage. The plaintiff was allowed to call evidence of her good character as the allegation of the defendant on the pleadings was that his promise to marry her was on the condition that she conducted herself modestly. Similarly evidence of the plaintiff's bad character in a divorce case based on adultery,[7] and evidence of the character of the woman seduced in an action for seduction,[8] may in both cases be relevant to mitigation of damages.

The next section, section 70, contains provisions relating to actions for damages for libel and slander. The section provides that in such actions if the defendant by his pleading or otherwise does not in defence assert the truth of the alleged defamatory statement, he is not entitled on the trial to give evidence in chief with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff. He will be allowed to do this only by leave of the judge trying the case or if at least seven days before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.[9]

53. Criminal Cases: Accused's Good Character

In criminal proceedings the fact that the person accused is of a good character is relevant (s. 67). Evidence of this may be elicited on cross-examination of witnesses for the prosecution or the defence. Or the accused may himself give evidence of his own good character. The Act does not indicate the purpose for which this

[5] On the question of impeaching the character of witnesses generally see §184, *post*.
[6] (1868) 18 L.T. 243.
[7] See *Butterworth* v. *Butterworth* [1920] P. 126 especially at p. 145.
[8] See *Verry* v. *Watkins* (1836) 7 C. & P. 308.
[9] See Ord. XXXVI, r. 37 of the Rules of the Supreme Court of England.

type of evidence is relevant. There can be no doubt that the evidence of good character cannot demolish a clearly established offence against an accused person. But in very doubtful cases, evidence of good character may so operate on the minds of the jury or the judge as to create a doubt in the case against the accused.

> "If an alarm of theft is raised at a charity bazaar, and the thief slips a stolen purse into the pocket of a bishop, the episcopal character may allay suspicion; but if a bishop should be caught in the act of 'shoplifting' the episcopal character would merely appear to be unmerited."[10]

Although the section simply states that evidence of good character is relevant, yet it is doubtful if evidence of good reputation for one type of conduct will be held relevant when another type of conduct by the accused is in question. For example it is doubtful if a good reputation for honesty will be held relevant in a charge for assault. If the offence is one of fraud the usual way of introducing evidence of character is to ask the question, "what is the accused's character for honesty?" and if the offence is one for rape or related offences, the question should be put thus: "What is the accused's moral character?" It should be remembered that whenever evidence of good character of the accused is held relevant and admissible, any evidence supplied by the prosecution in rebuttal must be held also admissible but this will be discussed in the next paragraph.

54. Criminal Cases: Accused's Bad Character

The general rule is that the fact that an accused person is of bad character is irrelevant in criminal proceedings (s. 68 (1)). This rule covers evidence of previous convictions also. There are three exceptions to this rule under the Act (s. 68 (2)). The fact that an accused person is of bad character is relevant (a) when the bad character of the accused is a fact in issue; and (b) when the accused person has given evidence of his good character. (c) Furthermore an accused person may be asked questions to show that he is of bad character in the circumstances mentioned in paragraph (d) of the proviso to section 159. This last named exception will be discussed in paragraphs 56 to 59 below as it deserves full consideration.

With regard to (a) the bad character of an accused person may sometimes be a fact in issue. For example on a charge for being a

[10] Nokes, *An Introduction to Evidence*, p. 127.

rogue and vagabond under section 250 (1) of the Criminal Code, proof of a previous conviction for being an idle and disorderly person under section 249 is necessary to establish the offence. Therefore such a previous conviction is a fact in issue which must be proved. Similarly under section 405 (2) of the Penal Code, a previous conviction as an idle person must be proved before a charge for being a vagabond can be established. And under section 405 (3) a previous conviction as a vagabond must be proved before a charge for being an incorrigible vagabond can be established. But such evidence may not be allowed to be given if the purpose of introducing the charge of being a rogue and vagabond is merely to prejudice the mind of the court against the accused person. In *Odutade* v. *Police*,[11] the appellant was charged with others with stealing and receiving stolen property and by himself with being a rogue and vagabond, presumably under section 250 of the Criminal Code. Evidence of convictions over ten years old (and therefore not admissible under section 46 (*b*) of the Evidence Act) was given and admitted. On appeal it was argued for the police that the convictions were put in for the purpose of proving the vagrancy charge. It was, however, held that the evidence should not have been allowed as the whole purpose of the charge of being a rogue and vagabond was apparently to prejudice the fair trial of the appellant.

(b) When the accused person has given evidence of his good character, the prosecution may give evidence of his bad character, in rebuttal. It should be noted that such evidence is not meant to be in proof of the offence charged as in (a) above but it is only meant to show to the court that the character of the accused is not such as he wants the court to believe.

55. Similar Facts

As we noted in Chapter 2, section 17 of the Act provides that when there is a question whether an act was accidental or intentional, 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 the act was concerned, is relevant. Under the section, evidence of other acts of the accused similar to the act complained of may be relevant to rebut defences of accident,[12] lack

[11] (1052) 20 N.L.R. 81.
[12] See *R.* v. *Bond* [1906] 2 K.B. 389 at 413; *R.* v. *Heesom*, 14 Cox C.C. 40; *R.* v. *Armstrong* [1922] 2 K.B. 555.

of intention (*e.g.*, to defraud[13]) and lack of knowledge.[14] This may have the effect of letting in evidence of bad character of the accused. The English rule on this matter is as laid down by Lord Herschell L.C., in *Makin* v. *Att.-Gen. for New South Wales.*[15]

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

The application of this principle was discussed in the later case of *R.* v. *Sims.*[16] In that case Lord Goddard C.J. said:

> "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 this we think is the correct view."

This method of approach was criticised by the Judicial Committee of the Privy Council in *Noor Mohamed* v. *R.*[17] In that case the lower court had, on the trial of the appellant for murdering his mistress by poison, admitted evidence that about two years before

[13] See *R.* v. *Wyatt* [1904] 1 K.B. 188; *Barnes* v. *Merritt* (1899) 15 T.L. R. 419; *R.* v. *Rhodes* [1899] 1 Q.B. 77. *Cf.*, *R.* v. *Boothby* (1933) 24 Cr. App. R. 112.
[14] See *R.* v. *Mason* (1914) 10 Cr. App. R. 169.
[15] [1894] A.C. 59 at 65 (P.C.). This has since been approved by the House of Lords in many cases: *R.* v. *Ball* [1911] A.C. 47; *Thompson* v. *R.* [1918] A.C. 221; and *Harris* v. *Director of Public Prosecutions* [1952] A.C. 694.
[16] [1946] 1 K.B. 531 at 539.
[17] [1949] A.C. 182.

the alleged murder, the appellant's wife had died of similar poison. The admission of that evidence was held to be wrong and consequently the conviction was quashed. In the later case of *R.* v. *Hall*,[18] Lord Goddard C.J., changed position as a result of the criticism by the Privy Council in *Noor Mohamed* of the view he had expressed in *R.* v. *Sims* and expressed the view that the first approach was the better one. The matter can now be said to have been finally resolved by the House of Lords in *Harris* v. *Director of Public Prosecutions*.[19] The appellant, a policeman who was, at all material times, on duty in a market, was indicted on eight counts, each of which alleged a breaking into the same office in the market and stealing therefrom between May and July. The evidence showed that most of the gates of the market were closed and that 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 evidence of opportunity there was no evidence to connect the appellant with the seven counts. With regard to the eighth count, the evidence showed that a burglar alarm had been placed on the premises unknown to the appellant who was on duty in the market at the time. Immediately after, the alarm sounded, and 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 some of the detectives, he nevertheless disappeared from sight for a short period sufficient for him to hide the money where it was later found. The jury acquitted him on the first seven counts but convicted him on the last count, which conviction was upheld by the court of Criminal Appeal.[20] The House of Lords, however, by a majority of four to one, quashed the conviction, on the grounds that irrelevant evidence in the nature of the evidence of the earlier thefts was wrongly admitted. The House expressly approved the principle laid down in *Makin*'s case and saw no reason for modifying it.

A number of cases were decided in this country before the introduction of the Evidence Act, after the decision in *Makin*, based apparently on the principles laid down in that case. In *R.* v. *Effiong Edet Ita*[21] the West African Court of Appeal approved the dictum of Jackson Assist. J., to the effect that "when the gist of an offence is fraud, intent is material and evidence of other similar

[18] [1952] 1 K.B. 302.
[19] See footnote 15 above.
[20] *R.* v. *Harris* [1952] 1 K.B. 309.
[21] (1943) 9 W.A.C.A. 35.

acts is admissible to prove that intent." Earlier in *R.* v. *Adeniyi*[22] it had been held that in a charge of preparation for coining current silver coins,[23] evidence of previous uttering by the accused was admissible. In *Akerele* v. *R.*[24] the appellant, a medical practitioner, had given injections of a mixture to a number of children suffering from yaws including the deceased. The deceased died as a result of the injection. At his trial for manslaughter, evidence that other children died as a result of injections given to them by the accused at the same time and from the same mixture was held admissible. In this case the negligence relied upon was that the mixture was improper. But it would have been otherwise had the negligence relied upon been that too great a quantity of the proper mixture had been given to the deceased.

All these cases would today be similarly decided, section 17 of the Act not having materially altered the relevant English common law on the matter. There is, however, a point which needs consideration. Section 17 does not in terms allow evidence of similar facts "to rebut a defence which would otherwise be open to an accused person," as laid down in *Makin's* case. This point has not arisen for decision in any reported case in this country and it is suggested that this extra use of similar facts evidence cannot be properly read into the section. And since there is provision in the section for admitting similar facts evidence, section 5 (*a*) cannot be called in aid so as to bring the law in this respect in line with the English law as laid down in *Makin's* and subsequent cases, by allowing the admission of this type of highly prejudicial evidence to rebut a defence which would have been opened to the accused person.

Another point to note is that relevancy under section 17 of the Act is a different thing from admissibility. Even if evidence is held to be relevant under section 17, the court may nevertheless exclude it if it considers the evidence prejudicial to the fair trial of the accused. In *R.* v. *Olubunmi Thomas*[25] evidence of other transactions similar to that which was subject of the charge was admitted by the lower court, such evidence showing the accused only to be a dishonest man, and having very little probative value. It was held on appeal that this evidence ought not to have been admitted and the appeal was allowed.

[22] (1937) 3 W.A.C.A. 185.
[24] [1943] A.C. 255 at 261.
[23] *Contra* s. 148 (3) (*c*) of the Criminal Code.
[25] (1958) 3 F.S.C. 8.

Finally it must be remembered that section 17 applies not only to criminal cases but to civil cases as well, so that evidence of similar facts will be admissible in civil cases. In *Hales* v. *Kerr*[26] A sued B, a barber, for negligence for shaving him with an unsterilised razor whereby he was infected with ringworm. Evidence that other persons shaved by B had contracted the same infection was held admissible.

56. Section 159 (d) of the Act

Under the Act, an accused person cannot be compelled to give evidence in his trial but if he volunteers to give evidence, then he will be subject to the rules laid down in section 159.[27] Section 68 (3) provides that an accused person may be asked questions to show that he is of bad character in the circumstances mentioned in paragraph (d) of the proviso to section 159. The provisions of that paragraph are taken almost word for word from section 1 (f) of the English Evidence Act, 1898,[28] and are as follows:

> "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 or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—
>
> (i) 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
>
> (ii) he has personally or by his legal practitioner[29] asked questions of the witnesses for the prosecution with a view to establish his own good character has given evidence of his good character or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

[26] [1908] 2 K.B. 601.
[27] For a full discussion on witnesses, including accused persons, see Chap. 19, *post*.
[28] 61 & 62 Vict. c. 36.
[29] The English statute uses "advocate." In Nigeria, practice in the courts is not restricted to barristers alone but is extended to solicitors as well.

(iii) he has given evidence against any other person charged with the same offence."[30]

The main provision of section 159 (*d*) provides a very powerful shield to an accused person who decides to give evidence at his trial. Although when an accused person goes to the witness box to give evidence he is, for all purposes, a witness in the case and therefore subject to cross-examination as to credit, this subsection provides that he nevertheless cannot be asked, and if asked, shall not be required to answer, questions which tend to show that he is a person of bad character.

The first problem that arises is the meaning of the phrase "tending to show" in the provision. This came up directly for a decision in *Jones* v. *Director of Public Prosecutions*.[31] In March 1961, the appellant was convicted of rape of a young Girl Guide. In June, 1961, he was tried for the non-capital murder of another young Girl Guide who had been indecently assaulted and strangled, one month after the previous crime. There were significant similarities between the two cases. On the second trial the cross-examination of a police officer by the appellant's counsel and also the appellant's own evidence-in-chief, made the jury aware that he had earlier had "trouble with the police." The appellant (who had previously set up an alibi now admitted to be false) gave evidence that he spent that night in question with a prostitute, and he gave an account of his wife's stormy reaction to his late return home, and her subsequent conversations with him. His explanation of his previous false alibi was that he was worried because earlier he had been "in trouble." It was known to the prosecution that the account which he had given of his movements, and of the conversation with his wife were almost precisely similar to the story which he had told when charged with the rape. The judge gave leave to the prosecution to cross-examine the appellant regarding the two explanations, with a view to showing the similarities between them, and so as to suggest that his evidence should not be believed. His appeal to the court of Criminal Appeal having been dismissed,[32] he

[30] The provisions of the 1898 Act have been subject of two very illuminating and interesting articles by Julius Stone, namely, "Cross-examination by the Prosecution at Common Law and under the Criminal Evidence Act, 1898" (1935) 51 L.Q.R. 443, and "Further Problems in the Interpretation of the Criminal Evidence Act, 1898, s. 1, proviso (*f*)" (1942) 58 L.Q.R. 369.

[31] [1962] A.C. 635.

[32] *R.* v. *Jones* [1961] 3 All E.R. 668.

appealed further to the House of Lords, on the ground that the cross-examination permitted by the judge was inadmissible because the questions were excluded by the section of the 1898 Act as "tending to show" that he had committed or been convicted or had been charged with an offence other than that with which he was then charged, or was of bad character. It was however, held by the House (consisting of Viscount Simonds, Lord Reid, Lord Denning, Lord Morris of Borth-y-Gest and Lord Devlin) affirming the Court of Criminal Appeal (but with Lord Denning and Lord Devlin dissenting) that the provision had not been infringed because the words "tending to show" mean "make known to the jury," and because in this case the appellant himself had already made it known to the jury that he had been in trouble with the police.[33]

The next problem is as to the meaning of "charge" in the provision. In *Stirland* v. *The Director of Public Prosecutions*[34] the House of Lords held that the word "charge" under the English Act meant "charge in court." In concluding his speech in this case on the rules as to the cross-examination as to credit of an accused person in the witness-box, Lord Simon L.C., made six propositions which will be discussed in their proper places in this section.[35] The first one merely states the effect of section 1 (8). The second one says that an accused person

> "may, however, be cross-examined as to any of the evidence he has given in chief, including statements concerning his good record, with a view to testing his veracity or accuracy or to showing that he is not to be believed on his oath."

And according to the fifth proposition "it is no disproof of good character that a man has been suspected or accused of a previous crime." Such questions as "Were you suspected?" or "Were you accused?" are inadmissible because they are irrelevant to the issue of character, and can only be asked if the accused has sworn expressly to the contrary. As to the effect of admitting irrelevant questions under this heading, Lord Simons's sixth proposition is that "the fact that a question put to the accused is irrelevant is, in itself, no reason for quashing the conviction." But as convictions may be quashed as a result of the admission of such irrelevant questions[36] it has become the practice in doubtful cases for counsel

[33] See an article by Cross in (1962) 78 L.Q.R. 407.
[34] [1944] A.C. 315.
[35] [1944] A.C. at 326–327.
[36] *R.* v. *McLean* (1920) 19 Cr. App. R. 104.

for the prosecution to obtain the leave of the judge before putting his questions as to credit to the accused person.[37]

When an accused person has put himself in a position whereby he can be asked questions tending to show his bad character under any of the paragraphs (i) to (iii) of section 159 (*d*), this does not mean that he can be asked questions indiscriminately about his past conviction or charge for an offence or generally about his bad character. Such questions, if answers to them are to be admissible, must be directly relevant to the issue or bear on the credibility of the accused. In *Maxwell* v. *Director of Public Prosecutions*,[38] a medical practitioner who was charged with manslaughter of a woman by means of an illegal operation, put his character in issue by giving evidence that he had lived "a good, clean, moral life." He was allowed to be asked whether a similar charge had been brought against him even though he had been acquitted of the charge. It was held that the question and answer were wrongly admitted. After all, the mere fact that someone has been charged with an offence is no proof that he has committed the offence. The fact that such a charge which resulted in an acquittal was brought is irrelevant, and evidence of it cannot have any other result than to tend to introduce mere suspicion as if it were evidence and to distract the jury from the true issue, which always is whether the accused in fact committed the offence for which he is charged.[39] The same principle will apply to a charge which was abandoned.[40] But an acquittal may be relevant to the defence of mistake or lack of knowledge. In *R.* v. *Ollio*[41] on a charge of obtaining money by the false pretence that cheques would be met, it was held that the evidence that the accused had made another pretence in relation to a further cheque was admissible, even though the accused had been acquitted of a charge based on that cheque, if only to show that the accused could have been in no mistake that the cheques would be honoured. In *R.* v. *Chitson*,[42] C was charged with having carnal knowledge of a girl, A, under sixteen years of age. In her testimony A swore that, after the act, C told her he had had similar relations with B and hoped she would be as loving as B. It was held that C could be cross-examined on this. In *R.* v. *Lovegrove*,[43] the accused was charged with manslaughter of a woman by performing an

[37] See *R.* v. *Ogala Nweze & Ors.* (1957) 2 F.S.C. 27.
[38] [1935] A.C. 309.
[39] See *ibid.* at 320.
[40] See *R.* v. *Wadey* (1935) 25 Cr. App. R. 104.
[41] [1900] 2 Q.B. 758.
[42] [1909] 2 K.B. 945.
[43] [1920] 3 K.B. 643.

illegal operation on her. The husband of the woman who was the prosecutor, testified that he had been given the accused's address by a woman who stated that the accused had performed an illegal operation on her. The accused denied this and said that the only time he saw the prosecutor was the time he called to inquire about accommodation. It was held that he could be cross-examined as to the story of the prosecutor.

57. The Interpretation of section 159 (d) (i)

As we have seen, section 159 (*d*) (i) allows the accused to be cross-examined concerning other offences when proof that he has committed or been convicted of those other offences is admissible evidence to show that he is guilty of the offence wherewith he is then charged. Under this provision an accused person can be cross-examined with a view to establishing that he has committed or been convicted of some other offences when evidence to establish that would be admissible in chief as relevant under some other provisions of the Act, for example, under section 17, apart from the reason of its tendency to show bad disposition.

It is doubtful if the provision under discussion will allow cross-examination as to bad character generally. It would appear, however, that the English courts are prepared to permit cross-examination as to bad character under this provision whenever proof that the accused had committed or been convicted of another offence would be admissible in examination in chief. In *R.* v. *Kurasch*,[44] the accused, who was charged with conspiracy to defraud by means of a mock auction, told the police that he was only a servant of the proprietress of the auction room. He was allowed to be cross-examined as to whether he and the proprietress had not lived together as man and wife. He was convicted and the Court of Criminal Appeal held that the cross-examination was justified. But in the later case of *R.* v. *Cokar*,[45] cross-examination as to a previous charge even though it related to an issue of liability was held to be inadmissible. The accused was charged with breaking and entering a dwelling house with intent to steal therein. His defence was that he had entered the house in order to keep warm and to have a sleep. During his cross-examination, he denied knowing that it was an offence to enter a house in order to sleep. The judge thereupon

[44] [1915] 2 K.B. 749.

[45] [1960] 2 Q.B. 207.

allowed the prosecution to put questions concerning a previous charge of breaking and entering which had resulted in an acquittal, in order to show that the accused had learnt during that trial that it was an offence to enter a house in order to go to sleep. It was held by the Court of Criminal Appeal that the questions concerning the previous charge had been wrongly admitted.

58. The Interpretation of section 159 (d) (ii)

Under section 159 (*d*) (ii) an accused person who gives evidence can be asked questions 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 under three conditions, namely,

(*a*) if 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
(*b*) has given evidence of his good character; or
(*c*) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

As to (b) there can be no difficulties and it is simply fair that an accused person who has given evidence as to his good character should be cross-examined as to this. As for (a) and (c) it is very essential that the conditions laid down there must exist before the questions can be allowed. In *Audu Maizako & Anor.* v. *Superintendent-General of Police*[46] the first appellant made imputations against the police and one of the witnesses for the prosecution. The prosecutor thereupon put questions to him to show that he had been previously convicted of some offences. It was held that the questions were properly admitted. Under (a) it must be quite clear from the nature of questions that they were asked with a view to establish the good character of the accused. The accused person in *James Popoola* v. *Commissioner of Police*,[47] was charged with burglary, stealing and unlawful wounding. At his trial, the complainant who gave evidence, said in answer to questions put to him by counsel for the accused:

"Yes, I knew accused's house; I knew there are 22 rooms in

[46] (1960) W.N.L.R. 188. [47] 1961 N.M.L.R. 21.

the house. It is a very large house. Yes, he is richer than I. I am not surprised that the accused in spite of having a 22-room house should come to steal from me, if stealing is his profession."

It was held that the accused could not be said to have put his character in issue as a result of these questions and answers.

The mere fact that an accused person says from the witness-box that the prosecutor is a liar is not sufficient to make the accused lose his protection under the section, as this may amount to no more than a plea of not guilty put in forcible language, or it may in fact have nothing to do with the conduct of the defence.[48] But it has been held that an accused who said that a witness for the prosecution was such a horrible liar that his own brother won't speak to him, lost his protection.[49] Allegations that the prosecution have manufactured evidence against the accused will amount to an imputation under (c).[50] In *R.* v. *Bridgwater*,[51] it was held that a suggestion that someone found in possession of stolen property acquired it under instructions from the police did not amount to imputation on the character of the prosecutor or his witness. And in *R.* v. *Preston*,[52] the suggestion that an identification parade had been unfairly conducted was held not to amount to an imputation within the provision. And also a suggestion that a confession by an accused had been obtained by threats or bribes,[53] or that a confession had been dictated by one police officer to another,[54] had been held to amount to imputation within the provision. Similarly allegations that witnesses for the prosecution were acting out of malice in revenge or to shield themselves will amount to imputations.[55]

59. The Interpretation of section 159 (d) (iii)

Section 159 (*d*) (iii) does not present much difficulty. Under it, an accused person may be cross-examined as indicated in the substantive proviso (*d*) if "he has given evidence against any other

[48] See *R.* v. *Rouse* [1904] 1 K.B. 184, especially at 189.
[49] *R.* v. *Rappolt* (1911) 6 Cr. App. R. 156.
[50] *R.* v. *Jones* (1923) 17 Cr. App. R. 117; *R.* v. *Dunkley* [1927] 1 K.B. 323; *R.* v. *Clark* [1955] 2 Q.B. 469.
[51] [1905] 1 K.B. 131.
[52] [1909] 1 K.B. 568.
[53] *R.* v. *Wright* (1910) 5 Cr. App. R. 131.
[54] *R.* v. *Clark* [1955] 2 Q.B. 469.
[55] See *R.* v. *Spalding* (1920) 15 Cr. App. R. 65; *R.* v. *McLean* (1926) 19 Cr. App. R. 104.

person charged with the same offence." It should be noted that section 159 (*d*) (iii) does not indicate that the accused who is giving evidence and the person against whom he is giving evidence must be on a joint trial as is contemplated under section 177 (2) (which will be subject of close examination later[56]) but merely states that the two persons must have been charged with the same offence. The rationale of this rule seems to be that an accused person giving evidence in the circumstances contemplated by this provision will of necessity be either a witness for the prosecution (where both are being tried for the same offence but not jointly) or deemed to be in the same position as such a witness (where they are being tried jointly) and, in either case, it is just fair that an accused person should be allowed to discredit such other accused person turned witness. Another point which should also be noted is that both persons must be charged with the *same offence*. So that if two persons are tried jointly but for two different offences, this provision will not apply if one goes to the witness box to give evidence against the other. In *R.* v. *Roberts*[57] A and B were jointly indicted, A with fraudulent conversion, and B with having used false pretences to procure the payment to A of the money alleged to have been fraudulently converted by him. It was held that as the two of them were not charged with the same offence, cross-examination should not be allowed under the similar provision of the English statute.[58]

[56] §164, *post*.
[57] [1936] 1 All E.R. 23.
[58] For other English decisions on this provision, see *R.* v. *Hadwen* [1902 1 K.B. 882; *R.* v. *Seigley* (1911) 6 Cr. App. R. 106.

PART III

PROOF

Chapter 9

MEANS OF PROOF

60. Proof by Oral Evidence

The usual method of proving facts in court is by the oral testimony of witnesses. The methods by which the witnesses can be brought to court to give evidence are matters of procedure and are not within the scope of this book. It is sufficient to say here that witnesses can be made available to give evidence in court if (a) they are summoned to court for that purpose, or (b) they come to court voluntarily for that purpose, or (c) they are in court for any other purpose. With regard to (b) and (c), all that need be said is that the court has the power to call anybody who is present in court for whatever reason to testify in a case being heard before it, if the court is of the opinion that the testimony of the person is necessary to a fair determination of the case. Failure to give evidence in the circumstances will amount to disrespect to the court and may be punished as contempt. With regard to (a) a person may be served with a summons to give evidence or tender documents on the application of a party to the proceedings. Once such a summons is served on a person his failure to attend court in obedience to the summons will amount to contempt of court and punished accordingly.[1]

Although all facts may be proved in the usual manner, that is, by oral evidence (s. 75) there are two important exceptions to this. A fact may be proved by the production in court of a movable object for the court, or by the inspection outside the court room of an immovable and sometimes a movable object. The second exception relates to the contents of a document which are usually proved by the production of the document in court. Before discussing these two exceptions it is necessary to make a few remarks about oral evidence.

Oral evidence must in all cases whatever, be direct (s. 76). Therefore if oral evidence refers to a fact which could be seen it must be the evidence of a witness who says that he saw that fact, and if it

[1] See for example Eastern Nigeria High Court Rules, 1955, O. XII, rr. 1–3; Western Nigeria High Court (Civil Procedure) Rules, O. 27, rr. 12–14.

refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact. If oral evidence refers to a fact which could be perceived by any other sense, for example, by touch or smell, or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense (touch, smell, etc.) or in that manner. And if oral evidence 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 these grounds (s. 76 (*a*)–(*d*)). We have already seen that the type of evidence known as hearsay evidence under the English common law is considered as irrelevant and therefore inadmissible, and that such evidence is also excluded under this heading as it cannot be said to be direct as contemplated by this section.[2] Thus a person can only be permitted to describe what he himself saw and not what another person told him that that other person saw. Similarly, if P sues D for slander, A who heard D utter the words alleged to be slanderous will be allowed to give evidence of what he heard D say.

Section 76 contains two provisos, the second of which deals with the production of a material thing before the court and the inspection of real property. Reserving a discussion on this to another section of this chapter, a few words must be said here about the first proviso. That proviso creates an exception to the rule that oral evidence must be direct, in cases of opinions of experts contained in any treatise usually offered for sale. Under the proviso the opinions of experts[3] expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unnecessary. Most of the evidence that will come under this heading will relate to medical, scientific and other technical matters. The author of a medical, scientific or other technical book must be called to give evidence if his opinion is required in support of the case of a party to a suit if such an expert is alive and can be found. His presence can, however, be dispensed with if he has become incapable of giving evidence, for example, by reason of illness or old age, or if the court

[2] §21. *ante.*

[3] For a discussion on who an expert is and as to the admissibility of his evidence, see §§34–39, *ante.*

regards the expenses of bringing such a witness to court, for example, from a far off country, to be unreasonable in the circumstances of the case.

61. Meaning of Real Evidence

The term "real evidence" has been variously described by writers on the English law of evidence. According to Phipson "real evidence" consists of "material objects other than documents produced for inspection by the court"[4] whilst according to Nokes "real evidence is anything, other than a document, which is examined by the tribunal as a means of proof." In elaborating on this definition, Nokes says that "real evidence may include (1) material objects, other than those deemed to be documents, produced for examination by the tribunal; (2) the physical appearance and demeanour of witnesses when in court and of other persons and animals present in the court or its precincts for such examination, and (3) any place or thing which is lawfully examined by the tribunal out of court."[5] Cross has expressed a preference for the definition by Nokes which, according to him, needs a little amendment for purposes of clarity. In his view Nokes' definition should be amended so as to read "real evidence is anything other than testimony, admissible hearsay or a document, the contents of which are offered as testimonial evidence, which is examined by the tribunal as a means of proof."[6] Section 76 of the Act which deals with the inspection of real evidence does not contain the definition of real evidence, but it is abundantly clear from the wording of proviso (ii) to the section that the definitions by Phipson and Nokes are inapplicable, the former being rather narrow as it does not include real property inspected out of court, and the latter being too wide as it includes the physical appearance and demeanour of witnesses. On the whole, the definition by Cross is the one that is most appropriate to the position contemplated by the Act. Although proviso (ii) of section 76 speaks of "material thing other than a document," a document is excluded only in so far as its contents are offered as "testimonial evidence" and not where it is put in evidence only as a chattel, for example, where a book alleged damaged is produced in court for the examination of the book by the court as to the amount of damage done to it.

[4] Phipson, *Law of Evidence*, 10th ed., p. 2.
[5] Nokes, *An Introduction to Evidence*, 3rd ed., p. 445.
[6] Cross, *Evidence*, 2nd ed., p. 10.

62. Inspection of a Material Thing

According to the second proviso to section 76, if oral evidence refers to the existence or condition of any material thing other than a document, the court may require the production of such a material thing for its inspection, if it thinks that the inspection of the property may be material to the proper determination of the question in dispute. As we have just seen, a document is excluded only in so far as its contents are offered as "testimonial evidence" but not otherwise. If the property is movable property there is little or no difficulty once it can be moved physically into the court room for inspection by the judge and the jury. In all cases where the court thinks that an inspection of such a movable object is necessary for the proper determination of the case before it, the practice is to make the object part of the case and tender it in evidence. A few examples of such objects are weapons alleged used in committing crimes, for example, guns, matchets, etc. currency notes alleged forged, goods alleged stolen and recovered. When they are tendered such objects become exhibits in the case. The handling of exhibits by the court and court officials is a matter of practice, not governed by any rule of evidence and therefore deserves no examination here.

63. View: Visit to Locus in Quo

The inspection of property which cannot be moved into court, either because it is land or property attached to land, or because of the particular nature of the property (for example two vehicles involved in a collision or a ship lying at the wharf) presents some difficulty. If the court takes the view that the inspection of such property is material to the proper determination of the question before it, the court will have to follow the procedures laid down in proviso (ii) to section 76 of the Act, which is substantially the same as is laid down in sections 207 and 243 of the Criminal Procedure Act[7] and the Criminal Procedure Code[8] respectively for criminal trials.

There are two procedures laid down by the provisions of the law referred to. First, the court may adjourn the hearing of the case to the place where the object is and continue hearing the case there as if it were the court room. Since the *locus in quo* is regarded as the

[7] Cap. 43.

[8] Cap. 30 of the Laws of Northern Nigeria, 1963.

court room, all the court officials, the jury, parties and accused persons and their counsel who are expected to be present in court, must be there. Evidence is taken at the place and a witness who has given part of his evidence in the regular court room may give the other part at the *locus*. A witness may give all his evidence there. Furthermore a witness may give part of his evidence at the *locus* and the other part at the court. After taking evidence at the *locus in quo* the court may adjourn the case back to the court room or to any other place for a continuation of the trial.

Secondly, and this is the procedure which is more complicated, the court may adjourn the case and proceed to the *locus in quo* to view it. After the view the court reassembles at the court again. At the place, the judge and the jury may make an inspection of the place or other material object and may ask witnesses to point out things and places. Before an inspection carried out under this heading can be held to be valid the court must have conformed with the following procedure:

(a) Places pointed out and everything else said by witnesses at the *locus* must be confirmed by evidence on oath in the court otherwise the court cannot act on such statements which are not part of the evidence in the case. In *Festus Yeku* v. *Inspector-General of Police*[9] the magistrate trying the case, inspected the *locus in quo* at the close of the trial. Immediately after he had returned to court, he made a record of the inspection including his observations of what he saw at the locus and what witnesses said there. In holding this procedure to be wrong, de Lestang C.J. (Lagos), relied on the procedure approved in *R.* v. *Albert Dogbe*[10] by the West African Court of Appeal. Although that Court did not specifically refer to section 76 of the Act, the procedure there approved was in accordance with the provisions of that section and it is as follows:

> "The practice . . . and to our minds an excellent practice, in several colonies and we believe in England, is for the court accompanied by the accused and his advocate together with the advocate for the Crown and such witnesses for the prosecution and the defence as may be deemed material to proceed to the *locus*. The witnesses there point out such places and things as are material to the case and distances are stepped off

[9] 1959 L.L.R. 138.
[10] (1947) 12 W.A.C.A. 184 at 185.

or otherwise arrived at. The court then reassembles and the persons who were used at the view are put into the witness box and, on oath, state what part they took in the recent visit to the *locus* and what they each did. The defence or the Crown, as the case may be, are then given an opportunity of cross-examining."

The point to note is that

"in all cases in which a visit is paid by the court to the *locus in quo* in a civil action (and likewise in a criminal case) the judge should be careful to avoid placing himself in the position of a witness and arriving at conclusions based upon his personal observations of which there is no evidence upon the record. When there is conflicting evidence as to physical facts, I have no doubt that he may use his own observations to resolve the conflict, but I do not think it is open to him to substitute the result of his own observation for the sworn testimony nor to reach conclusions upon something he has observed in the absence of any testimony on oath as to the existence of the facts he has observed. Should he do so he would in my view, be usurping the position of the witnesses . . ."[11]

(b) In all criminal cases, the presence of the accused at the *locus in quo* whilst the court is carrying out the inspection is essential. The fact that there are too many accused persons who cannot be conveniently conveyed to the scene is no excuse for not complying with this requirement. *Ayisatu Adunfe & Ors.* v. *Inspector-General of Police*[12] was a prosecution which followed the Oshogbo riots of 1956 in which considerable damage was done to property. Among two or three hundred persons arrested by the police, 125 were charged to court in Ilesha. Before taking evidence in the case, the trial magistrate, the police officer who started the prosecution, and counsel for the accused persons all went to the scene at Oshogbo twenty miles away, without taking the accused persons along with them. The Federal Supreme Court held this procedure to be wrong even though it would have been terribly inconvenient to convey 125 accused persons from Ilesha to Oshogbo and back. But since the inspection did not lead to any miscarriage of justice, the appeals of those convicted were dismissed.

[11] *Agbafuna Ejidike & Ors.* v. *Christopher Obiora* (1951) 13 W.A.C.A. 270 at 274, *per* Verity Ag. P.

[12] (1957) 2 F.S.C. 21.

(c) The court which has conducted the view must make a record of the inspection in the record book. It was, however held in *Chief Aaron Nwizuk & Ors.* v. *Chief Waribo Eneyok & Ors.*[13] that the absence of a record of the inspection of a *locus in quo* is not necessarily fatal and that statements by the judge in a solemn judgment must be taken as a correct account of what occurred and therefore final. In *Musa Maji* v. *Mallam Shewu Shaji*[14] after the close of the evidence, in an action for declaration of title to land, both counsel for the plaintiff and the defendant made an application for the trial judge to visit the *locus in quo* and the judge acceded to their request, and visited the *locus* in the presence of parties and their counsel. After the visit, counsel on behalf of both parties addressed the court. The trial judge made no record of his observation and findings on the visit to the *locus* but made reference to his observations in his judgment, and gave judgment in favour of the plaintiff. In dismissing this appeal on this ground the Supreme Court expressly followed *Nwizuk's* case, and held that the failure of the trial judge to make notes of his visit to the *locus* in his record book was not necessarily fatal.

(d) Although it is usual to carry out an inspection under this heading before the close of the case for both sides, it is permissible to carry it out even after judgment has been reserved in the trial.[15] In *Adeleke Arutu* v. *R.*[16] after the close of the case for the prosecution and the defence, counsel on both sides addressed the court and the trial judge reserved judgment. Three days later, the judge went to the *locus* with the accused and witnesses. At the *locus*, some witnesses pointed out places and positions to the judge. After this visit, no further proceedings took place. On the next day of adjournment the judge gave judgment and convicted the accused person. In holding this procedure to be wrong, Ademola C.J.F., said:

> "we are not saying that an inspection of the locus could not be made after judgment had been reserved in a case. That it could be made at any time is clear from the following cases: *R.* v. *Martin*,[17] *Agbafuna Ejidike & Ors.* v. *Christopher Obiora.*[18] Although the latter was a civil case, we think the

[13] (1953) 14 W.A.C.A. 354.
[14] 1965 N.M.L.R. 33.
[15] See *Aaron Aaron Nwizuk & Ors.* v. *Chief Waribo Eneyok & Ors.*, *supra.*
[16] (1959) 4 F.S.C. 77; (1959) W.R.N.L.R. 141.
[17] 12 Cox C.C. 204.
[18] *Supra.*

same principles apply. But where in a case of this nature, the inspection raises matters which are prejudicial to an accused person, he or his counsel has every right to put questions to the witnesses who have made statements and demonstrated to the judge at the scene of the crime."

In the *Adeleke Arutu* case the accused was discharged and acquitted but it is not in every case in which an error has been made in the conduct of an inspection, that an appeal will be allowed. An appeal will only be allowed if the irregularity is capable of resulting in a miscarriage of justice.[19] When an appeal court decides to allow an appeal, it will have to decide whether to make an order of acquittal also or to order a retrial. The principles governing this process are laid down by the Federal Supreme Court in *Yesufu Abodunde & Ors.* v. *R.*[20] and are fully discussed in Chapter 18 below.

64. The Exclusion of Oral by Documentary Evidence

As we have seen, another important exception to the rule that every fact must be proved by oral evidence, is in respect of documents. Section 131 (1) provides that

> "when any judgment of any court or any other judicial or official proceedings, or any contract, or any grant, or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained (to be discussed later[21]); nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence."

There are two important points in this provision. First it excludes

[19] See *Ayisatu Adunfe & Ors.* v. *Inspector-General of Police*, *supra*, and *Angela Odok* v. *The State*, unreported, but see Supreme Court Appeal, S.C. 380/1965, delivered on October 8, 1965.

[20] (1959) 4 F.S.C. 70; (1959) W.R.N.L.R. 145. This case, *Adeleke Arutu* v. *R.*, *supra*, and *Sanusi Ogunbode & Ors.* v. *R.* (1959) W.R.N.L.R. 150, all cases arising from the famous *Adelabu* riots of 1958, were decided on this same point, at the same Ibadan session of the Federal Supreme Court in 1959.

[21] See §91, *post*.

oral evidence of the contents of documents. In *Lagos Timber & Co., Ltd.* v. *C.A.A. Titkombe*[22] the plaintiffs sought to give evidence of an oral agreement which had been embodied in a written document, which was itself inadmissible in evidence for non-registration under the Lands Registration Ordinance (now Act). It was held that such evidence was inadmissible. But where the claim of the plaintiff is based upon an oral agreement which precedes a written agreement, he will be allowed to give evidence of the oral agreement even though the contents of the oral and written agreement are similar. In *Nwabuoku* v. *Ottih*[23] the plaintiff borrowed a sum of money from the defendant and agreed orally with the defendant that he should collect rents on certain of his property until the debt was satisfied. About two years later the plaintiff signed a document acknowledging the debt, and purporting to mortgage the property to the defendant. The document was not registered under the Land Registration Act. Plaintiff sued the defendant for an account of rents collected by the defendant as the mortgagee of the plaintiff's property and payment over to him of any amount due on the taking of an account. He did not plead the document but based his action on the oral agreement about which he gave evidence. The defendant did not give evidence but contended that as the document described as mortgage was an instrument affecting land, it was not admissible in evidence as it was not registered and that the oral evidence of its contents were inadmissible and should be excluded. The Federal Supreme Court held that the oral evidence was rightly admitted.

This case should be contrasted with the English case of *Angell* v. *Duke*.[24] In that case the defendant agreed in writing to let a house with the furniture to the plaintiff. The plaintiff gave evidence that, before the execution of a written agreement, the defendant had orally agreed to send into the house additional furniture. It was held that this evidence was inadmissible because, having reduced their agreement into writing the plaintiff could not afterwards set up a term of the oral agreement which was not made part of the written agreement. In practice if the existence of the document is accepted by both parties, a witness will be estopped from speaking of its terms. Where it is not clear on the pleadings whether the material transaction is in writing, a witness will be stopped from

[22] (1943) 17 N.L.R. 14.
[23] [1961] All N.L.R. 487 (F.S.C.).
[24] (1875) 32 L.T. 320.

giving evidence of the terms and conditions of the transaction as soon as he says that the transaction was reduced into writing. Secondly, and subject to the exceptions to be discussed presently, oral evidence will not be allowed for the purpose of contradicting, altering, adding to or varying the contents of a document. *Colonial Development Board* v. *Joseph Kamson*[25] was an action by a mortgagee to recover some sum of money under the mortgage deed. The defendants desired to adduce evidence to show that they never received the mortgage money of which they had acknowledged receipt in the mortgage deed and that repayment was contigent only on the borrowers making adequate profits, there being no clause to this effect in the mortgage deed. It was held that such evidence was inadmissible.[26]

Before discussing the exceptions certain general remarks have to be made. "Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, grant or disposition of property" (s. 131 (2)). When a fact to be proved is the existence of a legal relationship between two or more parties, oral evidence of the existence of such relationship is not excluded by the mere fact that it has been created by a document. But the terms on which the relationship was established or carried on are excluded under this rule (s. 131 (3)).

It should be noted that all the provisions of sections 131 and 132 "apply only to parties to documents, and their representatives in interest, and only to cases in which some civil right or civil liability is dependent upon the terms of a document in question"; and they do not affect any of the provisions of enactments as to the construction of wills[27] (s. 133 (4)). "Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove"[28] (s. 133 (2)) and any party to a document or the representative of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document (s. 133 (3)).

[25] (1955) 21 N.L.R. 75.

[26] See §66, *post*.

[27] The construction of wills is governed by the English common law throughout Nigeria, except Western Nigeria where it is governed by the Wills Law (Cap. 133 of the 1959 Laws of the Western Region of Nigeria).

[28] See *Eshugbayi* v. *Dawuda & Ors.* (1904) 1 N.L.R. 57; *R.* v. *Adamson* (1843) 2 Mood C.C. 286.

65. Exceptions to the Rule of the Exclusion of Oral Evidence by Documentary Evidence

Section 131 (1) provides that any of the following matters may be proved by oral evidence even though the agreement or other relationship between the parties have been incorporated into a document:

> (*a*) "Fraud, intimidation, illegality; want of due execution; the fact that it is wrongly dated;[29] existence, or want or failure of consideration; mistake in fact or law; want of capacity in any contracting party, or the capacity in which a contracting party acted when it is not inconsistent with the terms of the contract; or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto."

In *Taylor, Mbi* v. *Numan Native Authority*,[30] the appellant was convicted with some other accused persons in the Numan Federal Court of conspiring to defraud the Numan Native Authority. The appellant alleged that he was not in court during the whole course of the trial, and that one of the judges was also a witness in the case, and that in fact the judge had also been an accused person in the case. None of these allegations appeared on the record. In allowing the appellant to give oral evidence of these matters, Hurley S.P.J., said: "This court is unwilling, in an appeal, to look outside the record of proceedings in the trial court, but we have power to do so under section 131 (1) (*a*) of the Evidence (Act)." With the greatest respect this pronouncement would appear to overlook the provisions of section 133 (1) quoted above which makes sections 131 and 132 applicable only "to cases in which some civil right or civil liability is dependent upon the terms of a document in question."

Generally fraud vitiates all instruments and evidence of fraud is thus usually allowed. Thus in *Foster* v. *Mackinnon*[31] it was held that a person who had signed a document could be allowed to prove that his signature was obtained by fraudulent mis-representation as to the nature of the document. Similarly evidence will be

[29] See *Jayne* v. *Hughes* (1854) 10 Ex. 480; 156 E.R. 504.
[30] 1959, N.R.N.L.R. 11.
[31] (1869) L.R. 4 C.P. 704.

allowed to show that a person signed an agreement as a result of an intimidation, or that the object of the agreement is unlawful.

With regard to mistake, extrinsic evidence will be allowed to be given to show for example, that the parties to an agreement were never *ad idem*. In *Raffles* v. *Wichelhaus*,[32] A agreed in writing to sell to B goods which were to arrive "*ex Peerless* from Bombay." There were in fact two ships called *Peerless*, one sailed from Bombay in October and the other in December. Oral evidence was allowed to be led to show that A meant the October vessel whilst B meant the December vessel.[33]

Oral evidence may also be admitted to show in what capacity a party to an agreement signed it. In *Young* v. *Schuller*,[34] the question was whether A signed a deed of contract as A's agent, or on his own and B's behalf. Oral evidence as to the statements made by A at the time he was signing the deed was held admissible. In this case the capacity to be proved by oral evidence must not be inconsistent with the express terms of the written contract.

Under above provision, evidence of want or failure of consideration may be admissible and where on the face of a written contract the consideration is past, evidence will be admissible to show that in fact the consideration is a present or future one.[35]

(*b*) "The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers the parties did not intend the document to be a complete and final statement of the whole of the transaction between them."[36]

(*c*) "The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property."

This last provision, like the ones before it, has its root in the English common law. In *De Lassalle* v. *Guildford*[37] the plaintiff and the defendant negotiated for the lease of a house by the latter

[32] (1864) 2 H. & C. 906; 159 E.R. 375.
[33] See also *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597.
[34] (1883) 11 Q.B.D. 651.
[35] See *Morrell* v. *Cowan* (1877) 7 Ch.D. 151.
[36] See *Mercantile Bank of Sydney* v. *Taylor* [1893] A.C. 317 at 321.
[37] [1961] 2 K.B. 215.

to the former. The terms were arranged, but the plaintiff refused to hand over the counterpart that he had signed unless he received an assurance that the drains were in order. The defendant verbally represented that they were in good order, and the counterpart was thereupon handed to him. The lease contained no reference to drains. The drains were not in good order, and an action was brought to recover damages for breach of warranty. It was held that the representation made by the defendant as to the drains being in good order was a warranty and that it was a separate collateral agreement about which oral evidence could be given, and for breach of which an action was maintainable.[38]

(*d*) "The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property."

If an agreement is not required by law to be in writing, but is nevertheless reduced into writing, the parties may, before there is a breach, orally (i) rescind the agreement in its entirety or (ii) amend by subtracting from or adding to it, or vary it in any other way. But if the agreement is one required by law to be in writing, then the parties are only free either before or after a breach, to rescind it wholly by an oral agreement,[39] but they cannot amend or vary it in this way.[40]

(*e*) "Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of the description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract."

The position here also is as it exists under the English common law. In *Hutton* v. *Warren*,[41] Parke B., said:

> "It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have

[38] See also *Jacobs* v. *Batavia & General Plantations Trust, Ltd.* [1924] 2 Ch. 329; and *Webster* v. *Higgin* [1948] 2 All E.R. 127.
[39] See *Morris* v. *Baron & Co.* [1918] A.C. 1.
[40] See *Sanderson* v. *Graves* (1875) L.R. 10 Ex. 234; *Vezey* v. *Rashleigh* [1904] 1 Ch. 634.
[41] (1836) 1 M. & W. 466 at 475.

been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."[42]

In all business transactions a party who deals either personally or through agents in a particular type of transaction, is held to be bound by its reasonable usages even though he is ignorant of them.[43]

66. Evidence in Aid of the Interpretation of Documents

It is the judge who has the sole function of interpreting the contents of documents tendered before him, and oral evidence will not, generally speaking be allowed in this regard. Although the sole aim of interpretation is to ascertain the intention of the parties who executed the document, yet evidence of statements of their intention by the parties will generally be excluded. The duty of the judge is to ascertain such intention by the process of legal interpretation of what was actually written and not by taking evidence on what the parties to the document intended it to mean. When the meaning of the words of the document is clear, interpretation is unnecessary and evidence to aid interpretation is unnecessary. In *Gottschalck & Co.* v. *Elder Dempster & Co., Ltd.*[44] a certain package was short-landed from one of the defendant's ships. The terms of the contract for the carriage of goods were contained in the bill of lading upon which the plaintiffs sued. Plaintiffs sought to bring evidence of the custom of the port which would have extended the defendants liability beyond the terms of the bill of lading. In the Divisional Court, Ross J., refused to admit such evidence and this was affirmed on appeal by the Full Court.[45] Similarly if the words of a document are so defective or ambiguous as to be unmeaning, no evidence will be allowed to show what the author of the document intended to say. Provision for these and other rules affecting the use of oral evidence in aid of interpretation of documents are contained in section 132 of the Act. It is perhaps necessary to say again that this section does not apply to wills, the rules for the interpretation of which must be found somewhere else.

[42] See also *Dashwood* v. *Magniac* [1891] 3 Ch. 306.
[43] See *Pike* v. *Ongley* (1886) 18 Q.B.D. 708 (C.A.).
[44] (1917) 2 N.L.R. 16.
[45] See also *Hutton-Mills* v. *Nkansah II* (1940) 6 W.A.C.A. 32.

Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local and provincial expressions,[46] of abbreviations and words used in a peculiar sense. But evidence will not be allowed to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.

In order to ascertain the relation of the words of a document to facts, every fact to which the document refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it, that, is all the circumstances of the case, may be proved by oral evidence.

If the words of a document have a proper legal meaning and also a less proper meaning, the words must be given their proper legal meaning, unless such a construction would be meaningless in reference to all the circumstances of the case. In this latter event, the words may be given their less proper meaning. If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.

Where a document applies in part but not with accuracy or not completely to the circumstances of the case, the court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may equally well apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things. A good example is *Re Ofner*,[47] an English decision on the interpretation of a will. A testator bequeathed one hundred pounds "to my grand nephew Robert Ofner." He had a grand nephew named Richard Ofner, but none by the name Robert Ofner. Richard Ofner was the brother of Alfred Ofner also named in the will. It was held that oral evidence was admissible to show that the testator in giving instructions to the solicitor who drew up the will, had said that he wished to give

[46] See *Smith* v. *Wilson* (1832) 3 B. & Ad. 728; 110 E.R. 266, where evidence was allowed to show that according to usage 1,000 rabbits meant 1,200 rabbits.

[47] *Re Ofner, Samuel* v. *Ofner* [1909] 1 Ch. 60.

a legacy of one hundred pounds to Robert the brother of Alfred Ofner, not as evidence of the intention of the testator but to show that he was in the habit of referring to the brother of Alfred as Robert.

If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case of statements made by any party and to the document as to his intentions in reference to the matter to which the document relates. Finally, if a document is of such a nature that the court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.

CHAPTER 10

FACTS WHICH NEED NOT BE PROVED

67. Judicial Notice[1]: Facts of which the Courts must take Notice

As we have seen, all facts in issue and other relevant facts must be established in court by evidence. But there are two types of facts which a party to a proceeding need not prove by evidence: facts of which the court must take judicial notice (s. 72 of the Act); and in civil proceedings, facts admitted by parties to the proceedings or their agents (s. 74).

When a court takes judicial notice of a fact, which it may do in civil or criminal proceedings, it declares that it will find that that fact exists even though its existence has not been established by evidence. Section 73 (1) of the Act enumerates the facts of which the courts shall take judicial notice. They are the following:

(a) All laws or enactments and any subsidiary legislation made thereunder having the force of law in any part of Nigeria.

(b) All public Acts of Parliament and all subsidiary legislation made thereunder, and all local and personal Acts directed by Parliament to be judicially noticed.

(c) The course of proceeding of Parliament and of the Legislative Houses of the Regions.

(d) The assumption of office of the President and of any seal used by the President.

(e) All seals of which English courts take judicial notice; the seals of all the courts of Nigeria; the seals of notaries public, and all seals which any person is authorised to use by any Act of Parliament or other enactment having the force of law in Nigeria.

(f) The existence, title and national flag of every State or Sovereign, recognised by Nigeria.

(g) The division of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the *Gazette* or fixed by an Act. Under this heading the court will take judicial notice that Christians celebrate the birth of Christ on December 25.

[1] For a discussion of this subject under English Law, see Nokes, "The Limits of Judicial Notice," in (1959) 74 L.Q.R. 59.

(h) The territories within the Commonwealth or under the dominion of the British Crown.

(i) The names of the members and officers of the court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of legal practitioners and other persons authorised by law to appear or act before it.

(k) The rule of the road on land or at sea.

(l) All general customs, rules and principles which have been held to have the force of law in or by any of the superior courts of law or equity in England, or by any of the superior courts which have existed or are existing in Nigeria and all customs which have been duly certified to and recorded in any such court.

(m) The course of proceeding and all rules of practice in force in the High Court of Justice in England and in the High Courts of the Regions.

68. Judicial Notice: Facts of which the Courts may take Notice

It should be noted that apart from the above enumerated facts which *must* be taken judicial notice of by the courts, there are some other facts which the courts *may* be willing to take judicial notice of without requiring proof thereof. These are mainly notorious facts, for example the ordinary course of nature. A court will take judicial notice of the fact that two weeks is too short a period for human gestation,[2] and that the normal period of gestation is about nine months.[3] The court will also take notice of the meaning of ordinary expressions in the English language.[4] It is however doubtful if a judge will take judicial notice of any Nigerian language other than the English language which is the official language in the courts. It must be stated, however, that in practice, if not in theory, a judge who understands the language in which a transaction takes place usually makes use of his knowledge of the language when recording the facts of the transaction. Also a judge may take notice of the habit of the people. In *Yinusa Bakare* v. *Rasaki Ishola*[5] the defendant had said to the plaintiff, during an altercation between them which preceded a fight in the public, some words meaning "You are a thief. Ex-convict, you who have

[2] *R.* v. *Luffe* (1807) 8 East 193; 103 E.R. 193.
[3] *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391.
[4] *Chapman* v. *Kirke* [1948] 2 K.B. 450 at 454.
[5] (1959) W.R.N.L.R. 106.

just come out of prison." In holding that these were mere words of abuse which no one takes seriously, Jibowu C.J. (West) said:

> "It is a matter of common knowledge of which this Court takes judicial notice that people commonly abuse each other as a prelude to a fight and call each other '*Ole! Elewon!*' (Thief! Ex-convict!), which abuse no one takes seriously as they are words of anger, and are nothing but vulgar abuse."

The court will take judicial notice of the fact that civil servants, police officers, etc. receive proper pay and emoluments under the appropriate laws without further proof of those facts. In *Francis Izedomwen* v. *Inspector-General of Police*[6] the accused, a police officer in the Nigeria police force, was charged with accepting a reward beyond his proper pay and emoluments contrary to section 99 of the Criminal Code. It was held that judicial notice could be taken of the fact that the accused would receive proper pay and emoluments under the Police Act. In *Yesufu Garbar* v. *Inspector-General of Police*,[7] the appellant who was a police officer employed in the investigation branch of the Nigeria police was charged before a magistrate and convicted of an offence of official corruption, not judicial but relating to offences, contrary to section 116 (1) of the Criminal Code. One of the grounds of appeal was that the trial magistrate failed to consider the duties of the appellant at the time of the alleged offence. It was held that the court would take judicial notice under section 73 (1) of the duties of the appellant as laid down in the Police Act. But the court will not take judicial notice of internal arrangements of government departments or of government corporations.[8]

A court will be entitled to take notice that goats, dogs, cats,[9] camels,[10] are domestic animals and that young boys are naturally playful,[11] In *Rotimi Williams & Ors.* v. *West African Pilot*[12] (an action for libel contained in the defendant newspaper), it was held that the court would take judicial notice that the *West African Pilot* newspaper is a national daily in this country and that it exercises immense influence on its readers everywhere. But in

[6] 1957 W.R.N.L.R. 57.
[7] 1956 N.R.N.L.R. 32.
[8] *Victor Mukete* v. *Nigerian Broadcasting Corporation* [1961] All N.L.R. 482.
[9] *Nye* v. *Niblett* [1918] 1 K.B. 23.
[10] *McQuaker* v. *Goddard* [1940] 1 K.B. 687 at 700–701.
[11] *Clayton* v. *Hardwick Colliery Co., Ltd.* (1915) 32 T.L.R. 159.
[12] [1961] All N.L.R. 866.

Cyril Areh v. *Commissioner of Police*,[13] the court refused to take judicial notice of the fact that the General Hospital, Warri was a public place. In this case counsel for the accused argued that since that fact is not one of the facts stated in section 73 (1), the court could not take judicial notice of it. The court did not specifically rule on this point but proceeded on the basis that

> "when certain elements go to constitute an offence they must be strictly proved and the court cannot take judicial notice of such facts or act on its own private knowledge."

In the first place, the contention of counsel was erroneous in that, as we have seen, section 73 (1) is not meant to be a full catalogue of facts of which the court is expected to take judicial notice. It is also clear from the provision of section 73 (2) that the court may take judicial notice of some other matters—of public history, literature, sciences or arts. In the second place, and with the greatest respect, the learned judge would appear to have overlooked the point that a fact which a court takes judicial notice is taken as proved and when it is an element of an offence, no further proof of it is required.[14]

In all cases in which the court may take judicial notice of facts, it may refer to appropriate books or documents of reference to refresh its memory (s. 73 (2)). And the court may refuse to take judicial notice of a fact unless and until the person asking the court to do so produces to the court the relevant book or document as it may consider necessary to enable it to do so.

69. Formal Admissions

As we saw in paragraph 11 above, admissions are either formal or informal. Informal admissions are items of evidence and these have been discussed in that paragraph. Formal admissions which are the subject of the present discussion, are admissions made by a party to a civil proceeding so as to relieve the other party of the necessity of proving the matters admitted. Clearly when both parties have agreed about a particular matter in their pleadings such matter need not be proved and the court should accept such an agreed fact as established without proof.[15]

[13] (1959) W.R.N.L.R. 230.
[14] See *Yesufu Garbar* v. *Inspector-General of Police*, *supra*.
[15] *Chief Okparaeke of Ndiakaere & Ors.* v. *Obidike Egbuonu & Ors.* (1941) 7 W.A.C.A. 53.

Section 74 of the Act which deals with this matter does not apply to criminal cases. This is understandable as the prosecution cannot be relieved of the onus of proving the facts which constitute the offence by the admission, as opposed to the plea of guilty, of particular facts by the accused. The section provides that:

> "No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings."

Under the existing rules of the High Courts

> "any party to a suit may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the writ of summons, statement of claim defence or other statement of any other party."

Once a fact is admitted in this way in the pleadings it is taken as established and no proof of that fact is required. Furthermore

> "any party may, by leave of the court, call upon any other party, by notice filed in court and served under order of the Court to admit any document or fact, saving just exceptions, and on granting such leave the court shall fix the terms and conditions thereof, including the time within which the admissions are to be made.[16]

It is open to a party to a civil proceeding or his counsel to admit facts at the trial and the court may not allow evidence to be given on such admitted facts.

Lastly, it must be pointed out that in spite of all that has been said above, the court still has a discretion to require an admitted fact to be proved by some means other than by the admission itself. The proviso to section 74 stipulates that "the court may, in its discretion require the facts admitted to be proved otherwise than by such admission."

[16] Western Nigeria High Court (Civil Procedure) Rules, 1958, O. 16, rr. 1 and 2; Eastern Nigeria High Court Rules, 1955, O. XXXI, rr. 1 and 2.

CHAPTER 11

PROOF OF PREVIOUS CONVICTION

70. Meaning of Previous Conviction and when it is to be Proved

In considering the means of proof of facts, the method of proof of a previous conviction demands special treatment as the Act provides a set of rules for this which do not, strictly speaking, come within the methods of proving facts set out in the last chapter. Before discussing these, however, it will not be out of place to mention in passing the occasions when a conviction will need to be proved. The first general remark that must be made is that, whenever evidence of character is relevant, evidence of previous convictions is also relevant. This has been fully considered in Chapter 8 above and not much more about it need be said. It must be noted here, however, that (a) a previous conviction is generally speaking not relevant in civil proceedings except where it is a fact in issue or relevant to damages, (b) that a previous conviction may be proved in a subsequent criminal proceedings when the bad character of the accused is a fact in issue, or when he has given evidence of his good character, or has put his character in issue under section 159 (*d*) of the Act. In all these cases, previous convictions may be proved. The only other occasion on which previous convictions may be proved which was not mentioned in Chapter 8, is when an accused person has been convicted, and the question of an appropriate sentence arises.

If a previous conviction of the accused is brought to the notice of the court before verdict, then the conviction of the accused will be quashed on appeal, if the appeal court is of the opinion that the disclosure of the previous conviction has resulted in a substantial miscarriage of justice.[1] But if no substantial miscarriage of justice has been occasioned by the disclosure,[2] or if the jury has been adequately warned to disregard the previous conviction,[3] then the conviction may be allowed to stand.

[1] See *R.* v. *Curtis* (1913) 29 T.L.R. 512; *R.* v. *Lee* (1908) 1 Cr. App. R. 5; *R.* v. *Warner* (1908) 1 Cr. App. R. 227.
[2] See *R.* v. *Williams* (1920) 14 Cr. App. R. 135; 36 T.L.R. 251; *R.* v. *Featherstone* [1942] 2 All E.R. 672; *R.* v. *Fripp* (1942) 29 Cr. App. R. 6.
[3] See *R.* v. *Stratton* (1908) 3 Cr. App. R. 255; *R.* v. *Hargreaves* (1910) 6 Cr. App. R. 97.

"Previous conviction" for this purpose means conviction for an offence which was obtained previous to the commission of the offence subject of the present conviction. In *R.* v. *Osita Chukwigbo Agwuna & Ors.*,[4] the appellant delivered a lecture in the Tom Jones Hall, Lagos, on October 27, 1948, for which he was charged with offences of uttering and publishing seditious publications under section 51 (1) (*b*) and (*c*) of the Criminal Code and convicted on February 22, 1949. Meanwhile on November 7, 1948, he was involved along with others in the commission of similar offences in the Glover Memorial Hall, Lagos, for which they were charged. It was held that the convictions recorded on February 22, 1949 could not properly be regarded as previous convictions for purposes of enhancing the punishment for the offences committed on November 7, 1948, even though convictions for these came later in time to the convictions of February 22, 1949. It is clear, therefore, that the previous conviction must have been recorded against the accused before he committed the second offence. On the first conviction of the appellant, Blackall P., said:

> "The conviction in question was therefore not a previous conviction in the proper sense of the word. The only kind of previous conviction which a court is entitled to take into account when assessing sentence is one in which conviction took place before the commission of the offence for which the accused is instantly charged and convicted."[5]

When it is necessary to prove the previous conviction of an accused person, the first thing to do is to put such a previous conviction to him in the open court. If he admits it, that is the end of the matter and it will be taken as proved. But if he denies it then such a conviction must be proved in one of the ways laid down in sections 224 and 225 of the Act. In *Sunny Blues* v. *Commissioner of Police*,[6] the appellant was convicted by a magistrate and in an attempt to get enhanced punishment, the prosecution tendered a document showing a record of alleged previous convictions of the accused which was signed by an Assistant Superintendent of Police. It was held that this was not a proper mode of proving previous convictions. Similarly the mere oral evidence of a witness

[4] (1949) 12 W.A.C.A. 456.
[5] *Sunny Blues* v. *Commissioner of Police* (1959) W.R.N.L.R. 234.
[6] (1959) W.R.N.L.R. 234.

on oath that he was present in court when the accused was convicted would not be sufficient. A previous conviction can be proved by the production of one of the following certificates:

71. Proof by the Production of the Certificate of the Registrar of the Court

A previous conviction can be proved by the production of a certificate of conviction signed by the registrar or other officer of the court in whose custody is the record of the said conviction. The certificate must contain only the substance and the effect of such a conviction. Therefore a record of the whole proceedings in the previous case will not come under this heading (s. 224 (1) (*a*)). The position is the same with a conviction had in a customary or native court (including any Alkali court) in which case a similar certificate signed by the clerk or scribe of such a court would be sufficient (s. 224 (1) (*b*)).

72. Proof by the Production of the Certificate of the Director of Prisons

Where the person convicted served a term of imprisonment in a convict prison, the conviction may be proved by a certificate purporting to be signed by the Director of Prisons or other officer in charge of the records of the prison.

If there are aliases mentioned in any of the certificates referred to above and also to be mentioned presently, these have to be proved as referring to the accused person. If the person alleged to be the person referred to in the certificate denies that he is the person mentioned in it, the certificate will not be admitted in evidence until the court is satisfied by evidence that the individual in question and the person named in the certificate are one and the same person (s. 224 (2)).

73. Proof of Conviction had Outside Nigeria

A previous conviction recorded against a person in a place outside Nigeria may be proved by the production of a certificate purporting to be given under the hand of a police officer of that country where the conviction was had. Such a certificate must contain the following:

(i) A copy of the sentence or order;

(ii) The finger prints or photographs of the finger prints of the person convicted.

Along with this must be sent evidence that the finger prints of the person so convicted are those of the accused person (s. 224 (3) (*a*)). Section 224 (3) (*b*) stipulates that a certificate given under this heading shall be prima facie evidence of all the facts contained in it without proof that the officer purporting to sign the same did in fact sign it and was empowered to do so.

74. Proof by the Production of the Certificate of the Registrar of Criminal Records

The third method of proving a previous conviction recorded in Nigeria is by tendering a number of certificates as follows:

(i) The first of such certificates is obtained from the central registrar—that is, the person in charge of the principal registry of criminal records established under the provisions of the Prevention of Crimes Act[7]—purporting to be signed by or on his behalf. Such a certificate should contain particulars relating to the previous conviction extracted from the criminal records kept by the registrar, or a photographic copy, certified as such, of the particulars relating to such a conviction as entered in the said records. To this must be exhibited copies of the finger prints of the person against whom the conviction was recorded. The certificate must also certify that these copies of the finger prints are copies of the finger prints appearing from the said records to have been taken from the person convicted on the occasion of the conviction. Such a certificate is sufficient proof of such a conviction and that the copies of the finger prints exhibited to it are copies of the finger prints of the person convicted (s. 225 (1)–(3)).

(ii) The second is a certificate issued by the police or the prison authority as to the finger prints of the accused. The finger prints of the accused are taken with a view to comparing them with those attached to the certificate of the central registrar in (i) above, if the previous conviction is to be brought home to the accused. As a matter of police practice, the finger prints of accused persons remanded in custody are usually taken by the police when they are in custody. The court may also order that this should be done in the case of a particular accused person. Sometimes also the finger

[7] Cap. 157.

prints of an accused person are taken by the prison authority where he is remanded awaiting trial. After taking such finger prints the police, or the prison authority, as the case may be, issues a certificate certifying that the finger prints are those of the accused. Section 225 (4) stipulates that such a certificate:

"(*a*) purporting to be signed by or on behalf of the superintendent of a prison in which any person has been detained in connection with any criminal proceedings or by a police officer who has had custody of any person charged with an offence in connection with any such proceeding; and

(*b*) certifying that the finger prints exhibited thereto were taken from such person while he was so detained or was in such custody as aforesaid,

shall be evidence in those proceedings that the finger prints exhibited to the certificate are the finger prints of that person."

(iii) Lastly a certificate of comparison of the finger prints obtained under both (i) and (ii) above become necessary. The comparison is done by the central registrar who thereupon issues a certificate, which really concludes the matter. Section 225 (5) provides that

"a certificate—

(*a*) purporting to be signed by or on behalf of the central registrar; and

(*b*) certifying that—

(i) the finger prints, copies of which are certified as aforesaid by or on behalf of the central registrar to be copies of the finger prints of a person previously convicted; and

(ii) the finger prints certified by or on behalf of the superintendent of the prison or the police officer as aforesaid, or otherwise shown, to be the finger prints of the person against whom the previous conviction sought to be proved, are the finger prints of the same person, shall be evidence of the matter so certified."

A previous conviction may, in addition to above methods, be proved in any other way as may be stipulated by any other statute (s. 225 (6)).

PART IV

DOCUMENTS

CHAPTER 12

TYPES AND PROOF OF DOCUMENTS

75. Types of Documents

Sometimes a party to a proceeding in court may find it necessary to rely on the contents of a document for purposes of establishing his case. When this is so he must bring the contents of the document to the notice of the court. In some cases it is sufficient if the document or a certified copy of it is tendered before the court but in some cases it may be necessary to prove that the document has been properly executed.

Before discussing the cases in which it is necessary to prove due execution of a document it is necessary first to say what a document is. Section 2 (1) of the Act states that

> " 'Document' includes books, maps, plans, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter."[1]

The substance used for making the document, for example, writing, typewriting, printing, is immaterial. A writing projected on a cinema screen will come under the definition of a document under this provision.[2]

There are two types of documents under the Evidence Act: public and private documents. Public documents are:

(*a*) documents forming the acts or records of the acts—
  (i) of the sovereign authority;
  (ii) of official bodies and tribunals; and
  (iii) of public officers, legislative, judicial and executive whether of Nigeria or elsewhere;
(*b*) public records kept in Nigeria of private documents (s. 108).

It will be remembered that in *R.* v. *Taoridi Lawani*[3] a police

[1] See the definition of "document" under the English Evidence Act, 1938, s. 6 (1).
[2] See Williams, "What is a document?" in (1948) 11 M.L.R. 150.
[3] 1959 L.L.R. 97.

"Accident Report" book was held not to be a public record as it was not a document forming the acts or record of the acts of public officers, as "the acts" in this definition will not cover the inquiries which a police officer may make.

This definition under the Act must be distinguished from the definition of "a public document" under the English common law, as laid down in *Sturla* v. *Freccia*.[4] In this case the report of a committee appointed by the Genoese government on the fitness of a candidate for the post of consul which contained a statement of his age was held inadmissible as a public document in proof of that fact in proceedings in connection with the devolution of property in the United Kingdom. The document was held not to be a public document for three reasons, namely, (1) that the report was not made under a strict duty to inquire into all the circumstances it recorded, (2) it was not concerned with a public matter, although it was realised that public matter need not be the concern of the entire community and (3) that it was not meant to be retained nor was it meant for public inspection.

All documents other than public documents are private documents. The methods of proving these types of documents will now be discussed in turns.

76. Proof of Public Documents

The general method of proving a public document is by the production of a certified copy of it or of the parts of it that are required for the proceeding in court. A certified copy of any document which a person has a right to inspect can be obtained from the person having the custody of the document. Section 110 (1) of the Act provides that every public officer having the custody of a public document which any person has a right to inspect, shall give that person on demand a copy of it on payment of the prescribed fees. The copy, which is known as the certified copy, must contain at the foot of it that it is a true copy of the document or part of it. The certificate must be dated and subscribed by the officer with his name and his official title, and must be sealed if such officer is authorised by law to make use of a seal. Any public officer who, by the ordinary course of official duty, is authorised to deliver copies of a public document, is deemed to have the custody of such a document for the present purpose (s. 110 (2)).

[4] (1880) 5 App. Cas. 623 (H.L.).

Apart from proving public documents by the production of certified copies, certain public documents can be proved in special ways as provided for by section 112 of the Act. They are as follows:

(*a*) Acts of Parliament or Laws of a Regional Legislature, Proclamation, treaties or other official communications of the Government of Nigeria or the Government of Nigeria in any Region thereof or of local or native authority—

(i) which appear in the official *Gazette* of Nigeria or of a Region, by the production of such *Gazette*, and shall be prima facie proof of any fact of a public nature which they were intended to notify;

(ii) by a copy thereof certified by the officer who authorised or made such order or issued such official communication;

(iii) by the records of the departments certified by the heads of those departments respectively or by the Minister or in respect of matters to which executive authority of a Region extends by the Governor or any person nominated by him.

(iv) by any document purporting to be printed by order of Government.

In *R.* v. *The Governor of the Western Region of Nigeria, ex p. Alasan Babatunde Ajagunna II*[5] on an application for a writ of *certiorari* for the removal into the High Court for the purpose of being quashed, an order made by the Governor of approval and recognition of the appointment of a chief, the court directed the Governor to file an affidavit in reply to the point in issue as to whether the applicant, who previously held the chieftaincy, had been deposed or not. An affidavit was sworn by the Secretary to the Premier and Executive Council to which was attached a copy of the order of deposition of the applicant, which was signed by the Governor who was the person who made the order. This was held to be sufficient proof of the original order by virtue of section 112 (*a*) (ii), even though it was not certified.

(*b*) the proceedings of the Legislative Council or of a Federal Legislative House—

by the minutes of that body or by published Acts or

[5] 1957, W.R.N.L.R. 104.

abstracts or by copies purporting to be printed by order of Government;

(*c*) the proceedings of a Regional Legislative House—

by the minutes of that body or by published laws, or by copies purporting to be printed by order of Government;

(*d*) the proceedings of a municipal body in Nigeria—

by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;

(*e*) Acts of Parliament of the United Kingdom and other statutes therefore enacted including proclamations, orders, or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government—

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer;

(*f*) the Acts or Ordinances of any other part of the Commonwealth and the subsidiary legislation made under authority thereof—

by a copy purporting to be printed by the Government Printer of any such country;

(*g*) treaties or other acts of state of the United Kingdom or proclamations, treaties or acts of state of any other country—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign;

(*h*) books printed or published under the authority of the Government of a foreign country, and purporting to contain the statutes, code or other written law of such country, and also printed and published books of reports of decisions of the courts of such country and books proved to be commonly admitted in such court as evidence of the law of such country, shall be admissible as evidence of the law of such foreign country;

(*i*) any judgment, order or other judicial proceeding outside Nigeria, or any legal document filed or deposited in any court—

by a copy sealed with the seal of a foreign or other

court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by anyone of the judges of the said court, and such judge must attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal; or by a copy which purports to be certified in any manner which is certified by any representative of Nigeria or if there is no such representative appointed, then by any representative of the United Kingdom in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records;

(*j*) public documents of any other class elsewhere than in Nigeria—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a consul or diplomatic agent that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the law of the foreign country.

77. Proof of Execution of Private Documents

During the course of a litigation, either civil or criminal, it is often alleged that a document was signed, or written wholly or partly by a particular person. When this is so the signature on the document or the writing on it (or the relevant part of it) must be proved to be in fact that person's handwriting (s. 99). For the purposes of proving this the Act makes certain types of evidence admissible.

(a) As to the identification of the person who is alleged to have made a document, section 100 allows the evidence that a person exists having the same name, address, business or occupation as the maker of the document to be admissible to show that such document was written or signed by that person.

(b) Section 100 also allows evidence that a document exists to which the disputed document purports to be a reply, together with evidence of the making and delivery to a person of the earlier document, to be admissible to show the identity of the maker of the

disputed document with the person to whom the earlier document was delivered.

(c) Evidence that a person signed a document containing a declaration that a seal was his seal, is admissible to prove that he sealed it (s. 101 (1)).

(d) Evidence that the grantor on executing any document requiring delivery expressed an intention that it should operate at once is admissible to prove delivery (s. 101 (2)).

78. Attested Documents

If a document requires an attestation for its validity, such a document may, generally speaking, be proved by calling at least an attesting witness.[6] But section 102 (1) provides that instead of being proved by an attesting witness, such a document may be proved in the manner in which it might be proved if no attesting witness were alive. And subsection (2) of the section provides the manner in which such a document may be proved if no attesting witness is alive. The subsection stipulates that in such a case, the document is proved by showing that the attestation of at least one attesting witness is in the handwriting of that witness and that the signature of the person executing the document is in the handwriting of that person. These provisions relate to the proof of attested documents before the court either in civil or criminal proceedings but they do not apply to the proof of wills or other testamentary documents. They are similar to the provisions of section 3 of the English Evidence Act of 1938[7] which materially altered the English common law rule that at least one of the attesting witnesses of an attested document must be called unless they were all unavailable.[8]

A document required by law to be attested and which was in fact attested may be proved in another manner. The admission of a party to such a document of its execution by himself is sufficient proof of its execution as against him (s. 103).

If an attesting witness to a document denies[9] or does not recollect the execution of it (or refuses to testify) the execution of

[6] See *Whyman* v. *Garth* (1853) 8 Ex. 803; 153 E.R. 1578; *Bowman* v. *Hodgson* (1867) L.R. 1 P. & D. 303; *Coles* v. *Coles* (1866) L.R. 1 P. & D. 70.
[7] 1 & 2 Geo. 6, c. 28.
[8] See *R.* v. *Harringworth* (*Inhabitants*) (1815) 4 M. & S. 350; 105 E.R. 863; *Whyman* v. *Garth* (1853) 8 Ex. 803; 155 E.R. 1578.
[9] See *Bowman* v. *Hodgson* (1867) L.R. 1 P. & D. 302; *Pilkington* v. *Gray* [1899] A.C. 401.

such a document may be proved by other evidence (s. 105) for example, by oral evidence of other witnesses who were present when the document was executed and attested. If, however, the denial is categorical and there is no evidence from which a doubt can be cast on such denial, the attestation may be rejected.[10] But in *Re Vere–Wardale*[11] where the two attesting witnesses gave evidence that the testator did not subscribe the will until after they had done so, it was held that other persons who were present at the time of the attestation could be called to prove that the attesting witnesses were mistaken as their evidence on this issue was not conclusive.

It should be noted that an attested document which is not required by law to be attested may be proved as if it was unattested (s. 106).

> "In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose."[12]

And to enable it to carry out this comparison the court is empowered under section 107 (2) to direct any person present in court to write any words or figures or to make finger impressions. This power, however, cannot be used in the case of an accused person who does not go to the witness box to give evidence.

79. Cases in which Proof of Execution or of Handwriting is Unnecessary

Generally speaking a person seeking to prove the due execution of a document or that the writing on a document (either as the maker of the document or as an attesting witness) is that of a particular person has to call the person who is alleged to have executed the document or made the writing, as a witness. But section 104 (1) provides that

> "A person seeking to prove the due execution of a document is not bound to call the party who executed the document or to

[10] *Wyatt* v. *Berry* [1893] P. 5. [11] [1940] P. 395. [12] S. 107 (1).

prove the handwriting of such party or of an attesting witness in any case where the person against whom the document is sought to be proved—

(*a*) produces such document and claims an interest under it in reference to the subject matter of the suit, or

(*b*) is a public officer bound by law to procure its due execution, and he has dealt with it as a document duly executed."

This provision is without prejudice to the right of a person to put in evidence any document in the manner mentioned in sections 96 and 122 (s. 104 (2)).

It must, however, be pointed out that as a general proposition, the formal proof of a document can always be waived by parties to a civil suit, but not by parties to a criminal case.[13]

80. Documents Not Complying with the Illiterates Protection Act, Cap. 83

Documents executed by illiterate persons need special mention in that in some cases proof of mere execution of such documents is not sufficient to make them admissible in evidence. In such cases, it must be proved that the document complies with the provisions of the Illiterates Protection Act.[14] Section 3 of that Act provides that "any person who shall write any letter or document at the request, on behalf or in the name of an illiterate person shall also write on such letter or other document his own name as the writer and his address . . . ," while section 4 provides that "if the writer of any such letter or document shall fail to write thereon his name and address, . . . the writer shall be liable to a fine of fifty pounds. . .". A writer is defined by section 7 as "any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person"[15] except legal practitioners. The difficulty with the whole Act is that it does not state the effect of non-compliance with its provisions with regard to admissibility. There have been a number of judicial decisions on this point some of which will be considered here. But before doing so it will be essential to consider the meaning of "illiterate person" in this provision. In *Mallam Baba*

[13] *Nathaniel Okeke* v. *Okunkwe Obidije and Ors.*, 1965 N.M.L.R. 113.
[14] Cap. 83. See Cap. 47 of the 1959 Laws of Western Nigeria.
[15] A typist has been held not to be a writer within s. 7: *Mallam Baba Dan Kantoma* v. *Paterson Zochonis & Co., Ltd.*, 1964 N.N.L.R. 54.

Dan Kantoma v. *Paterson Zochonis & Co., Ltd.*,[16] the appellant signed a guarantee indemnifying the respondent company in respect of a third person's indebtedness to the company. The guarantee was in English. The appellant was not literate in English but was able to read and write Arabic. Taylor F.J., held that the word "illiterate" in the Act should be construed in its ordinary meaning as defined in the dictionary and that the appellant was not "illiterate" within that meaning as he was not "ignorant of letters, unlearned, unable to read." But in *S.C.O.A., Zaria* v. *A. D. Okon*,[17] the same Federal Supreme Court in a judgment delivered by Quashie-Idun Ag. F.J., had held that although a person may be sufficiently literate to sign his name and read figures, he may not be sufficiently literate to understand the meaning and effect of the document which he is signing; in such a case the provisions of section 3 of the Act must be complied with. This decision was not adverted to by Taylor F.J., in his dictum quoted above; and with the greatest respect, the view of Quashie-Idun Ag. F.J., would appear to be more in consonant with the intention of Parliament in this regard.

We should now consider the effect of non-compliance with the provisions of the Act. In *United Africa Company of Nigeria Ltd.* v. *Edems & Anor.*[18] the first defendant borrowed a sum of money from the plaintiff company and the second defendant stood surety for him. The debt was witnessed by a document the writer of which was the record clerk of the plaintiff company who, for this purpose, was regarded by the court as the agent of the plaintiff. The second defendant was found by the court to be an illiterate person and it was established that the document witnessing the debt did not comply with the provisions of the Act. It was held that the document was inadmissible against the second defendant. Smith J., explained that the object of the Act was to protect an illiterate person from fraud, and strict compliance with its provisions was obligatory as regards the writer of the document. If the document creates legal rights and the writer benefits thereunder those benefits are only enforceable by the writer of the document if he complies strictly with the provisions of the Act. If a document which does not comply with the provisions of the Act creates legal rights between the illiterate and a third party, then evidence may be

[16] *Supra.* [17] (1959) 4 F.S.C. 220; 1960 N.R.N.L.R. 34 (F.S.C.).
[18] 1958 N.R.N.L.R. 33.

called to prove what happened at the time the document was prepared by the writer and the parties signed it. But the writer himself cannot adduce evidence in his own favour to remedy the omission.[19] A document which does not comply with the Act may nevertheless be admissible for example, in support of the case of an illiterate: *Iro Egera* v. *Enyima Ndukwe*.[20] Nevertheless, in his book, *The Nigerian Law of Evidence*,[21] Rudd states that "a document which on the face of it does not comply with the Illiterates Protection Act . . . is inadmissible" and also that "where a contract in writing does not comply with the Illiterates Protection Act it is inadmissible in evidence," relying on *Eke* v. *Odolofin*[22] and *Ntiashagwo* v. *Amodu*.[23] With respect, the statements by Rudd cannot be regarded as a correct statement of the law. The facts of the former case are that sometime in 1955 the plaintiff, a building contractor, and an illiterate person at the request of the defendant, agreed to erect a building for the defendant at a cost of £660. This was embodied in a written agreement. The plaintiff erected the building, but the defendant refused to pay the agreed cost. At the trial of the suit to recover the sum of £660, the plaintiff sought to tender in evidence the written agreement. The court rejected the document as inadmissible as it offended against the provisions of the Act. Similarly in *Ntiashagwo* v. *Amodu*, Charles J. held that a document which did not comply with the provisions of the Act was inadmissible. Two years later, however, he abandoned the position he took in that case. In *Barclays Bank D.C.O.* v. *Memunatu Hassan*,[24] he said,

> "I am satisfied from further consideration of my remarks in *Ntiashagwo's* case that non-compliance with the requirements of the Illiterates Protection Act by the preparer of a document renders the document void, were too widely stated and inaccurate on that account. What is the exact general effect of such non-compliance on the enforceability of a document and its admissibility as evidence need not be considered here. It is sufficient to say that the document is not rendered void in the strict sense, as obviously the illiterate can rely on it. (*Akokwere of Okan* v. *Emayabor & Anor*.[25]) But it is unenforceable by the

[19] *Ibid.*, at 34.
[20] [1961] All N.L.R. 504.
[21] Rudd, *The Nigerian Law of Evidence*, p. 200.
[22] [1961] All N.L.R. 404; (1961) W.N.L.R. 151.
[23] (1959) W.R.N.L.R. 273.
[24] [1961] All N.L.R. 836.
[25] (1959) W.R.N.L.R. 88.

preparer against the illiterate in respect of legal rights created by it in favour of the former (*S.C.O.A. Zaria* v. *Okon*[26]).”

This last mentioned case seemed to have concluded the matter. The plaintiff company claimed the sum of £200 from the defendant upon a letter which was signed by the defendant as a surety guaranteeing the repayment of any shortages of a third party in the event of the latter being employed by the company, up to the amount of £200. The letter, though signed by the defendant was written by the plaintiff's manager. The evidence of the defendant was that he understood the figure £200 which he saw in the document, but that he signed it believing that he was witnessing a written transaction between the defendant company and the third party. The provisions of section 3 of the Illiterates Protection Act were not complied with. It was held that the document was inadmissible in support of the claim by the defendant. On appeal, the Federal Supreme Court upheld this point and approved the point made in *United Africa Company of Nigeria, Ltd.* v. *Edems & Anor., supra,* to the effect that if a document which does not comply with the provisions of the Act creates legal rights between the illiterate and a third party then evidence may be called to prove what happened at the time the document was prepared by the writer and the parties signed it.[27]

81. Affidavits

One type of document which demands special mention is an affidavit. An affidavit is sometimes made use of in establishing facts before a court either alone or together with oral evidence. An affidavit is a statement, usually of facts, made in writing, signed by a person and declared by him on oath to be true. Section 77 allows a court in a civil proceeding, to make an order at any stage of such proceeding, directing that specified facts be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination, notwithstanding that a party desires his attendance for cross-examination and that he can be produced for that purpose. In *R.* v. *The Governor of the Western Region of Nigeria, ex parte Alasan Babatunde Ajaguna II*[28] which was an application for a writ (now order) of certiorari, both parties filed affidavits in support of

[26] (1959) 4 F.S.C. 220; 1960 N.R.N.L.R. 34 (F.S.C.).
[27] See also *Paterson Zochonis & Co., Ltd.*, v. *Mallam Momo Gusau and Anor.* [1962] All N.L.R. 242.
[28] 1957 W.R.N.L.R. 104.

their claim, but counsel for the applicant urged the court to order that the deponent on behalf of the respondent be called for purposes of cross-examination. Taylor J., however, refused to accede to the counsel's request because he failed to show good cause why the court should not accept the affidavit and its contents as representing the true state of things.

Although there is no rule regulating the cases in which the court may order proof of facts by affidavits, it is not usual for the court to decide substantive actions on affidavit alone. It is, however, more usual for applications for the prerogative Orders (certiorari, mandamus, prohibition, and quo warranto) to be determined entirely upon affidavits. And in fact oral evidence will not be allowed in all these cases unless there are exceptional circumstances justifying the reception of such evidence.[29] Similarly, all interlocutory applications made in the course of a court proceeding are usually based upon sworn affidavits.

A party who wishes to make use of an affidavit in a proceeding or who is ordered to file an affidavit in court must file the original of the affidavit in court and it is only that original or an office copy of it that will be recognised for any purpose whatsoever in the court (s. 78).

An affidavit must be sworn before a commissioner for oaths, usually the Registrar of the magistrate's court or the Registrar of the High Court or a Notary Public, before it can be used in any court as an affidavit. But any affidavit sworn before any judge, officer or other person in the Commonwealth authorised to take affidavits may be used in the court in all cases where affidavits are admissible (s. 79). In the case of other countries outside the Commonwealth, any affidavit sworn in any such country before a judge or magistrate, must be authenticated by the official seal of the court to which the judge or magistrate is attached before it can be used in our courts. And an affidavit sworn before a public notary of such a country or before a British Minister or consul may be used in our courts (s. 80).

It is unnecessary to prove the signature of the person before an affidavit is sworn or that he has the authority to take oaths. Section 81 provides that the fact that an affidavit purports to have been sworn and authenticated (where necessary) in the manner

[29] *R.* v. *Elejigbo of Ejigbo & Anor.* 1964 N.M.L.R. Supplement 20, following *R.* v. *Stokesley-Yorkshire Justices* [1956] 1 W.L.R. 254.

described in the last paragraph, is prima facie evidence of the seal or signature, as the case may be, of any such court, judge, magistrate or other officer or person mentioned, appended or subscribed to any such affidavit, and of the authority of such court, judge, magistrate or other officer or person to administer oaths.

Provided an affidavit is sworn before a person duly authorised to take oaths, a court may permit it to be used even though it is defective in form (s. 83), but an affidavit which is proved to have been sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner, cannot be admitted (s. 82). The court may allow an affidavit which is defective or erroneous to be amended and re-sworn on such terms as to time, costs or otherwise as seem reasonable (s. 84).

82. Contents of an Affidavit

Every affidavit used in the court is to contain only a statement of facts and circumstances to which the witness deposes either of his own personal knowledge or from information which he believes to be true (s. 85) and shall not contain extraneous matter by way of objection, or prayer, or legal argument or conclusion (s. 86). A person who deposes to his belief in a matter of fact, and whose belief is derived from any source other than his own personal knowledge, must state explicitly the facts and circumstances forming the ground of his belief (s. 87). When such a belief is derived from information received from another person, the name of his informant must be stated in the affidavit, and he must state reasonable particulars of such an informant including the time, place and circumstances of the information (s. 88).

Any paragraph of an affidavit which offends against any of these provisions will be struck out by the court. In *Banque De L'Afrique Occidentale* v. *Alhaji Baba Sharfadi & Ors.*[30] the plaintiff's suit was entered on the undefended list and notice of intention to defend signed by the defendants' solicitor was supported by two affidavits, one of which was sworn by the defendants' solicitor. In paragraph 2 of his affidavit the solicitor deposed that he was informed and verily believed that the sum claimed in the suit was not yet due; in paragraph 3 he deposed that he had studied the written agreement and was of the opinion that it was not binding on the defendants, and in

[30] 1963 N.N.L.R. 21.

paragraph 4 that all the defendants had a good defence to the suit. It was held that paragraphs 3 and 4 must be struck out because paragraph 3 was for the most part an expression of opinion and not a statement of facts or circumstances and the only part which was not an expression of opinion could not stand alone, and paragraph 4 because it contained only an opinion and a legal conclusion. It was made quite clear in this case that there is nothing objectionable in principle in counsel swearing an affidavit on behalf of a person he is representing. This point was made also in *Iris Winifred Horn* v. *Robert Rickard.*[31] The provisos to this proposition which were mentioned in the latter case are (1) that the affidavit by reason of its subject-matter does not offend against the rule that a client's communications to his solicitor are privileged and (2) that counsel should not put himself in a position where he may be subjected to cross-examination or in any way enter personally into the dispute.[32] An affidavit, if it is to be of real value on facts to be disputed cannot, it would seem, avoid offending against one or both of these two provisos. Another important point which was made in the case is that an averment in an affidavit in support of an application for security for costs that unless security for costs is given the defendant will be seriously hindered from recovering any costs that may be awarded to him in an action, is a statement that exactly that state of affairs exists which would need to be proved to exist before the court would make the order prayed, and thus offends against section 86.

83. Provisions in Taking Affidavits

The following provisions regarding the taking of affidavits are laid down by section 89 of the Act.

Any affidavit which is to be used in any cause or matter must be headed in the court and in the cause or matter. The deponent must state his full name, trade or profession, residence, and nationality.

The affidavit must be written in the first person and divided into convenient paragraphs numbered consecutively. If it has any erasure, interlineation or alteration these must be attested by the person taking the affidavit (the commissioner for oaths) before it is sworn and he must affix his signature or initial in the margin im-

[31] 1963 N.N.L.R. 67.

[32] All these principles were confirmed by the Supreme Court in *Olaleke Obadara & Ors.* v. *The President, Ibadan West District Council, Grade "A" Customary Court,* 1965 N.M.L.R. 30 at 43.

mediately opposite to the interlineation, alteration or erasure. When an affidavit proposed to be sworn is illegible or difficult to read, or is in the judgment of the person before whom it is taken so written as to facilitate fraudulent alteration he may refuse to swear the deponent, and require the affidavit to be re-written in an unobjectionable manner.

After an affidavit has been sworn, it must be signed by the deponent, or if he cannot write, he must make his mark on it in the presence of the person before whom it is sworn. And once it is sworn, the affidavit cannot be altered in any manner without being re-sworn, but the person taking the affidavit may refuse to allow the affidavit to be re-sworn, and may require a fresh affidavit.

Every affidavit must contain a jurat. The jurat must be written without any interlineation, alteration or erasure immediately at the foot of the affidavit, and towards the left side of the paper, and signed by the person before whom it is taken. The jurat must state the date of the swearing and the place where it is sworn and that it was sworn before the person taking the affidavit.[33] Where the deponent is illiterate or blind, this fact must be stated in the jurat and also that it was read over (or translated into his own language in the case of a witness who does not have sufficient knowledge of the English language) and that the witness appeared to understand the contents of the affidavit. It is usual to insert in the jurat the name of the person who has read it over to the blind or illiterate person although this is not provided for in the section. Where the deponent makes a mark instead of signing the affidavit, the jurat must state that fact, and also that the mark was made in the presence of the person before whom it is taken. If two or more persons join in making an affidavit all their names must be written in the jurat and it must be clearly stated in the jurat that each one of them has been sworn to the truth of the matters stated in the affidavit.

If it becomes necessary to re-swear an affidavit, a new jurat must be added, and the new jurat must contain a statement of the alteration necessitating the re-swearing.

Any person before whom an affidavit may be taken, may take, without oath, the declaration of any person affirming that the

[33] See Ord. 38 of the Supreme Court Rules of England. In *Eddowes* v. *Argentine Co.* (1890) 38 W.R. 629; 62 L.T. 514, an affidavit was admitted even though the words "before me" were omitted from the jurat. Errors in jurats are always corrected by re-swearing.

taking of any oath whatsoever is, according to his religious belief, unlawful or who by reason of immature age or want of religious belief, ought not in the opinion of the person taking the declaration, to be admitted to make a sworn affidavit. The person taking such a declaration must state in the attestation the reason of such declaration being taken without oath.

CHAPTER 13

STATEMENTS ADMISSIBLE UNDER SECTION 90

84. Application of Section 90 in General

A statement in a document is admissible if it was made by a person having personal knowledge of the matter contained in it or if it was made in compliance with a duty to record it, subject to the other conditions laid down under section 90 of the Act. The section contains provisions similar to those of section 1 of the English Evidence Act, 1938[1] which was passed as a result of the work of a Royal Commission.[2] The main object of the Act was to provide a relaxation to the old English common law rule against hearsay.[3]

The section, section 90, applies only to statements in documents. Section 1 defines a "statement" for the purposes of the whole Act as including any representation of fact, whether made in words or otherwise, and a document as including books, maps, plans, drawings, photographs etc.[4] Although the section is mostly applied to private documents, there is no reason why it should be confined to these. Indeed it was made applicable to a public document in the English case, *Andrews* v. *Cordiner*.[5] It was an affiliation case in which the regimental records of the applicant's husband were held admissible under the provisions of the English statute.

It should be remembered that like section 1 of the English statute, section 90 is applicable only to civil proceedings and not to criminal proceedings. That was why in *Lilley* v. *Pettit*,[6] which was a criminal proceeding, documents similar to those which were admitted in *Andrews* v. *Cordiner*, *supra*, were held inadmissible. Whereas "proceedings" is defined by section 6 of the English statute as including arbitrations and references, so that these will come under the present rule, section 1 (4) of the Nigerian statute excludes proceedings before an arbitrator and such proceedings will therefore not come under the rule. Under both statutes, proceedings involving a matter of pedigree are excluded. Section 5 (*a*) of the

[1] 1 & 2 Geo. 6, c. 28.
[2] See "Report of the Royal Commission on the Dispatch of Business at Common Law, 1934–1936" (1936: Cmd. 5065).
[3] Discussed in §. 21, *ante*.
[4] See p. 145 above.
[5] [1947] K.B. 655.
[6] [1946] K.B. 401.

Nigerian statute says that nothing in the Act shall "enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this Act had not been passed." This provision is similar to that of section 6 (2) (*b*) of the English statute.

Finally reference must be made to the judicial discretion contained in section 90 (5) of the Act. Where the proceedings are with a jury, the court may in its discretion reject the statement notwithstanding that the requirements of the section are satisfied, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted. When a judge sits alone, he has no discretion to reject the document.[7]

85. The Construction of Section 90 (1)

Section 90 (1) provides that

> "in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible evidence of that fact",

provided certain conditions are satisfied. The conditions are as follows:

"(*a*) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of these matters; and

(*b*) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or

[7] *Ozzard—Low* v. *Ozzard—Low* [1953] P. 272, not following *Infields, Ltd.* v. *Rosen* [1939] 1 All E.R. 121.

> mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success."

There are two distinct situations provided for under this subsection: where the maker has personal knowledge of the matters dealt with and he is called as a witness in the proceeding, and, secondly, where the document in question is, or forms part of, a continuous record made in the performance of a duty to record information supplied to the maker by a person who had personal knowledge of the matters and he is called as a witness. There cannot be much difficulty with the first situation; but with the second, one or two points need clarification. The document must form part of a "continuous record". It has been held in *Thrasyvoulos Ioannou* v. *Papa Christoforos Demetriou*[8] that one paper from a file relating to the same subject matter will not come under this heading. Lord Tucker said: "The mere existence of a file containing one or more documents of a similar nature dealing with the same or a kindred subject matter does not necessarily make the contents of the file a continuous record within the meaning of the section."[9] The next problem is as to whom one can be said to supply an information. In *Edmonds* v. *Edmonds*[10] it was held that a witness who swore before a commissioner as to certain facts, supplied the commissioner with those facts; but in *Barkway* v. *South Wales Transport, Ltd.*[11] it was held that a witness does not supply information to a shorthand writer. Asquith L.J., said: "If a man dictates a letter giving information to the person to whom he is writing, it is an abuse of language to say that he is engaged in supplying information to his shorthand typist."[12]

It is now necessary to make reference to two cases decided in Nigeria on the application of the subsection in general. The first is *Adekunle Coker* v. *Albert Farhat.*[13] The plaintiff's case was that he bought the premises in dispute in 1950 with a conveyance from the vendor, the conveyance containing recitals proving the vendor's title and the right to convey. For him it was argued that the vendor had personal knowledge of the matters recited in the conveyance but as he was dead, it was not necessary to call him as a witness,

[8] [1952] A.C. 84. [9] At pp. 92 and 184 respectively. [10] [1947] P. 67.
[11] [1949] 1 K.B. 54. [12] At pp. 60. [13] (1952) 14 W.A.C.A. 216.

reliance being put on section 90 (1) (*a*) (i) and (*b*) and the proviso. For the defendant it was argued that before a statement in a document can become evidence of a fact under section 90 (1) the requirement that direct oral evidence of the fact would be admissible had to be satisfied. It was held that the mere recital was not sufficient evidence of the facts contained in it and that before a statement contained in a document can become evidence of a fact under section 90 (1), the requirement that direct oral evidence of the fact would be admissible has to be satisfied. In *Alhaji Etiko* v. *Aroyewun*,[14] in a claim for declaration of title, the plaintiff tendered the deed of conveyance which contained a recital and called the person who executed the conveyance to give evidence in support of the recital. The trial judge held that section 90 (1) was wrongly applied, and secondly, that section 129[15] must be complied with in addition to section 90 (1) before the latter section could be employed. It was held that these two contentions were erroneous. Abbott Ag. C.J.F., said:

> "It is quite obvious in my opinion, that section 90 (1) deals with one set of circumstances and section 129 with another, totally different. By virtue of the latter section, the facts stated in, for example, a recital in a document of the age specified are presumed to be true, except in so far as they may be proved to be inaccurate. In other words, a recital in such a document is prima facie evidence of the facts averred therein. The former section provides that oral evidence is required plus other conditions, to make *admissible as evidence* a statement made by a person in a document and tending to establish a fact whereof direct oral evidence would be admissible. To put the distinction another way, section 129 raises a presumption as to the correctness of a recital in a document twenty years old, while section 90 (1) provides for the admissibility, on certain conditions being fulfilled, of a statement in a recital no matter what the age of the document containing it."[16]

86. The Construction of Section 90 (2)

Subsection (2) of section 90 provides that:

> "In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the

[14] (1959) 4 F.S.C. 129. [15] Discussed in §119, *post*. [16] (1959) 4 F.S.C. at 181.

case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence—

(*a*) notwithstanding that the maker of the statement is available but is not called as a witness;

(*b*) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be."

Under this subsection there is a discretion in the court to order or allow the admission of a statement mentioned in subsection (1) or a certified true copy of it even though the maker of the statement is available and not called as a witness, and even though the original is not produced, if, having regard to all the circumstances of the case, the court is of the opinion that undue delay or expense would otherwise be caused.[17] If the court is in doubt as to whether or not the original of a document is in existence, then there is no discretion in the court to admit the copy, which will have to be rejected as no question of undue delay or expense arises. In *Bowskill* v. *Dawson*,[18] the plaintiff's action was for damages as a result of negligent driving. He made a statement which he signed, and a copy of it was later typed. He died before the trial, and as the original statement could not be found, the typed copy was tendered in evidence but was rejected, as not being admissible under this provision.

The provision of this subsection cannot be employed so as to dispense with the need for a judge to hear the two sides to a dispute. In *Peter Ogiogun* v. *Idukpaye*,[19] a magistrate who had heard the plaintiff's case was transferred to another district and his successor continued the hearing of the case after admitting in evidence the record of proceedings before the former magistrate purportedly under the subsection. It was held that this was erroneous as the subsection cannot be employed so as to dispense with the principle of *audi alteram partem*. There can be no doubt that the statements

[17] See *Baggs* v. *London Graving Dock Co., Ltd.* [1943] K.B. 291.
[18] [1954] 1 K.B. 288.
[1] (1959) W.R.N.L.R. 81.

in this case are clearly inadmissible under this subsection because of the provision of subsection (3) which will now be discussed.

87. The Construction of Section 90 (3)

Subsection (3) of section 90 can properly be considered as a proviso to the preceding two subsections. It provides that:

> "nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish."

Two phrases in this provision must be examined, namely, "a person interested" and "when proceedings were pending or anticipated."[20] Before a statement can be admitted under the section (s. 90) it must not have been made by "a person interested" nor "when proceedings were pending or anticipated." A statement made by a driver involved in a motor car accident is made by a person interested and is one made when a dispute is anticipated. The position is the same whether or not he was cautioned: *Bowskill* v. *Dawson*, *supra*. Where a person has been cautioned, there can be no doubt whatsoever that he must be taken to know that the matter might end in court, whereas where he was not cautioned there may still be a doubt as to whether the matter will end in court or not. In *Robinson* v. *Stern*, [21] the plaintiff, a child of seven years of age, was injured in a collision with the defendant's motor-car. Immediately after the accident the defendant went to a police station and, after a caution by the police constable that whatever she said might be used as evidence, made a statement tending to show that the accident was not due to her fault but to the fault of the infant plaintiff. The defendant, in answer to a question by the judge whether at the time she went to the police station she anticipated that there might be proceedings against her, said that she had not thought about it. The trial judge admitted the statement. It was held by the Court of Appeal that the statement was made by a person interested at a time when a dispute was anticipated and that the statement was inadmissible, and that the word "anticipated" must be construed as including "likely." This interpretation

[20] For a general discussion on these, see Cowen and Carter, "Interpretation of the Evidence Act, 1938 (1949) 12 M.L.R. 145; and Carter, "Evidence Act, 1938: Problem of Interpretation" (1952) 68 L.Q.R. 106.

[21] [1939] 2 K.B. 260.

was adopted by the Court of Appeal in *Jarman* v. *Lambert and Cooke (Contractors), Ltd.*[22] Evershed M.R., was prepared to accept the view that by "proceedings were anticipated" was meant "proceedings were regarded as likely," or even "reasonably probable." But the court distinguished the facts of *Robinson* v. *Stern, supra,* from the facts of the present case, the facts of which are as follows. A workman, while working alone in the course of his employment injured his foot. With a view to making a claim through his approved society on his employers, he gave particulars of the accident on the form supplied to him by the society for that purpose and signed the declaration at the foot of the form to the effect that the particulars were true. Subsequently he withdrew his claim for compensation, which was never disputed by his employers, and brought an action against the defendants for damages on the ground that the accident was due to their negligence. He died as a result of the accident while the action was pending whereupon his widow was substituted. It was held that the form filled and signed by the workman was admissible, for although it was made by a person interested, no proceedings were anticipated involving a dispute as to any fact which the statement might tend to establish, whether by the workman or by anyone else at the time when it was made.

It must be remembered that a "person interested" is not confined to the maker of the document. It means "any person whatsoever provided that he is interested."[23] A person not "interested" and who therefore does not come under this provision is "a person who has no temptation to depart from the truth on one side or the other—a person not swayed by personal interest, but completely detached, judicial, impartial, independent."[23] There must be a real likelihood of bias before a person making a statement can be said to be a "person interested." In *Bearmans, Ltd.* v. *Metropolitan Police District Receiver*,[24] a night watchman had made a statement to an insurance assessor concerning the circumstances in which the plaintiff's premises were broken into by criminals who were more than three in number. In proceedings under the Riot Damage Act, the Master admitted the statement and this was held to be correct; the night watchman could not in the circumstances be regarded as a person interested. The mere fact that the maker of a statement is

[22] *Barkway* v. *South Wales Transport Co., Ltd.* [1949] 1 K.B. 54 at 61.
[23] *Evon* v. *Noble* [1949] 222 at 225, *per* Birkett J. [24] [1961] 1 W.L.R. 634.

the servant of one of the parties to the suit will not make him a person interested. But where the servant or other employee has a direct interest (financial or otherwise) he will be considered as a person interested.[25] In *Plomien Fuel Economiser Co., Ltd.* v. *National Marketing Co.*,[26] a statement made by a tester employed by the plaintiff was tendered in a civil suit for breach of contract and passing off. This was held inadmissible on the ground that he was a person interested in the result of the proceedings, which result might affect his pay and prospects. In *The Atlantic and The Baltyk*,[27] the master of a ship involved in a collision was held to be interested, whilst the two engineers and the lookout man were held not to be persons interested under the provision.[28]

88. The Construction of Section 90 (4)

For a document to come within the provision of section 90 it must have been authenticated by the maker in writing. Subsection (4) provides that for the purposes of the section

> "a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible."

Where a person writes the statement himself or signs or initials it, no difficulties arise. Difficulties may, however, arise as to what will amount to making a statement which is not signed or initialled by a person and the making is dependent upon recognising the statement in writing. In *Re Powe*,[29] which was a probate action, the question arose whether a contemporary typed note produced by a witness who was the solicitor who had prepared the will and had been responsible for seeing that it was executed, and who had been acting at the time for the executor named in it, was admissible in evidence. The note had been dictated by the solicitor, but although it had been checked by him and amended in his own hand, he had neither initialled nor signed it. It was held that the document was

[25] *Evon* v. *Noble, supra.* [26] [1941] Ch. 248. [27] (1946) 62 T.L.R. 461.
[28] See further *Re Hill, Braham* v. *Haslewood* [1948] P. 341; *Holton* v. *Holton* [1946] 2 All E.R. 534; *Galler* v. *Galler* [1955] 1 W.L.R. 490; and *Re Powe, Powe* v. *Barclays Bank, Ltd.* [1956] P. 110.
[29] *Re Powe, Powe* v. *Barclays Bank, Ltd.* [1950] P. 110.

admissible as being made or produced by the solicitor with his own hand and the fact that the solicitor secured the intervention of someone else to do the actual typewriting did not matter, provided that he himself saw it, checked it, and wrote upon it. In *Bullock* v. *Borrett*,[30] notes of the evidence of a deceased witness of an accident taken by a magistrate were admitted under the provisions of the section even though they were not signed by the witness; but the correctness of this decision is seriously in doubt.

For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner (s. 90 (5)).

[30] [1939] 1 All E.R. 505.

CHAPTER 14

DOCUMENTARY EVIDENCE

89. Primary Documentary Evidence

If a party wants to rely on the contents of a document to establish his case, it is his duty to bring them into the notice of the court; and as a general rule he must produce the original of the document before the court. Before discussing the exceptions to this general rule, it will be necessary to discuss the two types of documentary evidence mentioned by the Act: primary and secondary. Primary documentary evidence means the document itself produced for the inspection of the court (s. 93 (1)). Where a document has been executed in several parts each part is primary evidence of the document. Where a document has been executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence of the document but only as against the parties executing it. Where a number of documents have all been made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence but secondary evidence of the contents of the original (s. 93 (1)–(4)).

It is perhaps necessary to give a few illustrations of the application of the above rules. If many copies of an agreement are made by the process of typing with carbon papers, each copy, including the carbon copies, is primary evidence of the provisions of the agreement provided they are all signed or executed by all the parties to the agreement.[1] But an unsigned carbon copy of a letter is not the primary evidence of the contents of the signed top copy; the position is the same with an unsigned copy made by a duplicating machine.[2] Similarly where a letter is typed from a draft each copy of the letter is primary evidence of the contents of the other copies, including the top copy, but not of the draft.[3] The written message handed over to the counter clerk in a post office for dispatch by

[1] See *Forbes* v. *Sammuel* [1913] 3 K.B. 706.
[2] *Nodin* v. *Murray* (1812) 3 Camp. 228; 170 E.R. 1363.
[3] *Coker* v. *Ayoade*, unreported, but see Ibadan suit No. 1/286/57 noted in [1964] *Nigerian Law Journal*, p. 132.

telegraph or cable is the primary evidence of the message sent by the sender,[4] but if the question is as to the message received by the addresses then the actual written message handed over to him will be the primary evidence of the message.

90. Secondary Documentary Evidence

Secondary documentary evidence may take different forms, for example it may be the contents of another document or it may be the oral accounts of the contents of the relevant document. Section 94 provides that secondary evidence includes

(*a*) certified copies given under the provisions of the Act;

(*b*) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(*c*) copies made from or compared with the original;

(*d*) counterparts of documents as against the parties who did not execute them;

(*e*) oral accounts of the contents of a document given by some person who has himself seen it.

An important point to remember is that the Act does not make one type of secondary evidence superior to the other and it may be safely suggested that, following the English common law,[5] there are no degrees of secondary evidence in this country. Once it is impossible to produce the original of a document, and it is a case in which secondary evidence of the contents is admissible, such secondary evidence may take the form of any of the documents, (a) to (d) above, or it may take the form of oral evidence.

Under the English law, it has been suggested that

> "there seems to be no reason why the copy of a copy should not be received in evidence provided the witness producing it, or some other witness, makes it clear that the copy produced is a true copy of the first copy and that that copy was, in its turn, a true copy of the original."[6]

[4] *R.* v. *Regan* (1887) 16 Cox C.C. 203.
[5] *Doe d. Gilbert* v. *Ross* (1840) 7 M. & W. 138; 151 E.R. 711.
[6] Cross *Evidence*, 2nd ed., pp. 497–498. See also *Lafone* v. *Griffin* (1909) 25 T.L.R. 308; and *R.* v. *Collins* (1960) 44 Cr. App. R. 170.

It is, however, doubtful if this suggestion can be followed here because of the specific provisions of section 94 on the point, except where the copy has been compared with a copy which was itself made from the original by a mechanical process ensuring accuracy (subs. (b)), or where the copy of a copy has itself been compared with the original (subs. (c)).

91. Cases in which Secondary Evidence may be Given

The Act provides that the contents of a document may be proved either by primary or by secondary evidence as discussed above (s. 92), but it confines proof by secondary evidence to exceptional cases (s. 95) which are the subject of discussion under the present heading. The secondary evidence of the existence, condition or contents of a document is admissible in the following cases (s. 96):

(a) When the original is shown or appears to be in the possession or power (i) of the person against whom the document is sought to be proved; or (ii) of any person legally bound to produce it; and such a person has been served with a notice to produce (discussed in the next paragraph). Any secondary evidence including oral evidence of the contents of the document is admissible. And it should be noted that a person wishing to prove the contents of a document in the possession of a stranger can only do so by serving a subpoena on him to produce the document.

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest. In this case the written admission is admissible.

(c) When the original has been destroyed or lost and in the latter case all possible search has been made for it, any secondary evidence including oral evidence[7] of the contents of the document is admissible. If the opposing party admits having lost the document it will be unnecessary to prove search, otherwise, the party wishing to prove the contents of a document under this provision must first show that all possible search has been made for it with no success. Any objection to admissibility of secondary evidence under this provision on the ground that all possible search

[7] See *Sugden* v. *Lord St. Leonards* (1876) 1 P.D. 154.

has not been made must be distinctly made at the time the secondary evidence is being tendered; otherwise it would be improper to allow the party who has failed to make the objection to call evidence to contradict the contents of the document.[8]

(d) When the original is of such a nature as not to be easily movable, for example inscriptions on a tombstone or on a wall, any secondary evidence, including oral evidence, of the contents of the document is admissible. Similarly when an offence will be committed if a document is removed from a particular place, for example, a notice affixed to the walls of a factory, secondary evidence of the contents of the document will be admissible under this provision.[9]

(e) When the original is a public document within the meaning of section 108.

(f) When the original is a document of which a certified copy is permitted by the Act, or by any other law in force in this country, to be given in evidence. In this case as well as in the case of (e) above a certified copy of the document, and no other kind of secondary evidence, is admissible. In *Bisichi Tin Co., Ltd.* v. *Commissioner of Police*,[10] in order to prove that mining had illegally taken place on Crown land, the prosecution had to prove that a mining lease had expired. The lease was not produced and no certified copy of it was tendered. Some witnesses gave evidence as to the fact that the lease had expired. It was held that the contents of the mining lease which was a public document could not be proved in this way but only by the production of a certified copy of it.

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection. In this case oral evidence as to the general result of the documents may be given by any person who has examined them and who is skilled in the examination of such documents.

(h) When the document is an entry in a banker's book. The Act does not say what form of secondary evidence is admissible but it is absolutely clear from section 96 (2) (*e*) that it is a copy of the entry that is admissible. But such a copy cannot be received as

[8] *Minister of Lagos Affairs* v. *The Federal Administrator-General & Ors.* (1961) W.N.L.R. 159.

[9] See *Owner* v. *Beehive Spinning Co., Ltd.* [1914] 1 K.B. 105; and also s. 8 of the Births, Deaths and Burials Act (Cap. 23).

[10] 1968 N.N.L.R. 71.

evidence of the entry unless it be first proved that the book in which the entry was made at the time of the making was one of the ordinary books of the bank, and that the entry was made in the usual and ordinary cause of business, and that 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. It must also be first proved that the copy has been examined with the original entry and is found correct. This proof must be given by some person (not necessarily a bank officer[11]) who has examined the copy with the original entry, and may be given orally or by affidavit. These provisions are similar to those of sections 3–5 of the Bankers' Books Evidence Act, 1879.[12] If a banker is a party to the proceeding, then he can be compelled to produce his banking books.[13]

(i) When the document is a ship's articles and other agreements relating to a seaman's wages, and the seaman sues for his wages, secondary evidence of the articles and of any other such agreements supporting his case may be given by him. This he can do without the necessity of giving notice to produce the documents.

In addition to the cases mentioned above, particular statutes make secondary evidence of some special documents admissible under certain stated conditions. Here are some examples of such statutes:

(i) To prove an entry in the Register of Births, Deaths and Burials, it is only a certified copy of the entry that can be tendered and the law says that this shall be receivable in evidence in all courts in Nigeria.[14]

(ii) Under the Marriage Act section 32,[15]

> "every certificate of marriage which shall have been filed in the office of the Registrar (of marriage) of any district, or a copy thereof, purporting to be signed and certified as a true copy by the registrar of such district for the time being, and every entry in a marriage register book or copy thereof certified as aforesaid, shall be admissible as evidence of the marriage to which it relates in any court of justice or before any person having by law or consent of parties authority to hear, receive and examine evidence."

[11] See *R.* v. *Abbut* (1910) 75 J.P. 112.
[12] 42 & 43 Vict. c. 11.
[13] S. 150 of the Act, discussed at §146, *post*.
[14] See ss. 8 and 29 of the Births, Deaths and Burials Act (Cap. 28).
[15] Cap. 115.

(iii) Under the Registration (Births, Deaths and Marriage) Act,[16] a copy of any entry in a register in the custody of a Principal Registrar (appointed either under the Marriage Act or under the Births, Deaths and Burials Act) certified by such registrar shall be receivable in evidence in all courts in Nigeria.[17]

(iv) A certified copy of any entry in any register book, register or filed document in possession of the Registrar of Business Names is receivable in evidence without any further or other proof in all legal proceedings, civil or criminal (s. 14 of the Registration of Business Names Act, 1961).[18]

(v) "In any proceedings a certificate under the hand of the secretary and registrar of the Council (the Nursing Council of Nigeria) shall be conclusive evidence that the person named in such certificate is registered in accordance with the terms of such certificate or is not registered, as the case may be."

(s. 10 of the Registration of Nurses Act.)[19]

(vi) Lastly, reference must be made to section 7 of the Public Archives Act[20] which provides that

> "when any copy or reproduction of a document in the custody of the Director (of the Federal Archives) is certified to be a true copy by the Director or by an officer of the Department of Federal Archives authorised by him in that behalf and is authenticated by such official seal, such copy or reproduction shall be admitted in evidence as proof of the contents of the original document as if it were the original document."

92. Notice to Produce

Whenever any of the parties to a suit is desirous that any document which he believes to be in the possession or power of another of the parties to the suit, should be produced at the hearing of the suit, he should at the earliest opportunity serve the party in whose possession or power he believes the document to be, or his solicitor, with a notice in writing calling upon him to produce the same.[21] It is important to know that a notice to produce does not compel the party served with such a notice to produce the document. If it is desired that a party be compelled to produce a document, the

[16] Cap. 178, s. 8. [17] See *R.* v. *Nsuquo Etim Inyang* (1931) 10 N.L.R. 33.
[18] Act No. 17 of 1961. [19] Cap. 180. [20] Cap. 163.
[21] O. 17, r. 18 of the Western Nigeria High Court (Civil Procedure) Rules.

proper course is to issue a summons against him to produce the document. Once he is served with the summons he is bound, subject to certain exceptions, to produce the document.[22]

Once a notice to produce a certain document has been served, then secondary evidence of it of any type (oral or written) may be given if the document is not produced. The purpose of a notice to produce is not to give the party served the notice an opportunity to prepare a defence to it, but it is to clear the way for the person serving the notice so that he can give secondary evidence of it. Therefore when the original is in court then a notice to produce can be served in court even during the trial.[23] When a document has been produced as a result of a notice to produce, and the party serving it has inspected the document, then he is bound to tender it in evidence.[24] If the party served with the notice fails to produce the document, then secondary evidence of the contents of it may be given if there are no objections to this on other grounds.

A notice to produce is not necessary in order to render secondary evidence admissible in the following cases, or in any other case in which the court thinks fit to dispense with it (s. 97):

(a) When the document to be produced is itself a notice. It is not clear if notice here refers only to notice to produce under the section but it is suggested that since the Act merely refers to "a notice" this may include other types of notices as has been held in England, for example, a notice to quit before an action for possession,[25] or notice by prosecution of its intention to rely on the accused's previous conviction.[26]

(b) When from the nature of the case, the adverse party must know that he will be required to produce it. This will be so when the document is the subject-matter of the proceedings, for example, a prosecution for the conversion or theft of a document,[27] or for driving a motor vehicle without being adequately insured.[28] At this juncture it is necessary to make reference to the case of *Iphie* v. *Plateau Auditing Co.*[29] In this case the plaintiff sued for a

[22] See ss. 218, 219 discussed at §186, *post*.
[23] See *Dwyer* v. *Collins* (1852) 7 Exch. 639; 155 E.R. 1104.
[24] S. 220 of the Act.
[25] See *Collin* v. *Treweek* (1827) 6 B. & C. 394 at 398.
[26] See *R.* v. *Turner* [1901] 1 K.B. 346 at 358, 359; *Practice Note* [1950] 1 All E.R. 37.
[27] See *How* v. *Hall* (1811) 14 East. 274; *R.* v. *Aickles* (1784) 1 Leach 294.
[28] *Machin* v. *Ash* (1950) 49 L.G.R. 87. But *cf.*, *R.* v. *Ekworthy* (1867) L.R. 1 C.C.R. 103.
[29] 1957 N.R.N.L.R. 212.

balance of salary as an accountant engaged by the defendant company. He gave evidence that the defendant orally engaged him to check the monthly accounts of his tavern and that he sent to the defendant a letter of acceptance, a copy of which he tendered in evidence. Objection was made that no notice to produce the original had been given, but the magistrate received it, apparently because he was of the view that such notice was unnecessary because of the present rule. The plaintiff further gave evidence that the defendant had paid him money three times for his services and he tendered the counterfoils of his receipt book in evidence. Objection was made to the admissibility of the counterfoils but it was overruled, apparently for the same reason. On appeal it was held that before secondary evidence of a document can be given a case must be made out under section 96 but that in the present suit since the plaintiff did not give any evidence to show that his letter of acceptance and receipts reached the hands of the defendant, the secondary evidence was not admissible. It was also held that the evidence was not admissible under section 97 (b) as this relates to a case where the document forms the basis of an action so that the action itself acts as a notice which was not so in this case.

(c) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force.

(d) When the adverse party or his agent has the original in court.

(e) When the adverse party or his agent has admitted the loss of the document.[30] Mere admission of possession will apparently not be sufficient.

93. Proof that Bank is Incorporated Under the Law

Section 98 of the Act makes admissible certain types of secondary evidence in proving the incorporation of a bank including the Post Office Savings Bank. The section makes provision for three different positions and stipulates as follows:

(1) The fact of any bank having duly made a return to the Commissioners of Inland Revenue in Great Britain may be proved in any legal proceeding by production of a copy of its return. But the copy must be verified by the affidavit of a partner or officer of the bank. It may also be proved by the production of a copy of a newspaper purporting to contain a copy of such return published by the said Commissioners of Inland Revenue.

[30] See *R.* v. *Hayworth* (1880) 4 C. & P. 254.

(2) The fact that any savings bank is established under the Savings Bank Act,[31] may be proved by a certificate purporting to be under the hand of the Director of Posts and Telegraphs or of the postal department in charge of such savings bank.

(3) The fact of any banking company having been incorporated under any charter granted before or after passing of the Evidence Act may be proved by the production of a certificate of a partner or officer of the bank that it has been duly incorporated under such charter.

[31] Cap. 188.

PART V

PRODUCTION AND EFFECT OF EVIDENCE

Chapter 15

BURDEN OF PROOF

94. Nature of Burden of Proof

One very vital question which inevitably arises in all court trials and on which the final verdict in a trial may depend is the question of the person on whom the burden of proof of the whole case or of a particular issue lies. This is so because if the person on whom the burden lies fails to discharge that burden the judgment may, on that account, go against him. Furthermore any mis-direction as to the person whose burden it is to prove the case or a particular issue may prove vital to the judgment on appeal.[1]

It is necessary to distinguish between two different meanings usually attached to the phrase "burden of proof," which can also be discerned in the provisions of the Evidence Act, although both are lumped together in the same section of the Act. Section 134 provides as follows:

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

It is clear from these provisions that "burden of proof" may refer to the ultimate burden of establishing a case or may refer to the burden of "producing evidence, whether at the beginning of a case, or any later moment throughout the trial."[2]

Before discussing these two different uses of "burden of proof" two points must be made. First, where a judge is sitting with a jury, it is the duty of the judge to point out to the jury the party on whom the burden of proof of the whole issue or of introducing evidence generally or with regard to a particular fact lies. As Lord Atkin said in *R.* v. *Basil Ranger Lawrence*,[3] "it is essential that a tribunal

[1] See, for example, *R.* v. *Oladipo Oshunbiyi* [1961] All N.L.R. 453.
[2] Thayer, *Preliminary Treatise on Evidence at the Common Law*, p. 355.
[3] (1932) 11 N.L.R. 6 at 7 (P.C.).

of fact must understand this. Unless the judge makes sure that the jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence." But it is more usual in this country for the judge to sit without a jury to try very important cases including capital offences. The Federal Supreme Court held in *Ade Bello* v. *Inspector-General of Police*[4] that in such a case, and also in a case where a professionally qualified magistrate tries a case, it must be assumed that the judge or the magistrate, as the case may be has in mind the elementary principle of the burden of proof but that it is open to an appellant to negative this assumption, if he can, from the terms of the judgment. But where a lay magistrate hears a case he must show it clearly in his judgment that he is well aware of the person on whom the burden of proof in either sense lies. The second point is that it is not necessary for a person on whom the burden of proof lies even in criminal cases to call every available evidence in order to discharge that burden, provided he has tendered sufficient evidence in discharge of the burden. In *Joshua Alonge* v. *Inspector-General of Police*,[5] the appellant was convicted of forgery on the evidence of one witness supported by certain corroborative facts. It was held that failure of the prosecution to call an expert witness who had examined the forged document was not fatal to the conviction. We should now turn our attention to a consideration of the first use of the phrase "burden of proof."

95. General Burden of Proof

The first use of the term "burden of proof" is, as has been pointed out, the ultimate burden of establishing a case, the burden as disclosed on the pleadings. To begin with, reference must be made to section 22 (4) of the Constitution of the Federation[6] which fixes the general burden of proof in criminal cases. It provides as follows:

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:[7] .
>
> Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts."

[4] (1956) 1 F.S.C. 48; 1955–56 W.R.N.L.R. 108.
[5] (1959) 4 F.S.C. 203.
[6] Act No. 20 of 1963.
[7] Presumption of innocence is discussed in §113, *post*.

Here we are concerned with the substantive provision which throws the general burden of proof in criminal cases on the prosecution. (We shall discuss the proviso later.) In general, the burden of proof in the present sense, lies on the party who would fail if no evidence were led at all by both parties. Above quoted provision of the Constitution covers criminal cases whilst section 135 of the Evidence Act is of general application. The section provides that:

> "the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

In civil cases this will be fixed by the pleadings. This is a question of law for the judge to decide, and the person on whom the burden lies must first state his case.[8]

As we have pointed out, the burden of proof in criminal cases remains on the prosecution and never shifts. This is a fundamental right guaranteed to all who may appear before any court in Nigeria on a criminal charge. As we have seen whereas the burden of proof of particular facts may be on the accused, this general burden lies on the prosecution and never shifts. In *R.* v. *Basil Ranger Lawrence, supra,* Lord Atkin pointed out that in criminal cases,

> "the true direction would be that the onus was always on the Crown . . . (and) it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt . . ."

Thus it was held in *R.* v. *Ani Nwokarafor & Ors.*[9] that where there was evidence of a fight between two persons and no evidence one way or the other as to what actually happened leading to the death of one of them, the benefit of the doubt thus created must be given to the accused. In *Amos Adetola* v. *R.*[10] the deceased was found lying on the ground with a deep cut across the throat in a room occupied by the deceased; the appellant was found helping her. The appellant was later arrested and charged with the murder of the deceased, and he put up the defence that the deceased committed suicide. It was held that as the general burden of proof lay on the prosecution, this must include the elimination of the possi-

[8] See Western Nigeria High Court (Civil Procedure) Rules, 1958, O. 26, r. 11; Eastern Nigeria High Court Rules, 1955, O. 42, r. 2; and Supreme Court (Civil Procedure) Rules, O. 41, r. 2 (Vol. X, 1948 Laws of Nigeria).

[9] (1944) 10 W.A.C.A. 221.

[10] (1960) W.N.L.R. 5 (F.S.C.).

bility of suicide. As has been pointed out by Kester Ag. J. (as he then was) in *Cyril Areh* v. *Commissioner of Police*,[11]

> "it is a principle of law that the burden of proof lies upon the party who substantially asserts the affirmative of the issue and generally in criminal cases (unless otherwise directed by Statute) the presumption of innocence casts on the prosecution the burden of proving every ingredient of the offence."

In civil cases, the ultimate burden of establishing a case is as disclosed on the pleadings. The person who would lose the case if on completion of pleadings and no evidence is led has the general burden of proof. In *Ededem Archbong* v. *Ntoe Asim Ita*,[12] the appellant's tribe claimed against the other two tribes of the town, exclusive ownership of an island of about four square miles and called witnesses who gave traditional evidence of user of isolated places. It was held that the burden of proof of ownership of the island was on the appellant and that the burden could not be discharged by evidence of a portion of it which might raise a probability but not a presumption of ownership of the whole. The West African Court of Appeal said: "The onus is on the plaintiff throughout to prove the title which he seeks to have confirmed. That onus never shifts. It is not sufficient for the plaintiff in such an action to show possession and argue that the defendant has proved no better title."[13] Similarly, in *Angelina Arefunwon & Ors.* v. *Sally Shola Barber & Ors.*,[14] the Privy Council approved the view expressed by the Federal Supreme Court that the burden of proving title to land by long possession lay on him who alleged it. In *Registered Trustees of the Nigeria Union of Teachers* v. *Sankey*,[15] one Cole, who had a lease of Crown land, gave a sub-lease of it to the defendant. The plaintiffs claimed possession on the ground that the lessee had mortgaged his interest to another person before giving the sublease to the defendant and that the other person had exercised his power of sale and conveyed the residue of the lessee's term to the plaintiffs. The only evidence adduced by the plaintiffs was the deed of conveyance executed by the mortgagee reciting that a mortgage had been made to them by the lessee and that they had exercised their power of sale, the plaintiffs submitting that it was for the

[11] (1959) W.R.N.L.R. 230 at 231.
[12] (1954) 14 W.A.C.A. 520.
[13] *Ibid.* at p. 522. See also *Nto Ekpo Eta* v. *Chief Eta Eta Ita* (1932) 11 N.L.R. 68 (Full Court) and *Odesanya* v. *Ewedemi* [1962] All N.L.R. 320.
[14] [1961] All N.L.R. 887.
[15] (1951) 20 N.L.R. 23.

defendant to dispute the mortgage and the propriety of the sale. It was held that the burden was on the plaintiffs to show that the assignment to them by the mortgage was valid and effective and that the sub-lease granted by the lessee to the defendant did not bind them or was void. In *Alhaji Elias* v. *Olayemi Disu & Ors.*[16] the plaintiffs brought the action against the defendants to set aside the sale and conveyance of a piece of their family land by some members of the family on the grounds that they did not consent to the sale. The trial court held that the onus of proving that the plaintiffs consented to the sale was on the defendants. The Supreme Court, however, reversed this judgment and held that the onus was on the plaintiffs and since after hearing all the evidence, the trial judge was not satisfied that the plaintiffs did or did not give their consent, the plaintiffs had failed to establish their case. Section 135 applied and there could be no shifting of burden of proof under section 136. In *Dawodu* v. *Solanke,*[17] the plaintiff sought to recover possession of premises let to the defendant on the ground that suitable alternative accommodation was available to the defendant under section 13 (1) (*b*) of the Rent Restriction Act.[18] It was held that the burden of proving the availability of suitable alternative accommodation was on the plaintiff. In *Fuji Trading Co., Ltd.* v. *Registrar of Trade Marks,*[19] the defendant refused to register a trade mark submitted by the plaintiff on the ground that it so nearly resembled another trade mark relating to goods of the same description as to be likely to deceive or cause confusion. It was held that the burden of proving the absence of reasonable probability of deception under sections 15 and 25 of the Trade Marks Act[20] was on the plaintiff.[21] In *Johan Arnold Joseph Nunnik* v. *Costain Blaneevoort Dredging, Ltd.*,[22] the defendant dismissed the plaintiff, their employee, for incompetence. It was held that the burden of proving incompetence of the plaintiff was on the defendants.

As Madarikan J., said in *Ogunsami* v. *C.F.Furniture (W.A.) Co., Ltd.*[23] "incompetency is obviously a ground for summary dismissal (of a servant). Where a master has dismissed his servant summarily for lack of skill the onus is on the master to prove to the satisfaction of the judge that his servant was incompetent." In *John Ihekwoaba*

[16] [1962] All N.L.R. 214.
[17] 1956 L.L.R. 15.
[18] Cap. 183.
[19] 1960 L.L.R. 50.
[20] Cap. 199.
[21] See also *Henkes' Distillery* v. *Netherlands Distilleries* (1933) 11 N.L.R. 76.
[22] 1960 L.L.R. 90.
[23] (1961) W.N.L.R. 327.

v. *The Commissioner of Internal Revenue*,[24] the plaintiff, in the absence of detailed information as to his annual income, was assessed for tax by the defendant. It was held that the burden of proving that the assessment was excessive under sections 17 (3) and 18 of the Eastern Nigeria Finance Law[25] was on the plaintiff. In *Sunday Josiah Ogie* v. *Edo Uke & Anor*.[26] it was held that in a suit for damages for malicious prosecution, the burden is on the plaintiff to prove absence of reasonable and probable cause even though there is evidence of malice. In *Alhaji Wada* v. *Chief Alkali of Birmin Kebbi*[27] the plaintiff sued the defendant, an Alkali, in respect of acts done in the exercise of his power as an Alkali under the Northern Nigeria Native Courts Law, 1956,[28] section 8 of which gives the defendant exemption from civil liability for acts done in the exercise of his powers as a court except such acts as are not done in good faith. It was held that the burden lay on the plaintiff to prove that the defendant did not act in good faith.

Reference must be made to divorce cases. In *Regina Olufunmilayo Thompson* v. *Samuel Olajide Thompson*,[29] it was held that where one spouse seeks divorce from the other on the grounds of adultery, the burden of proof is on the petitioner and where there is evidence that the adultery has been condoned, the burden is also upon the petitioner to disprove such condonation. In *Olufela Sowande* v. *Mildred Sowande*,[30] a petition for divorce on the ground of desertion, Dickson J. cited with approval the following dictum of Denning L.J. in *Dunn* v. *Dunn*:[31]

> "The legal burden throughout this case is on the husband as petitioner to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause but it is not bound to do so. Once he proves the fact of refusal she may seek to rebut the inference of desertion by proving that she had just cause for her refusal. . . . Even if she does not affirmatively prove just cause, the court still has, at the end of the case to ask itself: is the legal burden discharged?"

[24] (1958) 3 F.S.C. 67.
[25] Law No. 1 of 1956.
[26] 1957 W.R.N.L.R. 46.
[27] 1962 N.R.N.L.R. 76.
[28] Cap. 78 of the Laws of Northern Nigeria, 1963.
[29] [1961] All N.L.R. 496.
[30] 1960 L.L.R. 58 at 61.
[31] [1949] P. 98.

96. Burden of Introducing Evidence: Civil Cases

The more usual sense in which the term "burden of proof" is used is in the sense of introducing evidence—it is in fact evidential burden. In this sense the burden rests upon the person who substantially asserts the affirmative before evidence is gone into; after evidence is gone into, the burden of proof rests on him who would lose if no further evidence is called. In many cases, and these are the more usual cases, the burden of proof in the first sense, that is, the legal burden of proof and the burden of proof in the second sense, that is, evidential burden of proof, may rest on the same person, usually the plaintiff. Where this is so the satisfaction of the evidential burden by the plaintiff, may shift onto the defendant the burden of introducing evidence which if believed will defeat the claim of the plaintiff. In *Babafunke Johnson & Anor.* v. *Akinola Maja & Ors.*[32] the plaintiffs who were the executors of a will asked the court to declare in solemn form for the will and the codicil of the testator. The widow challenged the will on the ground that it was not properly executed. It was held that in a case of this nature the burden was on the plaintiff to show prima facie that the will is in order; but that thereafter the burden is cast upon those who attack the will to prove affirmatively the charges made against the will.

The principle involved is as laid down in section 136 of the Act. It provides as follows:

"(1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

(2) If such party adduces evidence which ought reasonably to satisfy a jury that the facts sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all the issues in the pleadings have been dealt with."

With regard to section 136 (1), this sub-section places the burden of introducing evidence on the person who would fail if after the pleadings no evidence were called on either side. In *Olu Akinfosile*

[32] (1951) 13 W.A.C.A. 200.

v. *Ijose*,[33] the petitioner in an election petition submitted that once he had shown the non-compliance with the regulations he needed not to show that such non-compliance did not affect the result of the election. Now Regulation 7 (1) of the Regulations[34] provided that

> "an election shall not be invalidated by reason of non-compliance with the (Regulations[35]) if it appears to the court . . . that the election was conducted substantially in accordance with those Regulations, and that the non-compliance did not affect the result of the election."

It was held that "a petitioner who alleges in his petition a particular non-compliance and avers in his prayer that the non-compliance was substantial, must so satisfy the Court."[36] In *Agbokaba* v. *Meka*,[37] the plaintiff (a licensed chemist and druggist) supplied the defendant with drugs on credit over a period of time. Some of the drugs were poisons as defined by Part III of the First Schedule to the Pharmacy Act.[38] The defendant contended that the supply of the poisons was illegal under section 32 (1) of the Act. It was, however, held that as the contract between the plaintiff and the defendant for the supply of the poisons was not on its face illegal, the onus lay on the defendant to prove the illegality. The case, *Dikey* v. *Odeniyi*,[39] was an action for libel brought by the plaintiff against the defendant for writing a letter to the chairman of the education committee of a local government council, which was the proprietor of the school where the plaintiff was a headmaster, which letter alleged immoral behaviour against the plaintiff. It was held that the occasion of the publication being privileged, the onus was on the plaintiff to prove malice. In *Akinlola Oloto* v. *Administrator-General & Ors.*,[40] it was held that where the owner of a piece of land brought an action to recover possession thereof, the defendants being in possession, the burden of proof of their right to possession lay on the defendants. This must be distinguished from the case where ownership is being claimed against a person in possession of the land which will come under section 145 of the Act. That section provides that:

[33] (1960) 5 F.S.C. 102; 1960 W.N.L.R. 160.
[34] Federal Legislative Houses (Disputed Seats) Regulations, 1959, L.N. 247 of 1959.
[35] Elections (House of Representatives) Regulations, 1958, L.N. 117 of 1958.
[36] (1960) 5 F.S.C. at 199.
[37] (1962) N.R.N.L.R. 1.
[38] Cap. 152.
[39] (1960) W.N.L.R. 102.
[40] (1946) 12 W.A.C.A. 76.

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner."

The principle in the decided cases cited above and in section 136 (1) is, however, subject to the existence of any presumptions which may arise on the pleadings. The existence of a presumption may cast the burden of proof on a party who otherwise would not have had the burden cast on him on the pleadings. In *Debo Sowande Olaiya* v. *Josiah Folorunso Ososami*,[41] the plaintiff sued the defendant for negligence alleged committed by the defendant's servants or agents. A crane which was being operated by the servants or agents of the defendant in the course of building operations carried on by the defendant fell on the plaintiff whilst making use of a public path normally used by members of the public. On these facts it was held that the maxim *res ipsa loquitor* applied to put the onus on the defendant to disprove negligence. In *Dickson Igbokwe & Ors.* v. *University College Hospital Board of Management*,[42] the deceased who was an in-patient in the defendant's hospital, was one night discovered missing from her bed. She had just given birth to a baby and was diagnosed as a suspected case of post-natal psychosis. She had been given some sedative, and the doctor on duty had instructed a staff nurse to keep an eye on her. It was held that the facts of this case raised the presumption of negligence, and the maxim *res ipsa loquitor* put the onus on the defendant to disprove negligence. In *Robert Ude* v. *Bonjust*,[43] the defendant who occupied the floor above the plaintiff's shop and store, went away leaving his servants behind and the premises in the charge of a friend. Water seeped through the floor above. There was evidence that the tap was not defective but that someone had let it run thus causing an overflow. It was held on these facts that the onus was on the defendant to prove facts inconsistent with liability, there being a presumption that the accident had been caused by negligence on the part of someone for whom he was responsible. But where this presumption cannot be drawn, the burden of proof remains where it lay on the pleadings. In *Lagos Municipal Transport Service* v. *Peter Ibechim*,[44] a pedestrian who was walking along the road was struck by a piece of metal which flew out when

[41] (1959) W.R.N.L.R. 264.
[42] (1954) 14 W.A.C.A. 533.
[43] (1961) W.N.L.R. 173.
[44] 1961 L.L.R. 146.

the tyre of a bus belonging to the appellants burst. The pedestrian sued in negligence. It was held that the maxim *res ipsa loquitor* did not apply in a case of this nature because the mere bursting of a tyre was not more consistent with negligence on the part of the driver than with other causes and that therefore the burden to prove negligence remained on the respondent. In *Dahiru Cheranci* v. *Alkali Cheranci*,[45] the applicant sought a declaration that certain sections of the Northern Nigeria Children and Young Persons Law, 1958,[46] were void as being repugnant to certain fundamental human rights provisions of the constitution. Bate J., said that "it seems to me that the presumption in favour of constitutionality throws the burden of proof on the person who alleges that the Legislature has infringed a fundamental human right."[47] A detailed discussion on presumptions will be found in the next chapter, and it is only necessary here to state that "where there are conflicting presumptions the case is the same as if there were conflicting evidence"[48] and the court will have to resolve the conflict as it does when there are conflicts in evidence.

Generally where there is a question as to the good faith of a transaction between parties, the burden of proving bad faith rests on him who alleges bad faith, but where one of the parties stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence (s. 146). Such positions of active confidence must include that of parent and child, guardian and ward, a person and his religious adviser, doctor and patient, solicitor and client.

Another provision of the Act which requires special mention is the provision of section 144. That section provides that:

> "When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it."

Finally reference must be made to section 138 of the Act. Sometimes it is necessary for a fact to be proved before another can be

[45] 1960 N.R.N.L.R. 24.
[46] Cap. 21 of the Laws of Northern Nigeria, 1963.
[47] *Ibid.*, at p. 29.
[48] S. 136 (3) of the Act.

admitted; and sometimes the proof of a particular fact may make another fact inadmissible. The section provides that in such cases the burden of proof lies in the first case on the person who wishes to adduce the evidence and in the second case on the person who wishes to prevent the admission of the other evidence (subs. (1)). Subsection (2) rather superfluously, provides that the court is to determine the existence or non-existence of facts relating to the admissibility of evidence under the section.

97. Burden of Introducing Evidence: Criminal Cases

In all cases the burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of section 140 of the Act to be discussed later, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action (s. 137 (2)). And if the commission of a crime is directly in issue in any civil or criminal proceeding it must be proved beyond reasonable doubt (s. 137 (1)). The Act then goes further to provide that "if the prosecution prove the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on the accused." (s. 136 (3)). This provision is very confusing as it may be taken to mean that *after* the prosecution has proved a case beyond reasonable doubt, the defence will then have to cast reasonable doubt on the case for the prosecution. This is not so. It is not correct to say that the prosecution has proved its case beyond reasonable doubt until the case for the defence has been considered along with that for the prosecution. What the provision means is no more than that at the end of hearing evidence for the prosecution and the defence, the court must discharge the accused if there is reasonable doubt of the guilt of the accused no matter whether the doubt arises from the evidence given for the prosecution or from evidence given for the defence. In *R.* v. *Mohammed Bada & Anor.*,[49] B was driving at a great speed, a lorry with a left-hand drive, and A was seated in his right. X, a cyclist coming from the opposite direction, was forced to his left-hand side and dismounted. In passing, A hit X with a stick. X fell against the rear of the lorry and was killed. It was held that the prosecution had a duty to prove not merely that A and B might have been acting in concert but that they were in fact so acting; that as B's action was explicable as due to unskilful driving, the

[49] (1944) 10 W.A.C.A. 249.

inference of concerted action on the part of A and B was not inescapable and that the doubt which thus existed must be resolved in favour of the accused persons.

98. The Shifting of Burden of Proof

Apart from a few exceptions to be discussed later, the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence but the burden may in the course of a case be shifted from one side to the other (s. 138). *Aouad* v. *Nzimiro & Anor.*,[50] provides a good example. The plaintiff and the defendants entered into a partnership agreement under which the plaintiff supplied goods to the defendants for sale on behalf of the partnership. When stock was taken, a shortage was discovered. The plaintiff thereupon sued for the recovery of this shortage. It was held that once the plaintiff established the shortage, the onus shifted on the defendants to account for it. In *John Brown Akoso* v. *Commissioner of Police*,[51] the appellant was convicted of stealing and an order of restitution with respect to the sum alleged stolen by him was made by the court. He did not appeal against the conviction but against the order. It was held that in this type of a case, the burden is on the prosecution to prove the identity of the property but that the burden of introducing evidence may shift and in this case had shifted on the accused. But this rule of evidence cannot be used to shift from the prosecution the onus which is on it to prove every ingredient of the offence. In *R.* v. *William Powell Reigles*[52] the accused was charged with fraudulent appropriation in accounting in his capacity of director of a company. It was proved that cement belonging to the company had been sold by the accused as his personal property. The trial judge held that upon such proof, the onus was upon the accused to show how and when the cement became his property. It was held that in so holding the trial judge was in error.

In all these cases, in considering the amount of evidence necessary to shift the burden of proof regard must be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively (s. 138). In addition in criminal cases, the burden of proof of certain facts are, by law put on the defence. These cases will be discussed, along

[50] (1944) 10 W.A.C.A. 73.
[51] (1950) 13 W.A.C.A. 43.
[52] (1982) 11 N.L.R. 83.

with the means by which the burden can be discharged, in paragraph 100 below.

99. Criminal Cases: Discharge of the Burden: The Prosecution

As we have pointed out the legal burden of proof in criminal cases is on the prosecution and never shifts. This burden can only be discharged by proving the guilt of the accused beyond reasonable doubts as provided in section 137 (1) of the Act. This is a principle of the English common law, re-affirmed in 1935 by the House of Lords in *Woolmington* v. *Director of Public Prosecutions*[53] where, in a charge of murder, Lord Sankey L.C., said that

> "if, at the end of and on the whole case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with malicious intentions the prosecution has not made out the case and the prisoner is entitled to an acquittal."

This same principle had three years earlier been pronounced by the Privy Council in the Nigerian case, *R.* v. *Basil Ranger Lawrence*[54] where Lord Atkin said ". . . it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established by the prosecution beyond reasonable doubt."

This principle makes it incumbent upon the prosecution to prove every ingredient of the offence. In *R.* v. *Sam Mofor*,[55] the trial judge found that the appellant had entered a dwelling house "for an illegal purpose" on a charge of entering the dwelling house with intent to commit a felony. It was held that it being of the essence of the offence that there should be an intent to commit a felony, the conviction was unwarranted in the absence of a proper finding to that effect.[56] But in some cases, the evidential burden of proving certain facts is thrown upon the accused. Such cases will be discussed in the next paragraph but before doing so it is well to remember that in the cases in which the evidential burden is thrown on the accused, the obligation on the prosecution to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the

[53] [1935] A.C. 462 at 481.
[54] (1932) 11 N.L.R. 6 at 7.
[55] (1944) 10 W.A.C.A. 251.
[56] *Cf.*, *Inspector-General of Police* v. *Hilary Ewekay*, 1957 L.L.R. 11.

person accused is charged, is not thus prejudiced or diminished (s. 140 (3) (*a*)).

100. Criminal Cases: Discharge of the Burden: The Defence

In some cases the burden of proving certain facts is thrown upon the accused. As we have seen provision is made for this under the Constitution, section 22 (4) of which provides that:

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:
>
> Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts."

The following cases will properly come within this proviso:

(i) The burden of proof of intoxication or insanity is on the accused (s. 140 (3) (*c*); *Matthew Onakoya* v. *R.*[57]). This the accused can discharge by evidence coming from the prosecution or from the defence. It is the responsibility of the judge where he sits without a jury, to decide whether an accused person was sane or insane in the legal sense.[58]

(ii) The burden of proof of facts especially within the knowledge of the accused is on him. Thus in *Christopher Otti* v. *Inspector-General of Police*,[59] it was held that, on a charge of carrying on business as a money lender without being in possession of a valid lender's permit,[60] the burden of proving that he had a licence was on the accused, as being a fact peculiarly within his knowledge. Similarly in a prosecution under sections 25 and 29 of the Medical Practitioners and Dentists Act,[61] for administering drugs without a licence or qualifications, the burden is on the accused to prove his licence or qualifications.[62] But in a criminal charge of this nature if the fact is equally within the knowledge of the accused and that of the prosecution, then the prosecution will still have to prove it. In *Abdulai Kolade Joseph* v. *Inspector-General of Police*,[63] the appel-

[57] (1959) 4 F.S.C. 150.
[58] *Att.-Gen. Western Nigeria* v. *Phillip Upetire*, 1964 N.M.L.R. 25.
[59] 1956 N.R.N.L.R. 1.
[60] *Contra* s. 5 (*b*) of the Moneylenders Ordinance (Cap. 136 of the 1948 Laws of Nigeria), now s. 5 (*a*) of the Money Lenders Act, Cap. 124.
[61] Cap. 116.
[62] See *R.* v. *Nkwiyu*, unreported but see Port Harcourt Criminal Charge, No. 8/6c/62, noted in [1964] *Nigerian Law Journal*, p. 138.
[63] 1957 N.R.N.L.R. 170.

lant was convicted of taking part in an unlawful procession which was alleged took place without a licence.[64] In holding that the burden was on the prosecution to prove that no licence was issued by the police for the procession, Brown C.J. (North) said:[65]

> "The principle in *Otti's* case, *supra*, applies where the existence of the licence is especially within the knowledge of the person who is alleged not to have the licence, and in such a case the burden of proving its existence is upon him. But in the present case, the appellant was charged with taking part in an unlawful procession, and it cannot be said that the existence or otherwise of a licence is a fact which was peculiarly within his knowledge. That fact is within the knowledge of the police, who are charged with the duty of issuing the licences, and the burden of proving the fact that there was no licence is upon them."

But as it was pointed out by the Federal Supreme Court in *Mandillas and Karaberis, Ltd. & Anor.* v. *Inspector-General of Police*,[66] ". . . it is clear that section 141 of the Evidence Ordinance does not alter the principle that the charge upon which an accused person is arraigned must be proved by the prosecution." Where possession of poisonous matter without registration, licence or other authority is presumptive proof of intent to use it for an illegal purpose under section 60 of the Pharmacy Act,[67] the prosecution has to prove lack of registration, licence or authorisation, as otherwise the accused will be forced to prove his own lack of intent.[68]

(iii) Generally, the burden of proving the existence of circumstances bringing the case of an accused person within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged is upon him (s. 140 (1)). Thus the burden of proving, infancy, self-defence, provocation, etc. is on the accused. In *Simi Johnson* v. *Commissioner of Police*,[69] the appellant who held a learner's permit, and had passed

[64] *Contra* s. 38 (*a*) of the Police Ordinance (Cap. 172 of the 1948 Laws of Nigeria), now s. 20 (*a*) of the Police Act, Cap. 154.
[65] 1957 N.R.N.L.R. at 172.
[66] (1958) 3 F.S.C. 20 at 22; 1958 W.R.N.L.R. 241 at 244.
[67] Cap. 152.
[68] See *Inspector-General of Police* v. *Okpan*, unreported, but see Port Harcourt Criminal Charge No. P/28A/1962, noted in [1964] *Nigerian Law Journal*, p. 138.
[69] (1960) W.N.L.R. 118.

her driving test, but had not obtained her driving licence, was found driving a vehicle. On a charge under section 7 (1) of the Road Traffic Act[70] it was held that the burden of proof that her case came within the proviso to the section was on her.

In all these cases, however, the burden which is on the accused is different from that which is on the prosecution to prove a case beyond reasonable doubts. Section 140 (2) of the Act provides that:

> "The burden of proof placed by this Part upon an accused charged with a criminal offence shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether on cross-examination or otherwise, that such circumstances in fact exist."

In *Matthew Onakoya* v. *R.*[71] the Federal Supreme Court said:[72]

> "The burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt; and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."[73]

But it was said in the case that the following direction by the lower court was unduly favourable to the accused person: "The prisoner need do no more than adduce evidence (draw attention to the evidence adduced by the prosecution) which raises in the minds of the jury a reasonable doubt as to his sanity." In *Chairman of the Board of Customs and Excise* v. *Ayo Baye*,[74] the accused was charged with knowingly, and with intent to defraud the Government of duty payable on certain goods, acquiring possession of them contrary to section 145 (*a*) of the Customs and Excise Ordinance, 1958.[75] It was held that the burden of disproving knowledge and intent to defraud which rested on the accused by virtue of section 68 of the Ordinance was less than that required of the prosecution in criminal cases. Fatayi-Williams J., said that "it is in fact, analogous to that laid on the plaintiff or defendant (as the case may be) in a civil action."[76] In *R.* v. *Yaro Biu*,[77] on a charge

[70] Cap. 184.
[71] (1959) 4 F.S.C. 150.
[72] Following *R.* v. *Carr-Briant* (1943) 29 Cr. App. R. 76.
[73] See also *R.* v. *Echem* (1952) 14 W.A.C.A. 158 at 160; *R.* v. *Michael Ogor* [1961] All N.L.R. 70 at 75, and *R.* v. *Jimoh Osumah*, 1957 W.R.N.L.R. 18.
[74] (1960) W.N.L.R. 178.
[75] Ord. No. 55 of 1958.
[76] (1960) W.N.L.R. at 181.
[77] 1964 N.N.L.R. 45.

for culpable homicide punishable with death contrary to section 220 of the Penal Code, the accused's defence was one of insanity under section 51 of that Code. It was held that although the burden of proving insanity lay on the accused, that burden could be discharged by the accused tendering evidence suggesting that it was "most probable" that he was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law.[78]

101. Civil Cases: Discharge of the Burden

Generally in civil cases it is the duty of the court to weigh the whole evidence and give judgment for the party in whose favour there is a preponderance of evidence. The burden of proof on the plaintiff in a civil case is not to establish a case beyond a reasonable doubt. It is only to establish that his story is more likely to be true than the defendant's. It must be noted, however, that this does not affect the substantive law or a rule of evidence which may require a party to a case to prove certain facts or to prove others beyond a reasonable doubt. For example if the commission of a crime by a party to a civil case is directly in issue, section 137 (1) of the Evidence Act stipulates that the other party must prove it beyond a reasonable doubt. As Unsworth F.J., pointed out in *Benson Ikoku* v. *Enoch Oli*[79]

> "the subsection only applies where there is a specific allegation of a crime in the pleadings so that the commission of a crime can properly be said to be a basis or foundation of the claim or defence as the case may be. For example, the subsection would apply where a defendant in an action for libel pleaded justification of an allegation that the plaintiff had committed a criminal offence or where a petitioner sought divorce under the Matrimonial Causes Act, on the grounds of rape, sodomy or bestiality."

In all these cases the party relying on the alleged offence must have to prove it beyond a reasonable doubt. Barring this type of case, however, the proof required in a civil case either to establish a case, or in defence of a case, is never as high as that required of

[78] Following *R.* v. *Carr-Briant, supra*; *R.* v. *Echem, supra*; *R.* v. *Ashigifuwo* (1948) 12 W.A.C.A. 390; *R.* v. *Yayiye of Kadi Kadi*, 1957 N.R.N.L.R. 207.
[79] [1962] All N.L.R. 194, at 199–200.

the prosecution in a criminal case to establish its case. In *Atedoghu* v. *Sanni Alade*[80] (a running down case) Ademola C.J. (West as he then was) said: "This, not being a criminal case, I hold the view . . . that it was not particularly necessary to prove the direct cause of death. It was enough that the accident or collision was the primary cause of her death; that she died as a result of the accident."

102. Matrimonial Causes: Discharge of the Burden

The standard of proof required for matrimonial offences, it must be pointed out, is different from that required in other civil cases. In *Olufela Sowande* v. *Mildred Sowande*,[81] Dickson J., said that "desertion must be strictly proved. . . . There can be no doubt that the burden is high." How high the burden is, was not indicated by the learned judge but it would appear that it is as high as that required to prove criminal cases. In *Onun Etem Ikpi* v. *Jenny Jonah Ekpiken Ikpi*.[82] Ademola C.J. (West as he then was) said that the standard required to prove adultery is a high one. At the same time, it is up to the court to consider in every case, the facts before it as well as the circumstances.[83] And in *Modupe Oloko* v. *Simeon Olatunde Oloko & Anor.*,[84] Irwin J., said that "the standard of proof in a case of adultery is not less high than in a criminal case."[85] This, with respect, would appear to be the correct position, not only in charges of adultery but also with respect to other matrimonial charges. The facts of the case are that in this cross-petition by the husband for divorce on the ground of adultery, it was established that the cross-petitioner lived in a different town from his wife and that he was in the habit of visiting her at intervals of about one week, the morning of the alleged adultery having fallen on a week-end when such a visit was probable. The evidence adduced in support of the allegation of adultery was *inter alia* to the effect that when he visited her in the morning in question in the company of a witness, he found the door unlocked, saw her running out of the bedroom half-dressed, and met another man lying on the bed; that when the allegation was made by him in the

[80] 1957 W.R.N.L.R. 184, at 186.
[81] 1960 L.L.R. 58 at 61.
[82] 1957 W.R.N.L.R. 59.
[83] See also *Letitia Effuah Lewis* v. *Richmond Babatunde Lewis*, 1960 L.L.R. 215.
[84] (1961) W.N.L.R. 101.
[85] Following the English cases *Ginesi* v. *Ginesi* [1048] P. 179; and *Galler* v. *Galler* [1954] P. 252.

presence of her and another witness, she did not deny it; and also that another witness's questions put to the other man had not been answered. It was held that while there was suspicion, the evidence on the whole fell short of proof that is required by law in a case of adultery.

CHAPTER 16

PRESUMPTIONS

103. Meaning of Presumptions

Neither the Evidence Act nor any other statute of general application has defined the word "presumption" even though a large number of sections[1] of the Act is devoted to a presumption as to some documents or matter or the other. A close study of the Act, however, shows that the word "presumption" in some cases means no more than that a certain conclusion must be drawn by the court until the contrary is proved. This is borne out by section 4 (b) of the Act which provides that,

> "wherever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

In this case if no proof to the contrary is offered and accepted by the court then the fact must be taken as proved. In some other and more frequent cases, it is used to indicate a conclusion which may be drawn unless it is disproved. This is also borne out by section 4 (a) of the Act which provides that,

> "whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved unless and until it is disproved, or may call for proof of it."

In this case the court is not compelled to draw the conclusion and if it is not disposed to drawing the conclusion then it will call for proof of it from the party in whose favour the conclusion would have been drawn. If that party does not supply the evidence then the court is free to draw or not to draw the conclusion.

104. Classification of Presumptions

The orthodox classification of presumptions by writers on the English common Law is usually into presumptions of fact and presumptions of law.[2] This classification has, however, been criti-

[1] See, for example, ss. 112–130, 143, 149, etc.
[2] See Cross, *Evidence*, 2nd ed., p. 105; and *Phipson on Evidence*, 9th ed., p. 4.

cised by Lord Denning[3] on the ground that it is very difficult to draw the line between both and furthermore that the distinction does not connote any difference in the legal effects of the presumptions. Although these are, with respect, valid criticisms, it is nevertheless true that the classification is convenient and can be used in the cases of the presumptions under the Act. Still following the orthodox method of classification, it must be pointed out that presumptions of law can be further divided into irrebuttable and rebuttable presumptions. This usual method of classification will be followed in the discussion that follows but it must be pointed out that some other writers have suggested other methods of classification.[4] It is submitted with the greatest respect that most of the disagreements on this score are rather of form than of substance and we need not dwell on them here.

It must be noted, however, that it is sometimes exceedingly difficult to distinguish between rebuttable presumptions of law and presumptions of fact. They can be distinguished as follows: (a) A presumption of fact is one which is dependent upon logical reasoning and which a court is free to draw if it so likes. A presumption of law on the other hand is one prescribed by the law, and which must be drawn in the absence of any evidence to the contrary. (b) The conditions of the application of a presumption of law are fixed and uniform and in consequence it alters the burden of proof of an issue whilst the application of a presumption of fact is governed by the facts of each case and does not necessarily alter the burden of proof. (*c*) Presumptions of law are drawn by the judge whilst presumptions of fact are drawn by the jury who may refuse to apply a presumption in a particular case.

105. Presumptions of Fact

A presumption of fact is the logical inference of the existence of one fact from the proved existence of other facts. In most cases it exists as an example of circumstantial evidence. In all cases of presumptions of fact, the court is free to draw a particular inference from proved facts. The court is not. however, obliged to draw the inference even though no further evidence in rebuttal is offered by the party to be affected by the inference. Section 148 of the Act provides that:

[3] (1945) 61 L.Q.R. 379 at 382.
[4] See Glanville Williams, *Criminal Law*, 2nd ed., §§286–289.

> "the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business in their relation to the facts of the particular case."

This section goes on to give special applications of this presumption which will be discussed in their proper places later in this chapter. In criminal and civil cases alike the judge is free to direct the jury to draw the inference as reasonable men but in the latter a verdict contrary to such direction may be set aside.

The most usual presumptions of fact will now be discussed.

106. Presumption of Intention

A rule for inferring from facts which are proved the intention of the actor has been developed by the courts, and it is briefly stated thus; a man is presumed to intend all the consequences likely to follow directly from his conduct.[5] For example in *R.* v. *Adema Arubi*,[6] a man, who posted a letter containing a criminal libel, was held to have delivered it with intent that it should be read by the addressee. Similarly it was held in *Maye Nungu* v. *R.*[7] that a man who struck another on the head with a heavily weighted haft of an axe thus causing the death of the latter, was presumed to have intended to kill him. A further discussion on this topic being out of place in a book on the law of evidence, all that need be added is that like all other presumptions of fact, this presumption is a rebuttable one.[8]

107. Presumption of Guilty Knowledge

The offences of receiving stolen property under section 427 of the Criminal Code or dishonestly receiving stolen property under section 317 of the Penal Code both require that the offender must have the requisite guilty knowledge, that is, the knowledge that the property had been obtained by means of any act constituting a felony or misdemeanour in the former case, or obtained by theft, extortion, robbery etc. in the latter case. Under the present heading there is a presumption of this requisite guilty knowledge if it is

[5] *Phillip Dim* v. *R.* (1952) 14 W.A.C.A. 154 at 155.
[6] (1938) 11 N.L.R. 27.
[7] (1953) 14 W.A.C.A. 379.
[8] For a detailed discussion on this presumption in the criminal law, see the author's *Principles of Criminal Liability in Nigerian Law* (1965), pp. 46 *et seq.*

proved that the property has been recently stolen. Under section 148 (a) of the Act, it is presumed that:

> "a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

In *R.* v. *Isa Braimoh & Anor.*,[9] the West African Court of Appeal held that the second accused must be presumed to have guilty knowledge that some goods were stolen because the thief, the first accused, who had just left the prison where the second accused was warder, had lodged with him, and he the second accused had, shortly after the goods were stolen, sent them to his brother in another town with the instruction to sell them "at any prices that you think good." Similarly in *R.* v. *Palmer Iyakwe*[10] it was held that the fact that the accused was found in possession of goods stolen through burglary five months after, attempting to sell them, raised the presumption of guilty knowledge but not a presumption that he was the burglar. But in *R.* v. *Sunday Jumbo*,[11] it was held that the accused who was found to be in possession of stolen goods as a result of burglary committed a few hours earlier could be presumed to be the burglar.[12] In *Lawani* v. *Police*,[13] it was held that the presumption of guilty knowledge could not be properly made on the facts of the case which were as follows: A motor lorry had been stolen and its wheels, complete with tyres, were removed. Two of the wheels were brought to the shop of the accused, a tailor, who later sold them to the other accused person a lorry driver, who was the appellant in this case. The appellant had made enquiries from the tailor who had given him some explanations as to how he came by them.

The general principle is that a court, or where there is a jury, the jury, may infer guilty knowledge where the accused gives no explanation as to how he comes to be in possession of goods recently stolen or if the jury are satisfied that the explanation he has given is untrue. But if the court, or the jury as the case may be, are left in doubt as to whether the accused person knows or does not know that the goods were stolen, then he is entitled to an acquittal.

[9] (1948) 9 W.A.C.A. 197 at 199. See also *Otto George Gfeller* v. *R.* (1943) 9 W.A.C.A. 12 (P.C.).
[10] (1944) 10 W.A.C.A. 180.
[11] 1960 L.L.R. 192.
[12] See also *R.* v. *Michael Opara* (1961) W.N.L.R. 127.
[13] (1952) 20 N.L.R. 87.

108. Presumption of Continuance

One of the special applications of the presumption under section 148 is the presumption usually called presumption of continuance. Under subsection (b) of the section there is a presumption.

> "that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence."

One of the most common applications of this presumption is the presumption in favour of the continuance of human life. A person alive and healthy is generally presumed to be alive a short while after. The presumption has in fact been extended by the English courts by giving a rather wide meaning to the phrase "a short while after." This has been held to cover a period of eleven years[14] and even seventeen years.[15] It is submitted that the provisions of this subsection is so wide that the court will be justified in extending the phrase even much wider. For example, a young man of twenty in good health may be presumed to be still living forty or fifty years after whilst the period may not be so long in the case of a healthy man of fifty or sixty years of age.

In the offence of bigamy as defined by section 330 of Criminal Code and section 284 of the Penal Code, a spouse is free to marry another person if the other spouse has been absent for seven years and has not been heard of for that period. It is doubtful if this is a presumption of death; it is perhaps no more than a defence made open to an accused person by the legislature on grounds of expediency. The fact is, however, that there is a general presumption of death under section 143 of the Act, which is a rebuttable presumption of law, and will be discussed under that heading below.

This presumption can be made use of in some other cases. For example a building which was seen to be in good condition at a particular place will be presumed to continue to remain there for some period after; the proof that the building belonged to A at a point of time is admissible in proof that it belonged to him some time after. In *Chief Imam Ashaya Tijani* v. *Bishop Aboyade Cole*,[16] the plaintiff representing the Oloto family sought a declaration of

[14] *R.* v. *Willshire* (1881) 6 Q.B.D. 366.
[15] *R.* v. *Jones* (1883) 15 Cox C.C. 284.
[16] 1958 L.L.R. 58.

title to, and possession of, premises within the Glover Settlement Area in Lagos. The defendant and his ancestors were proved to have been on the land for over fifty years. It was held that the defendant's long possession raised a presumption that he is the owner and imposed on the plaintiff the burden of proving that the defendant was not the owner under section 145 of the Act. Similarly the proof that A was in a particular official post will raise the presumption that he continues in that post for sometime after, and the fact that A was the servant of X at a particular time raises the presumption that he continues as the servant of X some time after. In *Alhadji Rotimi* v. *Adegunle & Anor.*,[17] appellant hired a lorry and a driver from the first respondent. Whilst the lorry was being driven by the first respondent's driver with the appellant in it, it had an accident as a result of the negligence of the driver and the appellant was injured. It was held that the presumption was in favour of the driver's continuing to be under the control of the first respondent. In *Ojo Shamonda* v. *James*,[18] a car belonging to J and driven by P collided with a car belonging to S which was properly parked on the highway. S brought an action for damages against J. It was held that the fact of ownership of the car by J raised the presumption that the motor car was at the material time being driven by J or his servant or agent.[19]

This presumption will also apply to a case where A and B were proved to be husband and wife at a particular time. This will be sufficient proof that they were husband and wife sometime after. Further examples of the presumption of continuance being unnecessary we shall now turn to another special application of the presumption under section 148.

109. Course of Business

There is a presumption under subsection (c) "that the course of business has been followed in particular cases." This presumption is not to be limited to a public or official business alone but must also extend to private business although it may be stronger in the case of the former. In *R.* v. *Anya Ugwuogo & Anor.*,[20] it was held that a person charged with an offence and to whom a caution has been administered is presumed to have understood it. Section 121

[17] (1959) 4 F.S.C. 19.
[18] 1960 L.L.R. 102.
[19] See also *Michael Oghogho* v. *Karunwi* "*Busy Bee*," 1957 L.L.R. 22.
[20] (1943) 9 W.A.C.A. 73.

(1) (*g*) of the Criminal Procedure Code [21] stipulates, among other things, that the statement of any witness to the police, if reduced to writing, must be set forth in the police case diary. In *Doctor Mohammed Ashard* v. *Commissioner of Police*,[22] it was held that it must be presumed that a statement coming within the description was duly set forth in the case diary. In *Victor Mukete & Ors.* v. *Nigerian Broadcasting Corporation & Anor.*[23] the plaintiffs sued the defendants for defamation as a result of a passage of a broadcast made by the second defendant over the first defendant's broadcasting network. There was no evidence that a script was used for the broadcast. The Federal Supreme Court refused to accept the contention that since such broadcasts are usually made from scripts this particular broadcast was made from a script without any evidence in support. But it is respectfully submitted that had there been evidence of the common course of how broadcasts over the defendant's broadcasting network was conducted, that would have raised the presumption that the particular broadcast in question also followed that common course.

110. Withholding of Evidence

Another special application of the section is that contained in subsection (d). That subsection provides that there is a presumption "that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it." This presumption like other presumptions of fact, as it has been noted, is a matter of logical inference. It cannot be used so as to shift the burden of proof in criminal cases from the prosecution to the accused. In *Mandillas and Karaberis Ltd. & Anor.* v. *Inspector-General of Police*,[24] the second appellant was area manager to the first appellant company. The complainant left his two lorries in the workshop of the appellants for repairs. The lorries disappeared and the second appellant later promised to pay for the lorries. The appellants were both convicted of stealing the lorries by the magistrates court which convictions were later confirmed by the High Court on the ground, *inter alia*, that since they withheld the evidence as to the whereabouts of the lorries, that evidence must be presumed to be unfavourable to them. It was held by the Federal

[21] Cap. 30 of the Laws of Northern Nigeria, 1963.
[22] 1963 N.N.L.R. 80.
[23] [1961] All N.L.R. 482.
[24] (1958) 3 F.S.C. 20; 1958 W.R.N.L.R. 241.

Supreme Court that this subsection is not applicable in a case of this nature so as to shift from the prosecution the burden of proving the offence. The same point was made in *Gabriel Babatunde Adeyemi* v. *Commissioner of Police*.[25] The appellant had been convicted of stealing and obtaining money and other property by false pretences. In the course of the trial it was alleged that the complainants had made a report to a paramount chief to the effect that the appellant had obtained monies and the other property from them and that the chief had advised him to return them. The appellant denied that the chief had spoken to him or advised him as alleged. The chief was not called as a witness. In convicting the appellant, the magistrate held that the appellant should have called him as a witness and that it must be presumed that the evidence of the chief would be unfavourable to the appellant. It was held that the provisions of section 148 could not be applied in a case of this nature to shift the onus of proof which is on the prosecution in all criminal cases.[26]

111. Document Creating Obligation in the Hands of Obligor

The last of these special applications under the section is the one created by subsection (e) to the effect that there is a presumption

> "that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged."

This subsection allows the court to presume for example, that a promise by A to pay X a sum of money has been fulfilled if the document witnessing the promise is in the hands of A. But as it has often been stressed, this being a rebuttable presumption, X will be free to tender evidence to show for example that A stole the document from his possession or got it from him by false pretences or other fraud. Similarly a person who has given a receipt is presumed to have received the sum of money covered by the receipt. In *Frank Montague Macaulay* v. *Abudu Seriki & Anor.*,[27] the plaintiff sought to recover the sum of £200 which he stated he had lent to the defendants in February 1920 and for which they had given him a written receipt which was produced in evidence. The defendants admitted giving the receipt, but stated that at the time it was given

[25] [1961] All N.L.R. 387; (1961) W.N.L.R. 137.
[26] See also *Anthony Enahoro* v. *R.*, 1965 N.M.L.R. 265 at 288.
[27] (1925) 6 N.L.R. 92.

the money had not actually passed between the parties and that they had not received it at any subsequent date. It was admitted that this receipt had been in the possession of the plaintiff since it was given to him in February 1920 and no satisfactory evidence was given on behalf of the defendants proving that they had either made any demand on the plaintiff either to return the receipt to them or to give them the money. It was held that the giving of the receipt by the defendants was presumptive but not conclusive evidence of their having received the money.

In conclusion it must be noted that this list is not closed and it is often that the courts are called upon to presume the existence of one fact from the existence of a proved fact. What cannot be over emphasised is that such a presumption will not be made even though there is no rebutting evidence unless such a presumption is irresistible. In *R.* v. *Okereke Iregbu*,[28] the appellant was convicted of the offence of slave dealing,[29] on the following facts. He had arranged with the parents of a girl to marry her and having paid her dowry was allowed to take her away. He later returned without her and gave at least two untrue explanations of her non-return and she was never seen ever after. From this the trial court presumed that the girl was taken or transferred to be held or treated as a slave. The West African Court of Appeal held that the presumption was unjustifiable. It was said that a court can only make a presumption of this nature if it is a presumption which must irresistibly be made from the evidence, that is, when there is no other reasonable presumption which fits all the facts. In this case the facts were, for instance, equally consistent with the appellant having murdered the girl and were also consistent with the girl having been accidentally drowned.

112. Irrebuttable Presumptions of Law

Irrebuttable presumptions of law are to the effect that if a certain fact is proved, then the court *must* draw a certain conclusion from the proved fact. Evidence in rebuttal of such a conclusion is inadmissible. According to section 4 (c) of the Act,

> "when one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

[28] (1938) 4 W.A.C.A. 32.
[29] *Contra* s. 369 of the Criminal Code.

It is usual to say that children below a stated age (seven years in Nigeria)[30] are presumed to be incapable of committing offences, and that a male person under the age of twelve years is presumed to be incapable of having carnal knowledge,[31] but in reality these are ways of framing what in fact are rules of substantive law. There is no harm, however, in framing the rules in this generally accepted manner. These two presumptions are irrebuttable presumptions law. No evidence will be allowed to be led to show that a child below the stated age is capable of committing an offence. Similarly no evidence will be allowed to be led to show that a male under the stated age is capable of having carnal knowledge.

Another presumption coming under this heading is provided for under section 53 of the Act. It provides that:

> "Every judgment is conclusive proof, as against the parties and privies, of facts directly in issue in the case actually decided by the court, and appearing from the judgment itself on which it was based."

This is better referred to as estoppel by record and will be discussed under that heading.[32] It is, however, necessary to note here that the section contains an exception to the effect that this rule will not operate if

> "evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved."

It should be noted also that, although it is not specifically mentioned in the Act, the courts may be willing to hold that there is an irrebuttable presumption that one who has been certified as a lunatic, as distinct from one who has not been so certified, is incapable of conceiving intention in offences requiring that element. This proposition has been applied in England to a case of divorce based on desertion as desertion requires intention.[33]

113. Rebuttable Presumptions of Law: Presumption of Innocence

In cases of rebuttable presumptions of law, once certain basic facts are proved, the court would presume the existence of the other facts, unless the contrary is proved. In fact these are the most

[30] S. 30 of the Criminal Code and s. 50 of the Penal Code.
[31] S. 30 of the Criminal Code.
[32] See §121, *post*.
[33] *Rushbrooke* v. *Rushbrooke* [1040] P. 24.

common types of presumptions. The effect of these presumptions is usually to shift the burden of proof. The first of these presumptions to be discussed is the general presumption of innocence in the case where a person is accused of an offence. According to Bairamian S.P.J. (as he then was) in *Goni Kinnami* v. *Bornu Native Authority*,[34] "it is not the duty of the accused to prove his innocence, it is the duty of the accuser to prove his guilt." This has now been clearly put by section 22 (4) of the Constitution of the Federation[35] which provides that:

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty."

This is a re-enactment of section 21 (4) of the 1960 Constitution[36] which came up for consideration in *Emmanuel Ibeziako* v. *Commissioner of Police*.[37] In that case it was held that this provision of the constitution enshrines a principle which has always been observed in our courts, and which is succintly enunciated in *Woolmington* v. *The Director of Public Prosecution*,[38] and that the procedure laid down in sections 118, 144, 145, 158, and 159 of the Criminal Procedure Code[39] whereby a part of the evidence against the accused is heard first by the court before the court frames a charge or charges against the accused does not infringe this provision of the Constitution.

Under section 30 of the Criminal Code there is a rebuttable presumption of innocence in the case of a child between the ages of seven and twelve years accused of an offence.

114. Presumption of Marriage

When there is evidence of the *de facto* celebration of marriage either under the Marriage Act[40] or under customary law there is a very strong presumption in favour of the validity of the marriage. The leading English case on this matter is *Piers* v. *Piers*.[41] In this case a marriage was celebrated in a private house, and although there was no evidence that the required special licence was ever granted, yet the court pronounced in favour of the validity of the marriage on the grounds of this presumption. The facts of the

[34] 1957 N.R.N.L.R. 40 at 42.
[35] 1963 Act No. 20.
[36] Nigeria (Constitution) Order in Council (S.I. 1960 No. 1952), 2nd Schedule.
[37] 1964 N.M.L.R., Supplement 10.
[38] [1935] A.C. 462 at 481.
[39] Cap. 30 of the Laws of Northern Nigeria, 1963.
[40] Cap. 115.
[41] (1849) 2 H.L. Cas. 331; 9 E.R. 1118.

Nigerian case of *Adegbola* v. *Folaranmi & Anor.*[42] are very complicated but can be simplified as follows for our present purpose. One Harry Johnson got married in Nigeria to one Oniketan under customary law and had a child by her. He was subsequently seized and made a slave and shipped to the West Indies where he lived for about forty years, his wife and child remaining at Awe, Western Nigeria, his home town. In the West Indies he was converted to the Christian faith and became a member of the Roman Catholic Church. Meanwhile he got married to one Mary in a Roman Catholic Church in the West Indies and Mary subsequently came to live with him in Lagos where they, on their arrival there, were received into the Roman Catholic Church and took sacrament. There was no evidence that the man had got a divorce from his former wife under customary law and no certificate was produced to the court as evidence of the celebration of the marriage in the West Indies, yet it was held that the existence of this latter marriage must be presumed. Today this decision can be justified under the presumption that the spouse of the former valid customary marriage, had died, he not having heard from her for more than seven years,[43] as otherwise the later marriage would have been void and of no effect.

This presumption of marriage extends both to formal validity as well as to essential validity. Once a marriage has been proved to be celebrated, there is a presumption that the form it took was valid. Once the party who alleges the existence of the marriage has tendered evidence that the marriage was celebrated with the full intention of the parties concerned, then the party alleging the opposite has to disprove the non-validity of the form of the celebration of the marriage. His task will be made more difficult where the parties have lived and cohabited together especially for a long time.

A marriage the form of which no exception can be taken remains valid until some evidence is adduced that the marriage is in fact a mullity.[44] Once the party alleging the validity of the marriage gives evidence of the formal celebration of the marriage, this raises the presumption that the marriage is valid in its essence and the burden is on the opposite party to show that the marriage is invalid as a result of a defect in one of the essential requirements of a valid marriage.

[42] (1921) 3 N.L.R. 89.
[43] See s. 43 of the Marriage Act, Cap. 115.
[44] See *Tweny* v. *Tweny* [1940] P. 180 at 182.

"Where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage." This was said by the Privy Council in the case *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*[45] where they held that the lower court erred in holding that the plaintiff who contended that she had been validly married according to Tamil customs, had to prove either their nature or that the alleged marriage complied with them. This presumption is especially useful in proving marriage under customary law where no certificate is ever issued but the *Aronegary* case was not cited nor considered in the more recent case of *Busari Alarape Lawal & Ors.* v. *Messrs. A. Younan & Sons & Ors.*[46] In this case some women who had been living with the deceased as his wives and who had had children for him gave evidence in a case of a claim under the English Fatal Accidents Act, 1846,[47] and deposed to the fact that they were married to the deceased under customary law. The learned trial judge, Quashie-Idun Ag. J. (as he then was) proceeded on the basis that the onus of strictly proving their marriages to the deceased lay on the women and as they had not called some other persons who gave away the women or witnessed the marriage or were sent to ask for the hand of the women they therefore failed to discharge that onus. He said:

> "I cannot imagine any woman alleged to be a wife coming to court and admitting that she was not married to a deceased person. As Native Customary marriages are not registered in this Region the danger of acting solely upon the testimony of the alleged couples or their administrators or dependants cannot be over estimated."[48]

With the greatest respect the basis of this argument would appear to be contrary to the fundamental principle of the law of evidence being discussed here. In the later case of *Lydia Adepeju* v. *Isaac Adereti*,[49] the same learned judge (then the Chief Justice of Western Nigeria) still favoured his previous view on the matter. It would appear that the proper approach in this sort of case is to proceed on the basis of the validity of the marriage concerned until the

[45] (1881) 6 App. Cas. 364 at 371.
[46] (1959) W.R.N.L.R. 155.
[47] 9 & 10 Vict. c. 93.
[48] (1959) W.R.N.L.R. 155 at 159.
[49] (1961) W.N.L.R. 154.

other party disproves its validity, especially in a case of this nature where the effect was to bastardise a number of the children of the deceased and thus disinherit them. If there is no convincing evidence to disprove the marriage or where there is doubt in the mind of the judge as to the validity of the customary marriage, the court must find in its favour.

An ancilliary presumption in Nigeria is the presumption that where a Nigerian marries in accordance with the rites of the Church of England (before the passing of the Marriage Act) or under the Marriage Act, this raises the presumption that he intends his life thereafter to be governed by English or statutory law. In *Nancy Alestina Smith & Anor.* v. *John Balfour Smith*,[50] it was held that the fact that Nigerians married according to the rites of the Church of England, raised a presumption that they intended their lives and their property should be regulated by English laws and standards but that this was not conclusive evidence of such an intention, and that in deciding the question the court should be guided by consideration of the position in life occupied by the parties and their conduct with reference to the property in dispute.

Similar to this is the presumption that when a woman called as a witness against an accused person, swears on the Bible and says merely that the accused is her husband without indicating the form of marriage between them—either Christian, Moslem or Customary —then there is a presumption that she has been married to him under the Christian, monogamous system. In *R.* v. *Daniel Ajiyola & Ors.*,[51] one of the witnesses called for the prosecution described herself as the wife of one of the accused persons. She was sworn on the Bible, as also her husband. It was held that it must be presumed that they were husband and wife of a Christian marriage.[52] Even if the husband had not given evidence at all, the court would still have presumed that they were husband and wife of a Christian marriage: *R.* v. *Moses Adeleke Adesina*,[53] and *Olotu Akpolokpolo* v. *Commissioner of Police*.[54] In *R.* v. *Francis Udo Udom*,[55] it was held that where a spouse of an accused person is called as witness for the prosecution and is sworn on the Koran or the Bible, a presumption arises that such a spouse is the spouse of a Moslem or Christian

[50] (1924) 5 N.L.R. 105.
[51] (1948) 9 W.A.C.A. 22.
[52] See also *R.* v. *Albert Dogbe* (1947) 12 W.A.C.A. 184; and *Francis Keshinro & Anor.* v. *Inspector-General of Police*, 1955–56 W.R.N.L.R. 84.
[53] (1958) 3 F.S.C. 25.
[54] (1960) W.N.L.R. 89.
[55] (1947) 12 W.A.C.A. 227.

marriage respectively. But in the earlier case of *R.* v. *Momodu Laoye & Anor.*[56] it had been held that where the wife of an accused person was sworn on the Koran, it could be presumed that she was a Moslem but that it was not sufficient to rebut the presumption that she was wife of a monogamous marriage. Finally reference must be made to *Inspector-General of Police* v. *Audu Ango & Ors.*[57] where Hedges Ag. C.J. (West as he then was) held that the fact that both husband and wife denied marriage under Moslem rites, and were not asked if they were married under Christian rites, raised the presumption that they contracted Christian marriage.

115. Presumption of Legitimacy

There is a presumption that a child conceived or born in lawful wedlock is legitimate. This is a corollary to the presumption that there is access between the parties and that sexual intercourse has taken place between them, except where there is judicial separation.[58] This is a very strong presumption which cannot be displaced by mere balance of probabilities but by strong preponderance of evidence.[59] As Lord Lyndhurst said in *Morris* v. *Davies*:[60] "The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive." It should be added, however, that it has been pointed out subsequently that the evidence needs not be "conclusive."[61]

It is here necessary to refer to section 147 of the Act which provides that,

> "The fact that a person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown—
>
> (*a*) either that his mother and her husband had no access to each other at any time when he could have been begotten,

[56] (1940) 6 W.A.C.A. 6.
[57] 1955–56 W.R.N.L.R. 168 at 172.
[58] *Ettenfield* v. *Ettenfield* [1940] P. 96.
[59] *Preston—Jones* v. *Preston—Jones* [1951] A.C. 391.
[60] (1837) 5 Cl. & Fin. 163 at 165; 7 E.R. 365.
[61] See *Piers* v. *Piers* (1849) 2 H.L. Cas. 331 at 370; 9 E.R. 1132, *per* Lord Brougham.

regard being had both to the date of the birth and to the physical condition of the husband; or

(*b*) that the circumstances of their access, if any, were such as to render it highly improbable that sexual intercourse took place between them when it occurred."

The effect of this provision is that if the court is left in doubt as to whether either of the two conditions (a) and (b) in this provision has been proved, then the court is bound to find in favour of legitimacy.

Regrettably, however, there is a proviso to this section which incorporates the old rule in *Russell* v. *Russell.*[62] This proviso stipulates:

> "that neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other where the legitimacy of the woman's child would be affected, even if the proceedings in the course of which the question arises, are proceedings instituted in consequence of adultery, nor are any declarations by them upon that subject, deemed to be relevant, whether the mother or husband can be called as a witness or not."

Fortunately, and it is submitted, this provision must be regarded as having been impliedly abrogated by section 32 of the English Matrimonial Causes Act, 1950,[63] because "the jurisdiction of the High Court in probate, divorce and matrimonial causes and proceedings may, . . . be exercised by the court in conformity with the law and practice for the time being in force in England."[64] At present as there are no other provisions relating to divorce and other matrimonial causes in our laws, the law to be applied in divorce cases in this country is therefore the law in England and under the section of the 1950 Act both the mother and the father of the person whose legitimacy is in question are competent though not compellable witnesses.

The rule as to the presumption of legitimacy is applicable under customary law at least of the Yoruba people. This presumption of legitimacy is very strong under Yoruba customary law and would

[62] [1924] A.C. 687. [63] 14 Geo. 6, c. 25.

[64] See s. 16 of the High Court of Lagos Act, Cap. 80; s. 16 of the Eastern Nigeria High Court Law, No. 27 of 1955; s. 32 of the Northern Nigeria High Court Law, No. 8 of 1955.

appear to be as strong as under English law. Even where the wife admits adultery it is the experience of the present author that the customary courts nevertheless invariably rule in favour of the legitimacy of the child especially where the lawful husband of the woman subsequently acknowledges the child as his. In *Olubunmi Cole & Anor.* v. *P. A. Akinyele & Anor.*,[65] C, a Yoruba man was married to A under the Marriage Act and during the subsistence of that marriage had a child, P, by another woman and who also had a second child, Q, for him six weeks after the death of the wife when he was still a widower. C subsequently acknowledged the two children as his children. After the birth of the second child, he got married again to yet another woman, B, under the Marriage Act. It was held that while P could not be legitimate under any recognised systems of law, there is a presumption of legitimacy in favour of Q under customary law.

116. Presumption of Sanity

In criminal law, there is a rebuttable presumption of law that every adult person is sane and possesses a sufficient degree of reason to be responsible for his acts. Section 27 of the Criminal Code provides that:

> "Every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved."

As it has been pointed in a previous chapter,[66] the burden of proof in criminal cases is upon the prosecution by virtue of section 137 of the Act, but section 140 (3) (*c*) of the Act provides that nothing in it shall: "affect the burden placed on an accused person to prove a defence of intoxication or insanity." The quantum of this burden has already been discussed[67] and what is left is to say that this presumption "includes a presumption that the accused is fit to stand his trial, until the contrary is proved."[68]

117. Presumption of Death

Although there is a presumption of continuance (already discussed above)[69] it is provided under the Act that under certain

[65] (1960) 5 F.S.C. 84.
[66] §95, *ante*.
[67] §100, *ante*. See also the author's *General Principles of Criminal Liability in Nigerian Law*,1965, p. 264.
[68] See *R.* v. *Michael Ogor* [1961] All N.L.R. 70 at 75.
[69] See §108, *ante*.

circumstances a person can be presumed dead. Section 143 (1) provides that:

> "A person shown not to have been heard of for seven years by those, if any, who, if he had been alive, would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not being heard of without assuming his death."

The first important point to note is what category of people will be included in those who "would naturally have heard from him" (that is, the person whose death is in question). The list of such people must depend upon the facts of each case and must be a matter of fact. It probably would include the husband or wife, parents, children etc. The next point is that "to hear of someone" in this connection includes hearing from him and also hearing about him from someone who knows him.[70] Finally although the person in question is presumed to have died,

> "but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it." (s. 143 (1)).

It follows naturally from above, but it is also specifically provided by section 143 (3), that: "there is no presumption as to the age at which a person died who is shown to have been alive at a given age."[71]

Complications may, however, arise as to the determination where two or more persons died simultaneously, for example, in a car crash or an aeroplane disaster, of the question who died before the other for the purpose of determining title to property. The question is answered by subsection 2 of the section which provides that:

> "For the purpose of determining title to property where two or more persons have died in circumstances in which it is uncertain which survived the other, they are presumed to have died in order of seniority."[72]

[70] See *Prudential Assurance Co.* v. *Edmonds* (1877) 2 App. Cas. 487.
[71] See the English cases on this point: *Re Phene's Trusts* (1870) L.R. 5 Ch. 139; *Re Lewes's Trusts* (1871) L.R. 6 Ch. 356; *Re Rhodes* (1887) 36 Ch. D. 586; *R.* v. *Lumley* (1869) L.R. 1 C.C.R. 196; *Lal Chand Marwari* v. *Mahant Ramrup Gir* (1925) 42 T.L.R. 159, and *Chipchase* v. *Chipchase* [1939] P. 391.
[72] See s. 184 of the Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20) as modified by s. 1 (4) of the Intestates' Estates Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2., c. 64).

The effect of this provision is that it will be presumed that the elder of the persons died first. Although this provision applies to the case where the persons concerned died in the same accident, there is nothing, it is submitted, in it to confine it to that type of case. It will be applicable to all cases where it is uncertain who survived who.[73]

118. Presumption of Negligence

Where the plaintiff is injured in consequence of something under the exclusive control of the defendant or his servant there is a presumption of negligence on the side of the defendant. This is usually expressed in the maxim *res ipsa loquitor*. This common law principle is aptly put by Erle C.J. in his judgment in *Scott* v. *The London Dock Co.*[74] thus:

> "where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."[75]

It may be raised specifically by reciting the latin maxim or merely by making it known that the plaintiff intends to rely on the very accident itself as evidence of negligence.[76]

A full treatment of this subject matter being out of place in a book on evidence, all that can be said is that where this maxim applies the burden of proof of the absence of negligence is shifted on the defendant. In *Debo Sowande Olaiya* v. *Josiah Folorunso Ososami*,[77] the plaintiff claimed damages for negligence of the defendant's servants or agents as a result of which he had been injured. The facts were that while the plaintiff was making use of a footpath near where the defendant was carrying out building operations, a footpath normally used by members of the public, a crane being operated by the defendant's servants or agents fell on the plaintiff. The evidence given by the defendant and his witnesses

[73] See *Hickman* v. *Peacey* [1945] A.C. 304 at 314–315.
[74] (1865) 3 H. & C. 596 at 601.
[75] For the application of this doctrine see: *Byrne* v. *Boadle* (1863) 2 H. & C. 722; *Ellor* v. *Selfridge & Co., Ltd.* (1930) 46 T.L.R. 236; and *Mahon* v. *Osborne* [1939] 2 K.B. 14.
[76] See *Orejekwe* v. *Mbiere and Anor.*, unreported, but see F.S.C. 345/1960.
[77] (1959) W.R.N.L.R. 264.

was that they were unable to explain why the crane fell. It was held that the presumption of negligence on the defendant was not discharged and the defendant was therefore liable. Similarly in the later case of *Dickson Igbokwe & Ors.* v. *University College Hospital Board of Management*[78] it was held that the presumption of negligence which arose was not rebutted by the defendant. The deceased who was an in-patient in the defendant's hospital, was, one night, discovered missing from her bed. She had just given birth to a baby and was diagnosed as a suspected case of post-natal psychosis. She had been given some sedative, and the doctor on duty had instructed a staff nurse to keep an eye on her. There was evidence to the effect that if the nurse had kept an eye on the patient the resultant accident would have been prevented.

As has been pointed out, this presumption shifts the burden of proof from the plaintiff to the defendant. But the maxim is not applicable to a case where there is sufficient evidence of the accident as in *Barkway* v. *South Wales Transport Co., Ltd.*[79] In that case an omnibus fell over an embankment as a result of a tyre burst which was shown to have been due to the negligence of the defendants in their system of tyre testing, and caused injury to the plaintiff. It was held by the House of Lords that the maxim was not applicable. In his judgment in the case Lord Asquith L.J., made certain important propositions, namely: (1) That if the defendants' omnibus left the road and fell down an embankment and nothing was proved, then *res ipsa loquitor*, there would be a presumption that the accident was caused by the negligence of the defendants. (2) That it was no rebuttal for the defendants only to show that the immediate cause of the omnibus leaving the road was a tyre burst, which was consistent with negligence as well as with lack of negligence. (3) To displace the presumption, the defendants must go further and prove (or it must appear from the evidence as a whole) that (a) the burst was due to a specific cause which did not connote negligence on their part but pointed to the absence of negligence as more probable, or (b) if they could not point to any such specific cause, that they used all reasonable care in and about the management of their tyres.[80] This case was neither referred to nor considered in the Nigerian case, *Lagos Municipal Transport*

[78] (1961) W.N.L.R. 173.
[79] [1948] 2 All E.R. 460.
[80] *Ibid.*, at p. 471. See also *Ekomezie Anichebe* v. *Jideofor Onyekwe and Anor.*, 1965 N.M.L.R. 108.

Service v. *Peter Ibechim*[81] which would appear to have been decided contrary to these three propositions. In that case a pedestrian was walking along the road when he was struck by a piece of metal which flew out when the tyre of a bus, belonging to the appellants, burst. It was held that the mere bursting of the tyre was not more consistent with negligence on the part of the driver than with other causes and that the plaintiff had to prove negligence; and that since this was not proved, the claim failed.

119. Regularity: Omnia Praesumuntur Rite Esse Acta

There is a presumption that things are rightly and properly done. Thus where a testamentary instrument is *ex facie* perfectly regular as regards all of the formalities of signature and attestation, and no question of incapacity or fraud exists, a presumption of due execution arises, to which great weight must be given.[82] This presumption is very common particularly with regard to official acts and documents and there is a number of the sections of the Act dealing with some acts and documents. Presumptions as to documents are provided for in sections 113 to 130. They include the presumption that a document purporting to be a certified copy of a document admissible under the Act is genuine, and there is also a presumption that the official who certified the copy as holding the post which is shown on the document as holding it (s. 113). When a document is produced purporting to be a record of evidence given by a witness in a judicial proceeding, the court shall presume that the document is genuine; similarly there is a presumption that evidence, statement or confession by an accused person or a prisoner taken in accordance with the law and purporting to be signed by any judge or magistrate is true and that such evidence, statement or confession was duly taken (s. 114).

The court is obliged to presume the genuineness of every document purporting to be the *London Gazette* or the official *Gazette* of the Federation or any of the Regions. This presumption extends to private Acts of British Parliament and private Acts and Laws of the Nigerian Parliament and Regional Legislatures, and to every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody (s. 115).

[81] 1961 L.L.R. 146.
[82] See *Re Randle, Nelson & Anor.* v. *Akofiranmi* [1962] All N.L.R. 130.

There is a presumption as to certain documents admissible in courts in the Commonwealth. Section 116 provides that:

> "When any document is produced before any court, purporting to be a document which, by the law in force for the time being in any part of the Commonwealth would be admissible in proof of any particular in the part of the Commonwealth where the document is produced without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the court shall presume—
>
> (*a*) that such seal, stamp or signature, is genuine, and
> (*b*) that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in the part of the Commonwealth where the document is produced."

In all cases under this heading the presumptions will only arise on proof that the documents in question comply with the stipulated conditions. The person contending for the application of any of the provisions, will have to prove that the document in question complies with the conditions appropriate to the particular document.

Next must be considered the presumption as to powers of attorney under section 117 of the Act. That section provides as follows:

> "The court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a notary public, or any court, judge, magistrate, consul or representative of Her Majesty, was so executed and authenticated."

In *Ayiwola* v. *Hadji Akorede*,[83] the plaintiff, as attorney of the landlord of the defendant, sued for arrears of rent and recovery of possession. He produced to the court a power of attorney, executed not before any of the persons named in this section but before a solicitor's clerk. It was held that in these circumstances the presumption would not be made.

There is a presumption that all maps or charts made under the authority of any government or of any public municipal body is

[83] (1951) 20 N.L.R. 4.

correct and admissible in evidence without further proof, provided they were not made for the purpose of any judicial proceedings. And any copies of such documents made by printing, lithography or other mechanical process are admissible in evidence, provided they were made under the authority which made the originals (s. 118 (1) and (2)).

Section 119 provides for the presumption of published books. It stipulates that:

> "The court may presume that any book to which it may refer for information on matters of public or general interest, the statements of which are relevant facts and which is produced for its inspection was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published."

There is a presumption that the message delivered to the addressee of a telegram corresponds to the message delivered for transmission but the presumption does not extend to the person who delivered it for transmission (s. 120). Any document called for on notice to produce[84] served on the person in whose possession it is, and which is not produced, is presumed to be duly attested, stamped and executed (s. 121).

The signature and every writing in a document twenty or more years old, referred to in English books on the law of evidence as "ancient documents," are presumed to be the signature and the writing of the person whose signature and the writing they purport to be and to be duly executed and attested by the persons by whom it purports to be executed and attested, provided it is produced from what the court considers as proper custody (s. 122). And a document is said to be in proper custody for the purposes of this section as well as of sections 116 to 122 already referred to if it is in the place in which, and under the care of the person with whom it would naturally be; but no custody is improper if it is proved to have a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable (s. 123). Furthermore,

> "recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the

[84] See §92, *ante*.

contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions."[85]

In *Samuel Omosanya* v. *Anifowoshe*,[86] A bought land under a conveyance and acquired a good title thereby. O attempted to disturb A's ownership of the land. A thereupon sued O for a declaration of title. O could show title to an equitable interest only dating to 1955 but sought to invoke this section. It was held that he could not invoke this section, that even if he could properly have invoked it in his favour, the presumption thereof raised is not conclusive evidence and does not relieve an owner from the necessity of showing a good title. Furthermore a presumption arising under this section cannot operate as an estoppel against a stranger to the contract who shows he had a better title than the person stated in the recital to be the fee simple owner.

There is a presumption that a document has been made on the date it bears. In *Atlas (Nigeria) Ltd.* v. *Steve Rhodes*,[87] the appellant appealed from an order of a magistrate's court. The record of appeal showed that he had not made the requisite deposit for the preparation of copies of the proceedings within the period ordered by that court. The respondent raised a preliminary objection that the appeal should be struck out because of failure to make the deposit within the required time. Appellant contended that the entry in the record on appeal was not conclusive as to the date of making the deposit. It was held that in the absence of evidence to the contrary the date of the receipt must be assumed to be the date of payment and the court is bound to rely on the entry on the record. If more documents than one bear the same date, there is a presumption that they were executed in the order necessary to effect the object for which the documents were executed. If the circumstances indicate collusion as to the date, then evidence of the correctness of the date will be required (s. 124).

The court is also obliged to presume that a document which is not produced after due notice to produce has been served, and after being called for, is duly stamped unless it is shown to have remained unstamped for some time after its execution (s. 125). When a deed appears or is proved to have been signed and duly attested, it is presumed to have been sealed and delivered although no im-

[85] S. 129. [86] (1959) 4 F.S.C. 94. [87] [1961] All N.L.R. 348.

pression of a seal appears thereon (s. 126). And there is a presumption in favour of deeds executed by corporations.

> "In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be fixed thereto in the presence of and attested by its clerk, secretary, or other permanent officer or his deputy, and a member of the board of directors, council, or other governing body of the corporation; and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly." (s. 130).

When a deed on the face of it appears to have been altered in a material particular, the alterations and interlineations are presumed to have been made before the deed was completed (s. 127 (2)), but if the document is a will the presumption is that the alterations and interlineations have been made after the execution of the will (s. 127 (3)). There is no presumption as to the time when alterations and interlineations appearing in a writing not under seal were made but it is presumed that they were so made that the making would not constitute an offence (s. 127 (4)).

A person who produces a document which on face of it has been altered in a material particular, whether the alterations were made by him or a stranger whilst in the custody of the person producing it, cannot claim under it the enforcement of any right created by it unless the alteration was made before the document was completed or with the consent of the party to be charged under it or his representative in interest (s. 127 (1)). An alteration is material if, had it been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way but not otherwise (s. 127 (5) and (6)).

There is a presumption that all parties to any conveyance are all of full age on the date of the execution of the conveyance (s. 128) and there is a presumption, that when a person in possession of property is shown to be entitled to the beneficial ownership thereof, that every instrument which his trustee is under a legal duty to execute has been executed.

Finally there is a presumption of regularity with respect to

judicial and official acts as well as acts of corporations and their directors etc. Taking the last first, section 149 (4) of the Act provides that:

> "When a minute is produced purporting to be signed by the chairman of a company incorporated under the Companies Act, and purporting to be a record of proceedings at a meeting of the company, or of its directors, it is presumed until the contrary is shown, that such meeting was duly held and convened and that all proceedings thereat have been duly had, and that all appointments of directors, managers and liquidators are valid."

With respect to persons acting in public capacities, it is to be presumed that any person acting in a public capacity has been duly appointed and is entitled to act[88] (s. 149 (2)) and:

> "When any individual or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with" (s. 149 (1)).

In *R.* v. *Thomas Ijoma*[89] the accused was indicted on an information in the High Court for offences of official corruption and extortion.[90] After plea, counsel for the Crown applied to quash the information because it would appear from the record of the committal that the magistrate in committing the accused had done so without giving him the opportunity of being heard in his defence. It was held that under the provision of this subsection, there was a presumption that the magistrate complied with the formal requisites for the committal. Similar to this and certainly more fundamental, is the presumption that every act of Parliament or of any of the Regional Legislatures is constitutional and *intra vires*. In *Dahiru Cheranci* v. *Alkali Cheranci*,[91] the applicant sought a declaration that certain sections of the Northern Nigeria Children and Young Persons Law, 1958,[92] which forbid persons under a certain age from taking part in politics were void because they were repugnant to

[88] See *Inspector-General of Police* v. *Agnes Eyo Ita*, 1959 L.L.R. 90.
[89] (1960) W.N.L.R. 130.
[90] *Contra* ss. 98 (1) and 99 respectively of the Criminal Code.
[91] 1960 N.N.L.R. 24.
[92] Cap. 21 of the Laws of Northern Nigeria, 1963.

certain sections of the Constitution. It was held that there must be a presumption that a law is constitutional and that its provisions are reasonably justifiable and necessary. Bate J., said:[93] "it seems to me that the presumption in favour of constitutionality throws the burden of proof on the person who alleges that the Legislature has infringed a fundamental human right."

[93] 1960 N.N.L.R. 24 at 29.

Chapter 17

ESTOPPEL

120. Nature of Estoppel

Estoppel is a rule which bars a party to a suit from asserting or denying a particular fact. Part VIII of the Evidence Act (containing sections 150 to 153) which bears the heading "Estoppel" does not contain the definition of an estoppel nor does it contain all types of estoppel known to our law. Indeed as we shall see presently, it does not deal with the most important type of estoppel, that is, estoppel by record, which is dealt with by sections 53 and 54. The other types of estoppel, that is, estoppel by deed, estoppel by agreement and estoppel by conduct are provided for under the part. The four types will be discussed in paragraphs 121 to 125 respectively below, but one further point as to the nature of estoppel needs clarification; namely, whether estoppel is a rule of evidence or a rule of substantive law or whether it is a matter of pleading. In Nigeria, the rules relating to estoppel are found in the Evidence Act, and they can therefore be regarded as rules of evidence. Where a person is estopped from giving certain evidence, the effect is that the evidence becomes inadmissible. In some of the sections under the part of the Act, estoppel in certain cases is regarded as conclusive evidence. But also estoppel bears resemblance to irrebutable presumptions of law from which it can, however be distinguished as it can be waived whilst an irrebutable presumption of law cannot be waived by the parties.[1]

Estoppel also has the look of a rule of substantive law. Although it cannot be made the basis of an action by a plaintiff, a defence can be based entirely on it. It is for this reason that it can be said to have effect as a rule of substantive law.

Estoppel can be regarded as a matter of pleading, but it is certainly not entirely a matter of pleading. Any party wishing to rely on it must raise it in his pleadings and state the relevant facts upon which he hopes to rely at the trial to make out the plea.[2] In *Michael Obanye* v. *Okwunwa & Ijoma*[3] it was held that estoppel

[1] See §112, *post.*
[2] *Chellaram & Sons* v. *G. B. Ollivant, Ltd.* (1944) 10 W.A.C.A. 77.
[3] (1930) 10 N.L.R. 8.

must be pleaded before the trial court otherwise it could not be raised on appeal.[4] It would appear, however, that if the estoppel relied upon is one by conduct then a party can rely on it at the final court of appeal. This was the decision of the majority of the Supreme Court, Bairamian and Taylor F.J.J. in *Agusto* v. *Joshua*.[5] In that case the first time the defence of estoppel by conduct was raised was at the Supreme Court even though the case had been adjudicated upon by the magistrate's court and the High Court sitting as a court of appeal. And yet the plea was allowed to be raised at that stage by the Supreme Court. Brett F.J., however dissented. In doing so he expressed the view that the question of estoppel could not be raised at that stage. He quoted with approval a dictum of Lord Morrison P. in *Sanders* v. *Sanders*:[6]

> "When an estoppel is asserted it should, whether by the formality of pleading, as in the High Court, or in some other appropriate way, be brought to the notice of the tribunal alleged to be affected by it, and, having been brought to the notice of the court, it should be supported by specific evidence of the matters from which the estoppel is said to arise."

To allow an estoppel to be invoked at the stage of a final appeal, Brett F.J. continued, would mean that the court was deliberately closing its eyes to the evidence as to the true state of affairs adduced without objection in the court of first instance by both parties. One can only hope that when an opportunity again arises the Supreme Court will find it possible to review its opinion on this matter.

It must be remembered that a judgment may be a relevant issue in a case even although it is not relied on as an estoppel. In such a case the judgment need not be pleaded, and it will nevertheless be admissible.[7] Section 54 of the Act provides that:

> "(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

[4] See also *Orku Sowa & Anor.* v. *Chief Jim George Amachree* (1933) 11 N.L.R. 82; *Felicia Dedeke & Ors.* v. *Victor Williams & Anor.* (1944) 10 W.A.C.A. 164.

[5] [1962] 1 All N.L.R. 312.

[6] [1952] 1 All E.R. 767.

[7] *Chief Dugbo & Ors.* v. *Chief Kporoaro & Ors.*, 1958 W.R.N.L.R. 73.

is deemed to be relevant to the issue, in any subsequent proceeding.

(2) Such a 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."

But where such judgment or one to be relied upon as estoppel is not tendered in evidence and admitted it cannot be acted upon. In *Mustapha Rufai Ojikutu* v. *Bintu Fasumo Fella*[8] the judgment relied upon as operating as *res judicata* was not given in evidence and no evidence was offered concerning it. It was held that it would be wrong for the court to act on it.

121. Estoppel by Record

In this regard "record" means the record of judicial proceedings, and when an estoppel of this type operates it does so as *res judicata*. Under section 53 of the Act, every judgment is conclusive proof as against parties and their privies, of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself to be the ground on which it was based; and then follows a proviso which is completely devoid of clarity, namely "unless evidence was admitted in the action to which the judgment is intended to be proved." What this proviso means is very doubtful but it is suggested that it means that, where evidence given in a previous judgment which is intended to be pleaded as estoppel is excluded in the subsequent proceeding then the other party is at liberty to supply the omitted evidence in the latter proceeding. But this will not affect the general rule as to estoppel. Indeed in *Ojo* v. *Jean Abadie*,[9] it was held that once the principles of estoppel applied, the mere fact that certain evidence was not tendered in the previous case would not prevent it from operating as an estoppel in a subsequent case.

The principles underlying the rule as to estoppel by record is that it is for the common good that there should be an end to litigation (*interest rei publicae ut sit finis litium*[10]) and also that no one should be sued twice on the same ground (*nemo debet bis vexari proceadem causa*).

[8] (1954) 14 W.A.C.A. 628. [9] (1955) 15 W.A.C.A. 54.
[10] See *Egbeyemi Ogundiran & Anor.* v. *Egunyemi Balogun*, 1957 W.R.N.L.R. 51 at 52, *per* Taylor J.

Judgments of courts can be divided into two; judgments *in rem* and judgment *in personam*. A judgment *in rem* is one which determines the status of some particular subject matter and such a judgment operates against the whole world, for example, a grant of probate, a dissolution of marriage, a declaration of legitimacy. A judgment *in personam* is any other type of judgment and includes judgments in action for breach of contract or for a tort. In both cases the parties to such judgments and their privies are estopped in the subsequent proceeding from litigating the same cause of action but in general a stranger is not estopped by a judgment *in personam*.

122. Conditions of Application of Estoppel by Record

Before discussing the special conditions of application of estoppel by record a few general remarks will have to be made. The fact that a judgment was wrongly decided will not prevent it from operating as *res judicata*.[11] Also the fact that a judgment was given by default will not prevent it from operating as *res judicata*,[12] nor will the fact that a judicial finding was made during the pendency of the action in which the plea is raised. In *Olufemi Abogunde* v. *Raji Lanlokun*,[13] the plaintiff sued the defendant for declaration of title to a piece of land. Prior to this the defendant had successfully sued the plaintiff in a native court for declaration of title to the same piece of land. This present action was commenced after the defendant's action in the native court had been commenced but before judgment was delivered. The defendant raised a plea of *res judicata* and the court upheld this plea.[14] The same point was similarly decided by the Federal Supreme Court in *Ihenacho Nwaneri & Ors.* v. *Nnadikwe Oriuwa*.[15] In this case Abbott F.J., in giving the conditions necessary for the operation of estoppel by record said:

> "It is well known that before this doctrine (of estoppel *per rem judicatam*) can operate, it must be shown that the parties,

[11] *Fabunmi Sule Larinde* v. *Salami Afiko & Anor.* (1940) 6 W.A.C.A. 168.
[12] *Chief Winoko Ekpe* v. *Chief Esin Antai* (1944) 10 W.A.C.A. 19.
[13] 1957 W.R.N.L.R. 38.
[14] Following *Bell* v. *Holmes* [1956] 1 W.L.R. 1359. The statement in Halsbury's *Laws of England*, 3rd ed., Vol. 12, p. 211, that "a *lis pendens* without judgment creates no estoppel, and it seems that a judgment cannot take effect as a *res judicata* or an estoppel unless it was given before the proceedings in which it is relied upon were commenced" cannot now be regarded as correct.
[15] (1959) 4 F.S.C. 132.

issues and subject matter were the same in the previous case as those in the action in which the plea of *res judicata* is raised."[16]

We will now consider these conditions one by one.

123. The Parties must be the Same

Before a judgment can operate as an estoppel in a subsequent proceeding, the parties to the two proceedings must be the same.[17] The term "parties" includes privies to the parties named on the writ. A "privy" is a person whose title is derived from and who claims through a party.[18] In *Thomas George Babatunde Hoare* v. *Samuel Patrick Hoare*[19] it was held that a person claiming as heir-at-law to a party to a proceeding can be regarded as a party to that proceeding. The term "parties" also includes those who had an opportunity to attend the proceeding, and those who ought to have been made parties to the proceeding. In *Odeyemi Onisango* v. *Akinkunmi & Ors.*[20] the plaintiff sued the six defendants for a declaration of title to a piece of land. The statement of claim showed that five of the defendants had wrongly sold the land to the third defendant against whom he subsequently withdrew. In a previous case the plaintiff had sued the third defendant alone for a declaration of title to the same piece of land and failed. It was held that the plaintiff was estopped from bringing this action as he might, had he so chosen, have sued all the present defendants along with the third defendant in the first action. This case was distinguished in the later case of *Lawani Lateju* v. *Lawani Iyanda & Anor.*[21] In this case, the plaintiff's claim against the defendant was also for a declaration of title to a piece of land. The present plaintiff had been plaintiff in a previous suit for a similar declaration, the second defendant being the first defendant in that suit whilst the present first defendant was a witness in that suit. Throughout the trial of the previous suit neither the plaintiff nor any of his witnesses mentioned the name of the present first defendant and the

[16] See *Oki & Anor.* v. *Akel* (1950) 19 N.L.R. 94; and *Idowu Alase & Ors.* v. *Sanya Olori Ilu & Ors.*, 1965 N.M.L.R. 66 (S.C.).
[17] See *Okwosa Odua & Ors.* v. *Nwanze* (1943) 2 W.A.C.A. 98; *Ola Fasan* v. *Fasekomi*, 1957 W.R.N.L.R. 110; *R.* v. *Lieutenant-Governor, Eastern Nigeria ex P. Okafor Chiagbana* (1957) 2 F.S.C. 46; *Vincent Okorie & Ors.* v. *Phillip Udom & Ors.* (1960) 5 F.S.C. 162; *Omidokun Owonyin* v. *Omotosho* [1961] All N.L.R. 304 (F.S.C.).
[18] *Ababio* v. *Kanya* (1936) 1 W.A.C.A. 253, *per* Dean C. J.
[19] (1936) 13 N.L.R. 28. [20] 1955-56 W.R.N.L.R. 39. [21] 1958 W.R.N.L.R. 3.

only allegation against the present second defendant was that he had granted the land to certain persons without consulting the plaintiff. Furthermore in that previous action both the present second defendant and his witnesses, deposed that his father owned the land in dispute. It was held that the present first defendant was not a party or privy to the previous suit as required by law for the purpose of creating an estoppel against him.[22] But the fact that both parties to the present suit were joint defendants in the former suit will not prevent an estoppel so long as there was a conflict of interest between them.[23]

In *Amancio Santos* v. *Ikosi Industries, Ltd. & Anor.*,[24] the West African Court of Appeal said that

> "for the purpose of estoppel *per rem judicatam*, 'party' means not only a person named as such, but also one . . . who, being cognisant of the proceedings and of the fact 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."

If a person was content to stand by and see his battle fought by somebody else in the same interest, he is bound by the result and should not be allowed to reopen the case.[25] But this rule has never been applied to cases of compromise. "Compromise" is the settlement of a dispute by mutual concession. A compromise takes place when there is a question of doubt and the parties agree not to try it out, but to settle it between themselves by a give and take agreement.[26] In *Chief Ajaka* v. *Chief Eyinmosan & Ors.*,[27] it was held that a privy who had neither the notice nor the knowledge that there was going to be a compromise, could not be estopped from bringing another suit subsequent to the compromise judgment.

[22] Following two Gold Coast (now Ghana) cases: *Ababio* v. *Kanya* (1930) 1 W.A.C.A. 253 and *Effuah Amissah* v. *Effuah Krabah* (1931) 2 W.A.C.A. 30 (P.C.).
[23] *Ojelade* v. *Bada & Ors.* (1951) 20 N.L.R. 28.
[24] (1942) 8 W.A.C.A. 29.
[25] See *Okorie Uwalaka & Ors.* v. *Ngwuliaku Agba & Ors.* (1955) 15 W.A.C.A. 63 at 65; *Odua Esiaka & Ors.* v. *Vincent Obiasogwu & Ors.* (1952) 14 W.A.C.A. 178; *Alex Joaquim* v. *Madam Labinjo & Ors.*, 1961 L.L.R. 169; and also the English case, *Hoystead* v. *The Commissioner of Taxation* [1926] A.C. 155 at 165 (P.C.).
[26] *Huddersfield Bank* v. *Lister* (1895) 2 Ch. 285, *per* Kay L. J.
[27] (1961) W.N.L.R. 230.

124. Issues and Subject Matter must be the Same

Estoppel will not operate even if the parties to both suits are the same once the issues and/or the subject matter[28] of both suits are different. In *Okwosa Odu & Ors.* v. *Nwanze*[29] the plaintiff sued for a declaration of title to a piece of land and the defendant pleaded estoppel *per rem judicatam* and relied on two previous judgments one of which was between the privies of the parties to the present action. But with regard to the other there was no evidence that the parties were privies or the same as in the present. With regard to the first, there was no evidence that the pieces of land concerned in that and in the present suit were the same. Furthermore, that action was one of criminal prosecution for trespass, it was held that the two earlier cases did not create an estoppel because both the issues and the subject-matter in the earlier cases were different from those in the present case. In *Commissioner of Lands* v. *Abraham & Ors.*,[30] the plaintiff first sued one Aromire for trespass on Crown land and claimed recovery of possession. Aromire denied trespass, disclaimed any personal title, and pleaded that the land belonged to the Aromire Chieftaincy family. The suit was dismissed on the grounds that there was no evidence of trespass. The plaintiff then instituted this action for recovery of the same piece land from some persons who claimed to be tenants of Aromire Chieftaincy family. Aromire on his own application was joined and permitted to defend as the representative of the family. It was held that the previous judgment could not operate as an estoppel (a) because Aromire was then sued in his personal capacity whereas in the present suit he was defending as the representative of the Aromire Chieftaincy family and (b) because the issue was now as to ownership whilst the previous suit was dismissed merely on the ground that there was no evidence of trespass.[31]

A party will not be allowed to split a cause of action into two or more and litigate it in parts. In *Alhaji Bature Gafai* v. *United Africa Company, Ltd.*,[32] the plaintiff agreed to buy a motor vehicle

[28] See *David Nwonicha Chiekwe* v. *David Obiora* (1960) 5 F.S.C. 258.
[29] (1934) 2 W.A.C.A. 98.
[30] (1948) 10 N.L.R. 1.
[31] See also *Jia Enterprises (Electrical), Ltd.* v. *British Commonwealth Insurance Co., Ltd.* [1962] All N.L.R. 363; and *Shitta-Bey* v. *The Chairman, L.E.D.B. & Anor.* [1962] All N.L.R. 373.
[32] [1961] All N.L.R. 785; 1962 N.R.N.L.R. 73. See also *Nelson Udo* v. *Chief Udo Etok & Ors.* (1943) 11 N.L.R. 136.

from the defendants and paid the purchase price. The defendants did not deliver the lorry and the plaintiff thereupon sued in the district court and obtained judgment for the purchase price as money paid for a consideration which had totally failed. The plaintiff then sued the defendants in the High Court claiming general damages for the breach of the contract for the sale of the vehicle. It was held that the plaintiff was estopped because it was the same cause of action which gave rise to the two different forms of relief. Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that action to bring forward their whole case; and will not allow them (except under special circumstances) to open the same subject of litigation in respect of a matter which should have been brought forward, merely because they have, from negligence, inadvertence or accident, omitted part of their case. And furthermore, the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but also to every point which properly belonged to the subject of that litigation and which the parties exercising diligence, might have brought forward at the time.[33]

Where the subject matter in the earlier case is different from that in the latter case, estoppel will not operate. In *Bakare Ibiyemi & Ors.* v. *Lawani Olusoji & Anor.*[34] the plaintiffs sued the defendants for a declaration of title to a piece of land. This piece of land, however, included another piece of land, part of which had already been adjudicated upon. It was held that the plea of estoppel failed. And in *Okusanya & Anor.* v. *Akanwo & Anor.*[35] the Judicial Committee of the Privy Council held that where a claim is included in an action but it is not adjudicated upon, *res judicata* will not operate in a subsequent case with respect to that claim.[36]

In determining whether the issue or the subject matter of the actions are the same, the court will, especially where the suit was brought in and determined by a native or customary court, look into the substance of the case and not the form of the claim. In *Edem Uno Edem* v. *Chief Oyo Edet*[37] the previous suit between the parties was for a declaration of title to land whilst the present suit

[33] *Ijale* v. *A. G. Leventis & Co., Ltd.* [1961] All N.L.R. 762.
[34] 1957 W.R.N.L.R. 25.
[35] (1941) 7 W.A.C.A. 1.
[36] See also *Felicia Dedeke & Ors.* v. *Victoria Williams & Anor.* (1944) 10 W.A.C.A. 164.
[37] (1940) 6 W.A.C.A. 220.

was for a declaration that the plaintiff had a right to farm on the land, but it was clear from pleadings and the evidence in court that the plaintiff's claim was as to the titular ownership of the land. It was held that the plaintiff was estopped from bringing the action.[38]

125. There must be a Valid Subsisting Judgment

The judgment which is to operate as an estoppel must be a final, valid and subsisting one.[39] Once it is proved that such a judgment exists (and subject to what has been said above) then both parties are estopped from re-litigating the same issues.[40] An order made by a district officer acting under the Inter-Tribal Boundaries Settlement Ordinance[41] is a judicial decision and will operate as an estoppel[42] but such an order will not operate as an estoppel if the district officer did not "decide any dispute between two or more tribes as to the boundaries between the lands of such tribes."[43]

The fact that a judgment was obtained by default does not prevent it from operating as an estoppel. In *Odu* v. *John Holt & Co., Ltd.*,[43] cross suits which had been filed by the parties were consolidated. On the day fixed for hearing, the present plaintiff did not appear. After hearing evidence for the present defendant, the court dismissed the present plaintiff's claim and gave judgment for the present defendant on his own claim. An application to have his action re-listed failed and he then brought this action on the same claim. It was held that he was estopped.[44]

Similarly the fact that a judgment is liable to be appealed will not prevent it from operating as an estoppel unless an appeal is in fact pending on it.[45] But a judgment which has been given by a court without jurisdiction[46] or which is otherwise a nullity for any reason, *e.g.*, that all the concurring members of the tribunal were

[38] See also *Ma Chukwunta* v. *Nwalu Chukwu & Ors.* (1953) 14 W.A.C.A. 341; *Ajayi, the Balogun of Ijanna* v. *Aina, the Oba of Ibese* (1942) 16 N.L.R. 67; and *Rosaline Modupe Parker* v. *Roland Akantir Parker*, 1964 N.M.L.R., Supplement, p. 28.

[39] *Alu Eko* v. *Uhere Ugwuoma & Ors.* (1940) 6 W.A.C.A. 206; *Olawunmi Abogunde* v. *Raji Lanlokun*, 1958 W.R.N.L.R. 69; *Lawani Lateju* v. *Lawani Iyanda & Anor.* (1959) 4 F.S.C. 257; *Moses Ojo Ajogodo & Ors.* v. *Samuel Fabikun Adegoriola* (1961) W.N.L.R. 177.

[40] Cap. 95 of the 1948 Laws of Nigeria.

[41] *Nnamere Anjoku & Ors.* v. *Ivube Nwa Nnamani* (1953) 20 N.L.R. 185; *George Nwabia* v. *Adiri & Ors.* (1958) 3 F.S.C. 112.

[42] *Chief Eke Oja & Ors.* v. *Chief Kanu Ukpai & Ors.* (1945) 14 W.A.C.A. 538.

[43] (1950) 19 N.L.R. 127.

[44] See *Krekchi* v. *United Africa Co., Ltd.* (1952) 20 N.L.R. 34.

[45] *Ma Chukwunta* v. *Nwalu Chukwu* (1953) 14 W.A.C.A. 341.

[46] *James Isoni* v. *Johnson Ejewu* (1960) W.N.L.R. 142.

not present throughout the trial cannot operate as an estoppel.[47] This is so in the former case only to the extent to which the court has no jurisdiction.[48] In *Chief Winoko Ekpe* v. *Chief Esin Antai*[49] the plaintiff sued the defendant for damages for trespass to a piece of land and an injunction. At the trial the defendant pleaded *res judicata* relying on a previous judgment given by default in 1931 in respect of the same land. That suit had been for damages for trespass, an injunction, and demarcation of boundaries. The trial judge held that the plea of *res judicata* could not succeed on the ground, *inter alia*, that the court which gave the previous judgment had no jurisdiction in real actions. It was held by the West African Court of Appeal that although the court which tried the previous suit had no jurisdiction to try the demarcation issue it had jurisdiction to try the trespass issue and since the present case was one for trespass, the previous one did operate as an estoppel so as to bar it.

The mere fact that a judgment was wrongly decided will not prevent it from operating as estoppel in so far as it has not been upset by a higher court,[50] provided it is not a nullity nor will the fact that both parties are dissatisfied with the judgment.[51] But a judgment which has been procured by fraud or collusion or which is void for any reason whatsoever will not sustain a plea of estoppel.[52] In *Equere Inyang & Anor.* v. *Simeon Essien & Anor.*,[53] it was held that the "judgment" of a body of people which had no judicial power could not operate as an estoppel.

Where it is clear from the provisions of the law that a decision of a particular issue is not meant to bar further proceedings on the issue, then the doctrine of estoppel will not operate. *Olawoyin* v. *Commissioner of Police*[54] is a clear illustration of this principle. In

[47] See *Raimi Oniyide* v. *Oriola & Anor.*, 1964 N.M.L.R. Supplement, p. 18, which followed *Madam Beti Runka* v. *Katsina Native Authority* (1950) 13 W.A.C.A. 98, where the West African Court of Appeal virtually overruled their previous decision to the contrary in *Madam Vakoh Chapman* v. *C.F.A.O. & Anor.* (1943) 9 W.A.C.A. 181, which was more lately followed by Idigbe Ag. C. J. (Mid-West) in *Okolie Chime & Anor.* v. *Ofili Elikwu & Anor.*, 1965 N.M.L.R. 71.

[48] *Nimota Oluwo & Anor.* v. *Adebowale* (1959) 4 F.S.C. 142.

[49] (1944) 10 W.A.C.A. 19.

[50] *Fabunmi Sule Larinde* v. *Salami Ajiko & Anor.* (1940) 6 W.A.C.A. 108; *Okoli Ojiako & Ors.* v. *Onwumaogueze & Ors.* [1962] All N.L.R. 58 (S.C.).

[51] *Olomu of Okwodiete* v. *Ivbighre of Ughwagba* (1960) W.N.L.R. 28 (F.S.C.).

[52] *Yekrorogha* v. *Barakpali* (1929) 9 N.L.R. 60.

[53] (1957) 2 F.S.C. 39.

[54] [1961] All N.L.R. 130; 1961 N.R.N.L.R. 23.

an appeal to the Native Courts Appellate Division of the Northern Nigeria High Court against his conviction and sentence in the Ilorin Provincial Court, the appellant made an application for bail pending the determination of his appeal. This application was heard by a single judge of the High Court acting under Order 11, rule 10 of the Northern Nigeria High Court (Appeals from Native Courts) Rules, 1960, and was refused. Subsequently in an application heard by the same Division presided over by two High Court judges and a Sharia Court judge, he applied for bail again. It was argued that the question of bail was *res judicata* by virtue of the previous application for bail. Now Order 11, rule 10 states that

> "at any time . . . after an appeal has been entered until the determination thereof by the Appeal Court, the Appeal Court or a single judge thereof may on the application of the appellant or of its own motion if the appellant is in custody order his release on bail with or without sureties. . . ."

It was held that this provision shows a clear intention that the question of bail is to be left open for consideration from the time the appeal is entered until it is determined and that no estoppel *per rem judicatam* was meant to apply.

Finally where there are conflicting judgments of courts of competent jurisdiction over the same subject-matter in dispute the rule is that the later decision operates in bar. It does not matter whether the court which gave the later decision is an inferior or a superior court to the one that gave the earlier decision. In *Makanjuola* v. *Hazan Khalil*,[55] the defendant, in 1945 obtained a judgment against the plantiff for trespass in the High Court. In 1949 the plaintiff obtained judgment in a Native Court for declaration of title to the same land. It was held that it was the 1949 judgment which operated as an estoppel in the present suit.[56]

126. Estoppel by Deed

Although writers on the English law of evidence[57] usually have a heading for "estoppel by deed," there is nowhere in the Evidence Act where provision is made for this. There is no doubt, however, it is equally true here as in England that a party who has executed

[55] 1958 W.R.N.L.R. 82.
[56] See also *Taiwo Obisanya Seriki* v. *Soyemi Solaru*, 1965 N.M.L.R. 1 (S.C.).
[57] For example, Cross, *Evidence*, 2nd ed., p. 282.

a deed will be estopped by a court from saying that the facts stated in the deed are not true.[58] But its scope must be strictly limited.

First it applies only to litigation arising on the deed,[59] and does not apply to actions on collateral matters.[60] As in the case of estoppel by record, it must be confined to the parties to the deed and their privies,[61] and to statements in the deed which are material in the transaction and which are clear and unambiguous. Finally, it must be remembered that a deed which can be declared void because of illegality, fraud or any other cause whatsoever cannot operate as in estoppel.[62]

127. Estoppel by Agreement: Landlord and Tenant

There are three types of estoppel by agreement which are dealt with by the Act itself. These will now be discussed in turn.

A tenant of immovable property, or a person claiming through such a tenant is estopped during the continuance of the tenancy, from denying that the landlord had, at the beginning of the tenancy, a title to such immovable property.[63] Similarly a person who came upon any immovable property by the licence of the person in possession of it is estopped from denying that such a person had a title to such possession at the time when such a license was given (s. 151).

A tenant may, however, prove that the title of the landlord has expired[64] or that he had been evicted by title paramount to the landlord's.[65]

128. Bailor and Bailee

A bailee is estopped from denying that the bailor by whom any goods were entrusted to him was entitled to those goods at the time they were entrusted.[66] But the bailee is permitted to show that he

[58] See *Bowman* v. *Taylor* (1834) 2 A. & E. 278; 111 E.R. 106.
[59] *Carpenter* v. *Buller* (1841) 8 M. & W. 209 at 212; 151 E.R. 1013 at 1014; *Re Simpson, ex p. Morgan* (1876) 2 Ch. D. 72 at 89.
[60] *Re Simpson, ex p. Morgan, supra.*
[61] See *Gracknell* v. *Janson* (1878) 11 Ch.D.1, C.A.
[62] See *Birch* v. *Birch* (1902) P. 130; *Bonarparte* v. *Bonarparte* [1892] P. 402.
[63] *Alindu Agbomeji* v. *G. B. Ollivant, Ltd.* (1942) 16 N.L.R. 96. See also *Balls* v. *Westwood* (1809) 2 Camp. 11; *Perrott* v. *Cohen* [1950] 2 All E.R. 939 at 948.
[64] *England* v. *Slade* (1792) 4 T.R. 682; 100 E.R. 1243; *Serjeant* v. *Nash* [1903] 2 K.B. 304.
[65] *Gouldswork* v. *Knights* (1943) 11 M. & W. 337 at 244; 152 E.R. 833 at 836.
[66] *Gosling* v. *Birnie* (1831) 7 Bing. 339; 131 E.R. 131.

has been compelled to deliver up the goods to some person who had a right to them as against the bailor or that the bailor wrongfully and without notice to the bailee obtained the goods from a third person who has claimed them from the bailee. The positions of the principal and the agent, and the licensor and licensee with regard to goods entrusted by one to the other are the same (s. 152).

129. Shipping Documents

A master or any other person signing any bill of lading which has been delivered to the consignee or endorsed for valuable consideration, representing goods to have been shipped or on board a vessel, is estopped from denying that the goods have been so shipped even though the goods or some part of them have not been so shipped, unless such holder of the bill of lading had actual notice at the time of receiving the same that the goods had not been in fact laden on board. In any event, the master or other person signing the bill is allowed to show that any mis-representation in the bill has been caused without any default on his part, but that such mis-representation has been caused wholly by the fraud of the shipper or of the holder or some person under whom the holder holds (s. 153).

130. Estoppel by Conduct

The principle governing estoppel by conduct is that when one person has, 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 representative in interest is allowed, in any proceedings between himself and such person or his representative in interest, to deny the truth of that thing (s. 150). In *Rowrafric & Far Eastern Ltd.*, v. *John Chief Avbenake & Ors.*,[67] the plaintiffs sued the defendants jointly as partners trading under the firm name Bryden, Gheye & Co. for an amount of money on account stated between them. The second defendant admitted the claim whilst the other two defendants denied liability on the ground that they were not partners in the firm and that any agreement entered into between the plaintiff and the second defendant was entered into by the second defendant in his personal capacity only. It was proved that the transactions, subject matter of this litigation, arose between the plaintiff and the firm and that at a time when all the defendants were registered members of the firm.

[67] 1958 W.R.N.L.R. 92.

They had all filled their names in the applications to the Registrar of Business Names for registration as a partnership. It was the second defendant who in fact carried out most of the business for the firm. It was held that the first and third defendants must be taken to have impliedly authorised the second defendant to hold them out to the plaintiffs as partners in the firm, and they were consequently now estopped from denying that.

CHAPTER 18

EFFECT OF WRONGFUL ADMISSION AND REJECTION OF EVIDENCE

131. Introduction

A court is expected to admit and act only on evidence which is properly admissible under the Evidence Act (and any other Act or Law or other enactment relevant in any particular case) and no court has the power, speaking generally, to reject any relevant admissible evidence. This chapter is devoted to the examination of the possible consequences of a court wrongly admitting inadmissible evidence or rejecting a relevant admissible evidence.

The first point to note is that when inadmissible evidence is tendered it is the duty of the adverse party or his counsel to raise objection to the admission of the evidence by the court.[1] If it is in the nature of oral evidence, the adverse party or his counsel must raise his objection before the witness gives his answer to the question which is likely to let in the inadmissible evidence. If the evidence is in the nature of a document, objection must be taken when the document is tendered for admission. (If the document is rejected, it must nevertheless be marked as having been tendered and rejected.[2]) Even if the adverse party fails to raise his objection, the court may, and indeed in criminal cases must, reject such evidence on its own motion. Even if the court admits such inadmissible evidence, it is still the duty of the court not to act on it.[3]

One difficulty which has to be pointed out is as to whether a party, who did not during the trial of a case object to the admission of inadmissible evidence, can raise the matter on appeal. One thing is clear; if it is a criminal proceeding the question of the admissibility of inadmissible evidence can be raised at any stage of the proceeding including proceeding in the court of appeal. Civil suits present some difficulty. In *Omidokun Owoniyi* v. *Omotosho*[4] the Federal Supreme Court (Bairamian F.J.) quoted with approval the head-note to *Jacker* v. *International Cable Co., Ltd.*[5] which reads

[1] See Western Nigeria High Court (Civil Procedure) Rules, O. 27, r. 9.
[2] *Op. cit.*
[3] *Ajayi* v. *Olu Fisher* (1950) 1 F.S.C. 90.
[4] [1961] All N.L.R. 304 (F.S.C.).
[5] (1888) 5 T.L.R. 13.

"where matter has been improperly received in evidence in the court below, even when no objection has been raised, it is the duty of the court of appeal to reject it and to decide the case on legal evidence." In the *Owoniyi* case itself, the trial court had admitted the record of the proceedings in another case by consent of both parties, and the trial court had used the entire proceedings as if they were legal evidence in the case before it. The law clearly is that "evidence given by a witness in another case, may be used to impeach his credit if, in the latter case, he says something different; but what he said in the earlier case does not become evidence in the later case."[6] It must be pointed out that the appellant's objection at the appeal court was not as to the admissibility of the record of proceedings but as to the use made of it by the trial court which was clearly contrary to general principles of the law of evidence. It cannot be argued that a party who has explicitly or by his conduct approved the admission of inadmissible evidence, or has himself tendered it, can be allowed to raise objection to it on appeal. On this principle the West African Court of Appeal has held, in *Chukwura Akunne* v. *Matthias Ekwuno & Ors.*[7] that it would not entertain argument on evidence being inadmissible when no objection had been made to it at the trial. Foster-Sutton P., said:

> "Appellant's counsel argued that the evidence of witnesses 5 and 6 for the defence was inadmissible. We declined to allow him to argue that point: the evidence was not objected to, it was cross-examined and its admissibility was not put in question at any stage of the trial. It was also argued that exhibits 4, 5, 6 and 8 were inadmissible, not being relevant to any issue in the case. As we pointed out to counsel for the appellants no exception was taken to exhibits 5, 6 and 8 at the trial, but apart from that consideration, in my view, the evidence was clearly admissible under the provisions of subsection (b) of section 12 of the Evidence Act."

Unfortunately this case was neither cited nor considered by the Federal Supreme Court in the *Owoniyi* case.

One other matter which has to be mentioned in this introductory section is that mere irregularity in the method of admitting a piece of evidence does not make it inadmissible if it was in fact admitted

[6] [1961] All N.L.R. 304 at 308. See also *Commissioner of Police* v. *Riegles* (1923) 4 N.L.R. 103.
[7] (1952) 14 W.A.C.A. 59.

and it is admissible evidence. In *R.* v. *Jonathan Adebanjo & Ors.*,[8] several documents were admitted before proper foundations for their reception in evidence were laid, but before the end of the case was reached every one of the documents tendered in evidence had been adequately proved. It was held that no exception could be taken against them on appeal.

We should now discuss the consequences of wrongly admitting evidence and wrongly excluding admissible evidence which is tendered before the court. There are three possible consequences, namely, (a) it may not affect the decision appealed, or (b) it may lead to a reversal of the decision, or (c) it may lead to the appeal court ordering a re-trial. Each of these will now be discussed in turn.

132. Wrongful Admission and Rejection of Evidence not Leading to a Reversal of Decision Appealed

The wrongful admission of inadmissible evidence is not of itself a ground for the reversal of any decision ("decision" here includes a judgment, order, finding or verdict[9]) provided the following conditions are fulfilled:

(*a*) if it appears to the court of appeal that the evidence so admitted cannot reasonably be held to have affected the decision; and that

(*b*) such decision would have been the same had such evidence not been admitted (s. 226 (1)).

Similarly the wrongful exclusion of admissible evidence is not of itself a ground for the reversal of any decision if it appears to the court of appeal that had the evidence excluded been admitted the decision would, reasonably, nevertheless have been the same (s. 226 (2)).

The above principles have been incorporated in very many court decisions both before the Evidence Act was passed and after[10] and only a few important cases need be mentioned as illustrations of the principles. In *R.* v. *Asuquo Edem & Ors.*,[11] the appellants were

[8] (1935) 2 W.A.C.A. 315.

[9] S. 226 (3) of the Act.

[10] *E.g.*, *Commissioner of Police* v. *Barlatt & Johnson* (1925) 6 N.L.R. 58; *R.* v. *Ede Okpalu & Ors.* (1935) 2 W.A.C.A. 345; *R.* v. *Akpan Udo Essien* (1939) 5 W.A.C.A. 70; *R.* v. *Adegbola Thomas* (1945) 11 W.A.C.A. 12; *R.* v. *Francis Udo Udom & Ors.* (1947) 12 W.A.C.A. 227; *R.* v. *John Ogbuewu* (1949) 12 W.A.C.A. 483; *Ayisatu Adunfe & Ors.* v. *Inspector-General of Police* (1957) 2 F.S.C. 21; and *James Popoola* v. *Commissioner of Police*, 1964 N.M.L.R. 1.

[11] (1943) 9 W.A.C.A. 25.

charged with murder. Each of them gave evidence in his defence and one of them introduced fresh matter relating to customary law which if true, would have seriously discredited the evidence of the prosecution. The judge then called a chief who had been sitting in court to testify to his knowledge of customary law on the question thus raised. The West African Court of Appeal held that even if the evidence of the chief was wrongly admitted, it would have been disposed to hold that no substantial miscarriage of justice had actually occurred since two eye-witnesses, whose evidence the judge believed, testified to the actual murder of the deceased by the appellants.[12] In *Timitimi & Ors.* v. *Chief Amabebe & Ors.*,[13] although a judgment of a native court had been wrongly admitted it was clear on the evidence that the trial judge did not regard the judgment as establishing the plaintiff's title to the land but had based his decision on a sound body of other evidence. It was held that the appeal must be dismissed. In *R.* v. *Victoria Aderogba*[14] the appellant was on trial with another person who was discharged during the prosecution case. When the case for the prosecution closed the trial judge called the discharged person and had counsel for the prosecution to examine him and counsel for the defence to cross-examine him. It was held that this procedure was irregular and that the evidence of the witness was inadmissible but that since no substantial miscarriage of justice had occurred, the appeal was dismissed. The deciding factor in all these cases is whether the wrongful admission of the inadmissible evidence or wrongful rejection of admissible evidence in each case occasioned a substantial miscarriage of justice. And whether the wrongful admission of evidence or wrongful rejection of evidence has this effect is a matter for which no general rules can be laid. Two important cases must be mentioned here. The first is *R.* v. *Gabriel Adaoju Wilcox*.[15] The appellant was charged with uttering a forged document and stealing the amount covered by the cheque. Exhibited in the case was a bank account book in which the account entry of the same cheque was to be found. Evidence was given that the entry had been partially erased. The trial judge, outside the court, and not during the course of the hearing, found out by himself what the erased words were by the use of a magnifying glass. It

[12] See also *Kuba Bukie Odu* v. *The State*, 1965 N.M.L.R. 129.
[13] (1953) 14 W.A.C.A. 374.
[14] (1960) 5 F.S.C. 212.
[15] [1961] All N.L.R. 631.

was held that the court was in error for examining the exhibits outside of court and for thus considering matters which had not been brought out of examination of witnesses in open court or which should have been judicially noticed by the Court, but that as there had been no substantial miscarriage of justice the appeal could not be allowed on that ground. The second case is *Chief Dugbo & Ors.* v. *Chief Kporoaro & Ors.*[16] In this case a copy of a judgment which was not certified and therefore inadmissible was admitted. The Federal Supreme Court held that since the learned trial judge used it partly to discredit the traditional history given in the case and partly to re-affirm evidentiary value and could not reasonably have affected the decision in the case, the court acting under section 226 (1) would not reverse the judgment.

133. Wrongful Admission and Rejection of Evidence Leading to a Reversal of the Decision Appealed

When the wrongful admission of inadmissible evidence (which in civil cases has not been agreed to by both parties) or the rejection of admissible evidence or indeed other grave irregularity committed by the court of trial has in the opinion of the appeal court, led to a substantial miscarriage of justice, then the judgment of the trial court would be quashed.[17] After quashing the judgment, the appeal court may, under certain circumstances, order a retrial; these circumstances will be discussed in the next paragraph. The purpose of this section is to discuss the cases in which the appeal court will merely allow an appeal either by quashing a conviction or giving judgment for the respondent in a civil case.

The question as to what amounts to "substantial miscarriage of justice" must depend upon the facts of each case and as it was pointed in the last section, no general rules can be laid down. It is well, however, to note that an appeal will be allowed in any of the following situations:

(*a*) If after expunging the inadmissible evidence there is not left sufficient admissible evidence to support the verdict of the trial court. This will be so, for example, where inadmissible evidence is admitted and used as corroboration of the evidence of a witness needing corroboration. In *Reuben Shofoluwe* v. *R.*[18], the deposition

[16] 1958 W.R.N.L.R. 73.
[17] See *R.* v. *Oyefolu* (1950) 13 W.A.C.A. 186, and *Angela Odok* v. *The State*, unreported, but see Supreme Court Appeal S.C. 380/1965 decided on October 8, 1965.
[18] (1951) 13 W.A.C.A. 264.

of a witness was wrongly admitted and in his judgment the trial judge not only made frequent reference to the deposition, but also specifically accepted part of the statement contained in it as corroborative evidence of the testimony of a witness whose evidence the judge stated he would have hesitated to accept without corroboration. The appeal was allowed on this ground.

(b) In criminal cases if the appeal court is in doubt whether or not the wrongful admission of inadmissible evidence has substantially affected the mind of the judge or the jury in coming to the decision, then the appeal will be allowed. In *R.* v. *Harry & Ors.*,[19] the appellants were convicted of the murder of a boy whose "dying declaration" was wrongly admitted. The West African Court of Appeal allowed the appeal on the grounds, *inter alia,* that they felt unable to say that had the inadmissible declaration been rejected, the lower court would inevitably have come to the same conclusion. This should be contrasted with *R.* v. *John Ogbuewu*[20] where in spite of the wrongful admission of a "dying declaration", the West African Court of Appeal dismissed the appeal as there was sufficient other evidence to support the conviction. In civil cases, it is submitted that if an appeal court is in doubt whether or not the wrongful admission of inadmissible evidence has substantially affected the mind of the judge or the jury, the appeal will be dismissed as in that case the appellant would not have discharged the onus which lies on him in such cases.

(c) If the appeal court is satisfied that had the admissible evidence (which had been rejected) been in fact accepted, the verdict would certainly have been different, then the appeal will be allowed. Similarly if the appeal court is doubtful if the verdict would or would not have been different, the appeal will be allowed. In both of these cases, however, re-trials may be ordered. In *Peter Ezeani & Ors.* v. *Nneli Ezene & Ors.*,[21] the plaintiffs claimed special damages being the value of their properties alleged wilfully damaged and looted by the defendants. The trial court refused to admit a certified copy of the criminal proceedings in which the defendants were convicted of riot during which the plaintiff's properties were damaged. It was held that the trial court erred in refusing to admit the copy of the criminal proceedings and that the

[19] (1938) 4 W.A.C.A. 37.
[20] (1949) 12 W.A.C.A. 483.
[21] (1935) 2 W.A.C.A. 342.

appeal would be allowed and the case sent back for re-trial.[22] The general principles governing the re-ordering of a new trial when admissible evidence has been wrongly rejected or inadmissible evidence wrongly admitted will now be discussed.

134. Wrongful Admission and Rejection of Evidence Leading to an Order of Re-trial

Under certain conditions when admissible evidence has been wrongly rejected or inadmissible one wrongly accepted, an appeal court may, after allowing an appeal, order a re-trial. We saw in the last paragraph how wrongful rejection of admissible evidence in civil cases may lead to an order of re-trial and we need not say more of that here.

It will be more profitable to base our discussion under this heading on the case of *Yesufu Abodunde & Ors.* v. *R.*[23] which deals not only with the admission of inadmissible evidence and the rejection of admissible one, but with other irregularities committed by the court of trial generally. The case was one of the many murder cases arising out of the famous "Adelabu Riots" of 1958. The judge who heard most of these murder cases conducted visits to the *locus in quo* in almost each one of the cases, and convicted many of the accused persons. Appeals in the cases of those convicted of murder in the riots came before the same session of the Federal Supreme Court, and the most important ground of appeal in each case was that the visit of the court to the *locus in quo* was wrongly conducted and that therefore inadmissible evidence was wrongly admitted. The Federal Supreme Court allowed some of the appeals[24] and ordered a re-trial in others.[25] On the whole that court found it necessary to enunciate the principles under which it ordered the re-trials. Abbott F.J., in enunciating these principles said:[26]

> "We are of opinion that before deciding to order a re-trial, this court must be satisfied
>
> (*a*) that there has been an error in law (including the observa-

[22] The court relied on *Re Crippen* [1911] P. 108; and *Marsh* v. *Darley* [1914] 1 K.B. 1.
[23] (1959) 4 F.S.C. 70; (1959) W.R.N.L.R. 145.
[24] These included the *Abodunde* case, and *Adelakun Arutu* v. *R.* (1959) 4 F.S.C. 00; (1959) W.R.N.L.R. 141.
[25] *E.g.*, *Sanusi Ogunbode & Ors.* v. *R.* (1959) W.R.N.L.R. 150.
[26] (1959) 4 F.S.C. 70 at 73; (1959) W.R.N.L.R. 145 at 149.

tion of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand this court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to section 11 (1) of the Ordinance;[27]

(*b*) that, leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant;

(*c*) that there are no such special circumstances as would render it oppressive to put the appellant on trial a second time;

(*d*) that the offence or offences of which the appellant was convicted or the consequences to the appellant or any other person of the conviction or acquittal of the appellant, are not merely trivial; and

(*e*) that to refuse an order for a re-trial would occasion a greater miscarriage of justice than to grant it."

As it was pointed out by the court, it is impossible to forsee all combinations of circumstances in which the question of ordering a re-trial may arise. It is to be remembered that these principles are based upon the overriding consideration of doing substantial justice in each case.

Lastly the point must be made that it is not likely that an appeal court will order a re-trial twice in the same matter on account of the wrongful admission of the same type of evidence by the trial court. The appellant in *R.* v. *Olubunmi Thomas*[28] had been tried in the High Court and convicted. He appealed to the Federal Supreme Court and his conviction was quashed because the High Court had admitted inadmissible evidence. A re-trial was ordered. At the re-trial before another judge of the High Court, the same inadmissible evidence was again admitted. De Lestang Ag. C.J.F. (as he then was) said:

> "Normally in an appeal of this nature we would consider ordering a re-trial, but in view of the fact that the appellant has been in jeopardy twice and the prosecution have persisted

[27] The Federal Supreme Court (Appeals) Act, Cap. 67. The appropriate section is s. 15 (1), and not s. 11 (1).
[28] (1958) 3 F.S.C. 8.

in leading inadmissible evidence which could have no other effect but to prejudice the fair trial of the appellant, we consider that it would not be right to make that order in the present case."

The appellant was accordingly discharged and acquitted.

PART VI

WITNESSES

Chapter 19

COMPETENCE AND COMPELLABILITY OF WITNESSES

135. Competence and Compellability: General Considerations

At the onset of the discussion on the present subject matter it is necessary to distinguish between competence and compellability. In general, and subject to the exceptions to be discussed hereinafter, every person is a competent witness in any judicial proceeding. The question whether a person who is competent to give evidence can also be compelled to do so, depends on entirely different considerations. It is obvious that every compellable witness is a competent witness because the court will not compel anyone to give evidence if he is incompetent to do so. On the other hand it is not every competent witness that is compellable. Any compellable witness who refuses to give evidence can be punished for contempt of court, but, it must be pointed out that in some cases, to be discussed later in this chapter, a compellable witness may be excused from answering certain questions.

Section 154 (1) of the Evidence Act provides that:

> "All persons shall be competent to testify, unless the court consider that they are prevented from understanding the questions put to them, or from giving material answers to those questions, by reason of tender years, extreme old age, disease whether of the body or mind, or any other course of the same kind."

Reserving a discussion in respect of children of tender years, persons of extreme old age and persons suffering from defective intellect and disease of body and mind to paragraphs 138 and 139 below, it is only necessary at the moment to state that once a person who is not a party to the suit is a competent witness, the mere fact that he has listened to a part or all the evidence that has been given in the case does not make him cease to be a competent witness. In *Udo Idion Akpan Ekerete* v. *Udo Unwe Eke*,[1] a witness who had been in court throughout the proceedings was held to be competent to give evidence in the proceedings but that the question of the weight

[1] (1926) 7 N.L.R. 73.

to be attached to his evidence was a different matter altogether.

The question whether a person convicted of murder is a competent witness was decided in *R.* v. *Felix Onyinke*,[2] by reference to the English common law and the English Forfeiture Act.[3] In that case it was held that a person under sentence of death was a competent witness. Although that case was decided before the Evidence Act, yet there can be no doubt that such a person is a competent witness under that Act, because if it was otherwise the Act would have said so.

The fact that a person is an accomplice does not prevent him from being a competent witness. Section 177 (1) of the Act provides that "an accomplice shall be a competent witness against an accused person." In *Inspector-General of Police* v. *Sunday Edosomwan*[4] it was held that an accomplice who is not charged with the offence along with the accused person was a competent witness for the prosecution. It was held in *R.* v. *Michael Adedapo Omisade & Ors.*[5] that a witness who was not on trial in the case but facing court trials in other cases on charges which were related to the charges for which the accused persons were being tried was a competent witness. The accused persons in the case were indicted for conspiracy to commit treason and for treasonable felonies. Two of the witnesses were facing charges for being in illegal possession of arms alleged to have been imported into the country in pursuance of the conspiracy and for the purpose of committing treason, that is, to levy war against the country. The Federal Supreme Court held that the two witnesses were competent witnesses. Furthermore it was held in this case that section 177 (1) is a rule of general application which applies to treasons, treasonable felonies and other offences alike.[6]

136. The President, The Regional Governors and Diplomatic Agents

It is submitted that neither the President of the Republic nor any of the Regional Governors as heads of states are compellable witnesses. They are however, competent witnesses. Similarly foreign sovereigns, their ambassadors and other diplomatic agents, are not compellable witnesses but are competent witnesses if they waive their immunities. Section 1 (1) of the Diplomatic Immunities and Privileges Act, 1962,[7] provides that every

[2] (1941) 7 W.A.C.A. 31.
[3] 33 & 34 Vict., c. 23, s. 1.
[4] 1957 W.R.N.L.R. 161.
[5] 1964 N.M.L.R. 67.
[6] See Chap. 21, *post*.
[7] No. 42 of 1962.

> "foreign envoy and every consular officer, the members of the families of those persons, the members of their official or domestic staff, and the members of the families of their official staff, shall be accorded immunity from suit and legal process. . . ."

but by section 2 of the same Act, all the persons described above may waive their immunities. Sections 3 and 4 of the same Act make similar provisions in respect of the High Commissioners from the Commonwealth countries, their officials and their families, whilst sections 11 and 15 also make similar provisions in respect of representatives of certain recognised international organisations.

Subject to the above all aliens are competent and compellable witnesses. Even if they cannot speak English, which at present is the language of the courts, they will have to give their evidence through sworn interpreters just as a Nigerian who is unable to speak that language.

137. Children

As we have seen, a child who is prevented from understanding the questions put to him or from giving rational answers to those questions by reason of tender years, is not a competent witness (s. 154 (1)). The first point to note is that there is no age stated and it is therefore the duty of each court before which a child appears for the purpose of giving evidence, to determine first of all whether the child is sufficiently intelligent to be able to understand questions put to him or to be able to answer questions put to him rationally. The court does this by putting preliminary questions to the child which may have nothing to do with the matter before the court. If as a result of this investigation the court comes to the conclusion that the child is unable to understand questions or to answer them rationally then the child cannot be a witness at all in the case. But if the child passes this test, he is submitted to a further test for the determination of the further question whether he is in the opinion of the court able to understand the nature of an oath. This question is also determined by the court putting questions to the child as to the nature of an oath. He is asked about God and what will happen to one who tells lies after being sworn etc. If he fails in this respect he will nevertheless be able to give his evidence but will not be sworn provided he has passed the first

test under section 1 54 (1), and understands the duty of speaking the truth (s. 182 (1)).[8]

The point must be emphasised that the procedure sketched in the last paragraph must be strictly followed. The order cannot be changed. The question whether a child is capable of understanding the duty of speaking the truth cannot be determined outside the court[9] or after the child has given his evidence. In *William Omosivbe* v. *Commissioner of Police*,[10] Kester J., said:

> "There was nothing on the record to show that an investigation was first made in court to justify admitting the child's evidence on oath. This is a serious omission. . . . The fact that in his judgment the learned magistrate said that after hearing the evidence of the child in the witness box he came to the conclusion that she was mentally capable of understanding and giving an intelligent account of the case to his satisfaction, cannot justify this condition precedent nor cure the irregularity."

A court would be wrong to exclude the evidence of a child merely because the child does not understand the nature of an oath. Before the court can properly do so it must be satisfied that the child as a result of tender age is unable to understand questions or answer them rationally or to understand the duty of speaking the truth. In *Inspector-General of Police* v. *Suara Sunmonu*,[11] the appellant was charged with indecent assault[12] and a child attempted to give evidence for the defence, but the trial magistrate refused to allow the child to give evidence on the ground that the child did not understand the nature of an oath. In deciding this case Ademola C.J. (West as he then was) unfortunately relied on an English case without referring to the Evidence Act, which as we have seen, contains abundant provisions which cover the point. He said,[13]

> "Now, the matter of a child who does not understand the nature of an oath was dealt with in the case, *R.* v. *Southern*.[14]

[8] This provision is similar to that of s. 38 (1) of the Children and Young Persons Act, 1933 (23 & 24 Geo. 5, c. 12). See *R.* v. *Surgenor* (1940) 27 Cr. App. R. 175.
[9] See *R.* v. *Dunne* (1930) 21 Cr. App. R. 176.
[10] (1959) W.R.N.L.R. 209 at 211.
[11] 1957 W.R.N.L.R. 23.
[12] *Contra* s. 360 of the Criminal Code.
[13] At p. 24.
[14] (1930) 22 Cr. App. R. 6.

> It is clear from this case that the evidence of a child would be properly admitted if the court is satisfied that the child does not understand the nature of an oath. Before admitting such evidence, however, it is the duty of the judge to satisfy himself that the child is sufficiently intelligent to appreciate what he was saying and understands the duty of speaking the truth."

This is also a statement of law under the Act.

There is no provision under the Act to prevent the court from acting on the unsworn testimony of a child and relying on it alone in finding or disproving liability in civil proceedings but it is exceedingly doubtful if any court will find civil liability on the unsworn evidence of a child without corroborative evidence. The matter is however, put beyond doubts in criminal cases. Section 182 (3) provides that in such cases the evidence of such a child must be "corroborated by some other material evidence in support thereof implicating the accused."

Once a child is proved to understand the nature of an oath and he gives his evidence on oath, there is little difference between that evidence and the evidence of an adult. In *William Omosivbe* v. *Commissioner of Police, supra,* the appellant was convicted by a magistrate of stealing a sum of money, the evidence against him being that of a girl under seven years of age who said that she had been lured away from their home whilst the appellant proceeded to steal the money which had been locked up in a cupboard. It was held that the evidence of this child given on oath did not as a matter of law, require corroboration although it was not the practice to convict on such uncorroborated evidence except after weighing it with extreme care. But a court which is convicting on the evidence of a single adult witness also has to weigh that evidence with care.[15]

138. Old Persons and Persons Suffering from Disease of Body or Mind or other Affliction

An old person, no matter how old, is a competent witness as in the case of a child of tender years, if he is able to understand questions and to give rational answers to those questions (s. 154 (1)). It does not appear that there are any reported cases on this point

[15] See *Joshua Alonge* v. *Inspector-General of Police* (1959) 4 F.S.C. 203.

in this country and the present writer has not come across a single case in which this point has arisen. It is therefore submitted with some confidence that the same method of test used in the case of a child would be used in the case of an old person.

Similarly a person suffering from disease whether of body or mind is a competent witness, unless the court considers that he is prevented from understanding questions put to him or from giving rational answers to those questions by virtue of the said disease (s. 154 (1)). This provision will also cover the case of a person who is unable to understand questions or answer them by reason of "any other cause of the same kind." It is submitted that the procedure for determining this will have to be similar to that used in determining the same question in the case of a child. A person does not become incompetent to give evidence merely because he is drunk—he must be so drunk that he is unable to understand questions or answer them rationally.

A person who is of an unsound mind, and even if so certified, is not *ipso facto* incompetent to give evidence. Section 154 (2) provides that

> "a person of unsound mind is not incompetent to testify unless he is prevented by his mental infirmity from understanding the questions put to him and giving rational answers to them."

In this case as well as in the cases discussed above in this section, the question whether the person suffering from old age, or from disease of the body or mind, or from intoxication, or of unsoundness of mind, is in consequence unable to understand the questions put to him and give rational answers to them is for determination by the trial judge or magistrate. If the court is of the view that the disease or the intoxication or the unsoundness of mind is only of a temporary nature likely to disappear soon, it is submitted that the court would be justified in granting an adjournment in the case, provided in criminal cases the provision of the Constitution requiring that a person accused of an offence is "entitled to fair hearing within a reasonable time,"[16] is complied with.

Finally reference must be made to section 155, relating to dumb witnesses. It is submitted that this provision must also be applicable *mutatis mutandis* to deaf and dumb witnesses. The section provides as follows:

[16] S. 22 (2) of the Constitution of the Federation, Act No. 20 of 1963.

"(1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court.

(2) Evidence so given shall be deemed to be oral evidence."

In this sort of case, preliminary questions are first put to determine if the witness could understand questions and give rational answers which can be understood by the court or through a sworn witness who is able to communicate with the witness. It is after the court is satisfied that the witness has passed this test that he can be allowed to give his evidence in the manner prescribed by the section.

139. Accused Person: As Witness for the Prosecution

The problem of an accused person being called as witness for the prosecution in criminal cases arises only where there are one or more other accused persons charged along with the particular accused person. Before an accused person can be called to give evidence for the prosecution against a co-accused person he must himself have pleaded guilty; and the right of an accused person to testify against a co-accused is given under section 158 of the Act. In *Emmanual Umole & Ors.* v. *Inspector-General of Police*,[17] the appellants and Z were charged with stealing. Z pleaded guilty and was convicted but before he was sentenced he was called as witness for the prosecution. Brown C.J. (North) said:[18]

> "We have no doubt that at the time when he gave his evidence he was not on trial. When he pleaded guilty he was convicted on his own plea; there was no issue to be tried . . . (He) was not being tried jointly with the appellants, and he was therefore a competent witness for the prosecution."

In this sort of case, however, the witness would be an accomplice.

When the witness is not charged along with the accused persons but he is a person who could be convicted of the offence, then he is an accomplice and his position has already been examined. A witness who is not on trial in the case but is facing court trials for other offences related to those which are the subject of the trial in hand is also a competent witness. The point is well illustrated by the case

[17] 1957 N.R.N.L.R. 8. [18] At p. 10.

of *R.* v. *Michael Adedapo Omisade and Ors.*[19] which has been discussed. (See § 135, *ante*). It only remains to add that in that case the Supreme Court viewed with the greatest disapproval the method adopted by the prosecution in keeping the charges in the magistrate's court hanging over the two witnesses until after they had given their evidence in the case in the High Court.

140. Accused Person: As Witness for the Defence

One point is beyond doubt; that "no person who is tried for a criminal offence shall be compelled to give evidence at the trial". This is a fundamental right under the constitution (s. 22 (9) of the Constitution of the Federation[20]). This provision forbids an accused person from being compelled to be a witness whether for the prosecution or for the defence in the same trial. We have seen how far an accused person can give evidence for the prosecution. As far as giving evidence for the defence is concerned, an accused person is a competent, and as we have seen, not a compellable witness. Section 159 of the Evidence Act is in conformity with the above quoted provision of the Constitution. It provides that:

> "Every person charged with an offence shall be a competent witness for the defence at every stage of the proceeding, whether the person so charged is charged solely or jointly with any other person."

This is subject to the proviso that he must not be called as witness except upon his own application (s. 159 (a)), and, if he refuses to give evidence, his failure to do so must not be made subject of any comment by the prosecution, (s. 159 (b)).

If he chooses to give evidence then he can be asked questions whatsoever on cross-examination including questions which would tend to criminate him as to the offence charged (s. 159 (c)), but he is not obliged to answer any question tending to show that he has committed or been convicted of or been charged with any offence other than that with which he is then charged, or is of bad character with some exceptions already discussed (s. 159 (d)). The provisions of an English statute (s. 1 of the Criminal Evidence Act, 1898[21]) similar to these were considered by the Court of Criminal Appeal and the House of Lords in the case *R.* v. *Jones*[22] which has been fully discussed in paragraphs 56 to 59, *ante*.

[19] 1964 N.M.L.R. 67. [20] Act No. 20 of 1963. [21] 61 & 62 Vict., c. 36.
[22] *Sub nom. Jones* v. *Director of Public Prosecutions* [1962] A.C. 635.

141. The Spouse of an Accused Person: As Witness for the Prosecution

The basic principle is that the spouse of an accused person is not a competent (and *a fortiori* not a compellable) witness for the prosecution unless upon the application of the other spouse who is on trial (s. 160 (2)). It should be remembered that the requirement of the provision is not that the accused must *consent* to the other spouse giving evidence for the prosecution but that he or she can only do so upon the *application* of the accused.

This provision is applicable only in the cases of a husband and wife of a monogamous marriage. This is a relic of the old colonial days when the so-called "Christian" marriage was regarded as superior to the indigenous customary and Moslem marriage of the Nigerians which relic should have disappeared with the colonial era. Nevertheless the law remains the same, that is, that only the wife of a monogamous marriage and not that of a polygamous marriage who cannot, generally speaking, be called as a witness for the prosecution against her husband unless upon his application. As we have seen[23] there is a presumption that every marriage in Nigeria is a monogamous marriage, and it will be for the prosecution to prove that a witness for example who says "I know the accused, he is my husband" to show either that the marriage of the woman to the man is not a monogamous form of marriage or that she has been called on his application before her evidence can be admitted.[24]

It is now left to discuss the main exceptions to this rule. When a person is charged with certain named offences under the Criminal Code the other spouse is a compellable witness (s. 160 (1) (*a*)). The offences are indecent practices between males (s. 217 of the Code), defilement of girls under thirteen (s. 218), permitting defilement of young girls on a premises (s. 219), indecent treatment of girls under sixteen (s. 222), procuration (s. 223), procuring the defilement of women by threats, fraud or administering drugs (s. 224), abduction of a girl under eighteen with intent to have carnal knowledge (s. 225), unlawful detention with intent to defile, or in a brothel (s. 226) and indecent acts (s. 231), all coming under Chapter XXI of the Code which deals with offences against morality. The

[23] §114, *ante*, where this matter is discussed in detail.
[24] *R.* v. *Daniel Ajiyola & Ors.* (1943) 9 W.A.C.A. 22; *R.* v. *Alberi Dogbe* (1947) 12 W.A.C.A. 184; *R.* v. *Moses Adeleke Adesina* (1958) 3 F.S.C. 25 and other cases referred to in §114, *ante*.

offences also include any charge brought against any person for the consequences of his failure to provide necessaries of life for a person under his charge (s. 300 of the Code) or for the consequences of his failure as head of a family to provide necessaries for a member of the family who is under fourteen years of age (s. 301), as well as for offences of endangering life or health of apprentice or servants (s. 340) and abandoning or exposing children (s. 341). The remaining offences relate to assaults on females and abduction (Chapter XXX, ss. 357 to 362); slave dealing (s. 369), bigamy (s. 370) and child stealing (s. 371).

By the Adaptation of Legislation Order in Council, 1960,[25] the offences which come within these exceptions under the Northern Nigeria Penal Code are the following: obscene or indecent acts (s. 278), keeping a brothel (s. 201), abandonment of a child under twelve years of age (s. 237), cruelty to children (s. 238), kidnapping (s. 271), procuration of a minor girl (s. 275), importation of a girl from a foreign country (s. 276), buying or selling a minor for immoral purposes (s. 278), buying or disposing of a slave (s. 279), traffic in women (s. 281), rape (s. 283), unnatural offences (s. 284), and acts of gross indecency (s. 285). The rest of the offences come under Chapter XXII of the Code (ss. 383–390), "offences relating to marriage and incest."

When a person is charged with an offence against the property of the other spouse but subject to the provisions of section 36 of the Criminal Code, the other spouse is a compellable witness (s. 160 (1) (*b*) of the Act). Finally, when a person is charged with inflicting violence on the other spouse, then the other spouse is a compellable witness for the prosecution (s. 160 (1) (*c*)). But by subsection (3)

> "Nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage or a wife compellable to disclose any communication made to her by her husband during the marriage."

Where an accused person does not apply for his wife to be called as a witness either for the prosecution or even for the defence, such a failure must not be commented upon by the prosecution (s. 160 (4)). But there does not seem to be anything against the court commenting on it.

[25] N.R.L.N. 120 of 1960.

The wife of an accused person is a competent witness against a co-accused person (s. 158). If A and B are jointly charged then Mrs. A can give evidence for the prosecution against B if she consents so to do even though not on the application of A, but she is not compellable. But if her evidence is going to criminate her husband, then she has to be called on the application of her husband.[26]

It should be noted that a spouse cannot be compelled to disclose any communication made by the other spouse to him or her during the existence of their marriage even though he or she may be a competent or even a compellable witness under section 160 (s. 160 (3)). This exception applies even where the marriage has terminated.

In cases of a non-monogamous marriage, a spouse is a competent and compellable witness against the other spouse. Here there seems to be a difference between customary marriage and Moslem marriage. In the case of the latter, neither party to such marriage is compellable to disclose communication made to him or her by the other spouse during such marriage (s. 161). This distinction between the various types of marriages is not only artificial but indefensible, if not before, but certainly after, Nigeria has become a sovereign state.

142. The Spouse of an Accused Person: As Witness for the Defence

There is no doubt that the accused person's spouse is a competent and compellable witness for him if she has been called as a witness on the application of the accused himself. This is so irrespective of the offence for which he is being tried. This can be clearly seen from a general reading of the whole of this part of the Act, Part IX, dealing with the matter of competence of witnesses generally. This is subject, however, to the exception previously mentioned, that is, that the spouse cannot be compelled to disclose any communications made to him or her by the other spouse during the marriage (s. 160 (3)).

When A and B are being tried on the same charge, Mrs. A., on the application of A, is a competent and compellable witness for the defence of A and in doing so she may incriminate B. If she does so, her evidence will not be regarded as that of an accomplice needing corroboration. But she cannot be compelled to give evidence on behalf of B so as to incriminate her husband.

[26] *R.* v. *Daniel Ajiyola & Ors.* (1943) 9 W.A.C.A. 22.

143. The Parties to a Civil Suit and their Spouses

In all civil proceedings the parties to the suit and their spouses are competent witnesses (s. 157). They are not only competent witnesses for themselves, but they are also competent witnesses for the opposing party. The question whether a subpoena has been issued on them, as well as in all other cases, is immaterial, to competency. In *Alhaji Elias* v. *Olayemi Disu & Ors.*[27] the plaintiffs brought an action against the defendants to set aside the sale and conveyance of a piece of family land by some members of the family. At the trial two of the plaintiffs gave evidence. When the defence opened its case, counsel for the first defendant applied to call the plaintiff who had not given evidence. No objection was raised by counsel for the plaintiffs; nevertheless the trial judge ruled that the plaintiff was not a competent witness for the defence. In holding that the trial judge was in error, Brett F.J., after quoting section 157, said:

> "There is nothing in this (section) to indicate that a party in a civil suit is only competent to give evidence upon his own application as is the case under section 159, proviso (a) of the Evidence (Act), with a person charged with an offence, and although it is rare for counsel to take the risk of calling on opposing party, I have no doubt that the judge was wrong in ruling that the plaintiff was not a competent witness for the defence. The fact that no subpoena had been issued was immaterial on the question of competence."[28]

The only exception created by the Act to the rule that all parties to a civil suit are competent witnesses in the proceedings, is in respect to the proviso to section 147 which is to the effect that neither parents of a child is a competent witness as to the fact of their having or not having had sexual intercourse with each other where the legitimacy of the woman's child, who is concerned, would be affected. The proviso, as it has been submitted,[29] has been impliedly abrogated by section 32 (2) of the Matrimonial Causes Act, 1950,[30] and either of the parents is now a competent but not a compellable witness in that respect.

There is nothing in the Act to prevent the spouse of parties to a civil suit from being competent and compellable witnesses for or

[27] [1962] All N.L.R. 214.
[28] *Ibid.*, at p. 217.
[29] §115, *ante.*
[30] 14 Geo. 6, c. 25.

against their spouses. But by virtue of section 163 of the Act a spouse cannot be compelled to disclose any communication made to him or her during their marriage; nor can he or she be permitted to disclose any such communication, unless the person who made it or that person's representative in interest consents. This does not, however, apply to suits brought between the spouses (nor to prosecutions under section 160 (1) discussed above). Finally mention must be made of proceedings relating to adultery. Section 162 provides as follows:

> "The parties to any proceedings instituted in consequence of adultery and the husband and wives of the parties shall be competent to give evidence in the proceedings, but no witnesses in any such proceedings whether a party thereto or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she has already given evidence in the same proceeding in disproof of the alleged adultery."

Under this section, not only the parties but also the co-respondent and the woman-named are competent witnesses. But they cannot be compelled to answer questions tending to show that they had been guilty of adultery unless they have already denied adultery in the same proceedings.

144. Counsel: As Witness for the Client

There is no direct provision in the Evidence Act to debar counsel appearing in a case from giving evidence in it and this must be governed by rules of common sense and of the etiquette of the profession. The statutory provisions which exist deal with professional communications between counsel and client and these will be dealt with in the next chapter. The point for discussion here is the competence of the lawyer to give evidence on behalf of his client.

It would appear that there can be nothing objectionable to counsel giving formal evidence on behalf of his client, provided always that the evidence is not on a point directly material in the case. For example, counsel must be able to tender on oath receipts received for filing papers in court etc. if this has to be done. Such occasions must be rare indeed and the general principle is that counsel cannot give material evidence on behalf of his client so as to identify himself with his client's case: *Adesanya Idowu* v.

Adekoya.[31] During the trial of this suit, counsel for the defendant who had acted for him throughout the trial gave material evidence on his behalf. It was held that the procedure adopted was not only contrary to the practice of the courts, but that it was also an irregularity which rendered the trial unsatisfactory, and therefore a nullity. It is also irregular for counsel to give evidence for an accused person for whom he is appearing.

Similarly it is irregular for counsel to swear to affidavits in the course of the proceedings in a case in which he is appearing if the facts deposed to are material to the determination of the facts in issue between the parties.[32] This is so, because any person who has sworn an affidavit relating to material facts in a case is a potential witness in the case. And it is a clear principle of practice that the duty of counsel to his client and the court prevents him from associating himself with his client's case. Counsel who knows that he is likely to give evidence in a case should withdraw from appearing in the case.[33] It is submitted that this rule must be held applicable so as to bar all the counsel practising in the same chambers from giving evidence in a case in which their chambers have been consulted and in which one counsel from their chambers is appearing.

This rule has, however, been held not to be applicable to the case of a police officer who took part in criminal investigation and is conducting the prosecution on behalf of the Inspector-General of Police. In *Inspector-General of Police* v. *Oyiogu & Ors.*,[34] the police officer who had taken part in the investigation of the case was conducting the prosecution on behalf of the police. Objection was taken against his appearance as he was a potential witness. This objection was over-ruled because as the court said, there was nothing in section 159 against this procedure, but no reference was made to the practice of the courts with respect to legal practitioners. Another case of note is *R.* v. *Daniel Ahamefula Nwachuku & Anor.*[35] During the preliminary investigation before the magistrate, a police officer, who was conducting the preliminary investigation on behalf of the prosecution, at one stage entered the witness box

[31] (1960) W.N.L.R. 210.

[32] See *Banque L'Afrique Occidental* v. *Alhaji Baba Haba Sharfadi & Ors.*, 1963 N.N.L.R. 21; and §82, *ante*.

[33] See *Iris Winifred Horn* v. *Robert Rickard*, 1963 N.N.L.R. 67; and *Olaleke Obadara & Ors.* v. *The President, Ibadan West District Council Grade "B" Customary Court*, 1965 N.M.L.R. 30 at 43.

[34] (1961) W.N.L.R. 248.

[35] 1960 L.L.R. 6.

and gave evidence for the prosecution. At the trial before the High Court he was called as a witness for the Crown. It was submitted on behalf of the defence that in these circumstances the proceedings in the magistrates court and in the High Court were irregular and that therefore the trial was a nullity. It was held that the proceedings before the High Court were regular, the police officer not being the prosecutor and that therefore there was nothing improper in calling him as a witness.

145. Counsel: As Witness for the Opposing Party

There can be no doubt that counsel appearing for one party cannot give evidence for the opposing party. This is clearly contrary to the ethics of legal practice and nothing more need be said about the matter except to state that once counsel has been consulted and instructed in a case, he cannot give evidence for the party opposing the party who has instructed him even though he has not appeared and does not in fact wish to appear in the court proceedings. If he knew that he was likely to give evidence in the case he should never receive instructions from the party opposing the party for whom he was likely to give evidence.

146. Banker

A banker or an officer of a bank cannot be compelled, in any legal proceeding to which the bank is not a party, to produce any bankers book the contents of which can be proved in any manner provided in section 96,[36] or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court made for special cause (s. 156).

[36] Discussed in §91, *ante*.

Chapter 20

OFFICIAL AND PRIVILEGED COMMUNICATIONS

147. Introductory Remarks

Even where a witness is competent and compellable, as discussed in the last chapter, he may be able, under certain circumstances, to claim privilege from answering certain questions or from tendering certain documents. The privilege may be either a privilege of the witness himself or that of another person whom he is representing. If it is his privilege, he cannot be compelled to give the evidence or tender the document, but if it is the privilege of another person he will not be allowed to give the evidence or tender the document unless the person whose privilege it is waives the privilege. When privilege relates to a document this will extend to secondary evidence of the document. This rule does not, however, prevent the other party from tendering the privileged document or giving secondary evidence of it, unless where the document relates to affairs of state.[1]

Where the trial judge has made an erroneous ruling in a case of privilege, and privileged evidence has been accepted or non-privileged evidence shut out, an appeal will not necessarily be allowed nor a new trial ordered.[2] No adverse presumption should be drawn from refusal to waive privilege, unless the privilege relates to the answering of incriminating questions in the case of an accused person giving evidence for the defence.

Usually the claim to privilege is made by the witness himself, but there is nothing preventing counsel from making the claim on his behalf. In some cases, the judge himself tells the witness that he needs not answer the question put. If the privilege is in respect of a document, not being a document relating to state affairs, the court may inspect the document to determine if it is privileged.

Finally the point must be made that there are practically no reported cases in Nigeria on this aspect as most of the court rulings on this aspect of the law are usually interlocutory and cannot find

[1] See *Lloyd* v. *Mostyn* (1842) 10 M. & W. 478 at 481–482; 152 E.R. 558 at 560.

[2] See *R.* v. *Kinglake* (1870) 22 L.T. 335. See also Chap. 18, *ante*.

their way into the law reports. We shall now discuss the different types of official and privileged communications provided for in the Act.

148. Judicial Officers: Information as to Commission of Offences

No judge can be compelled to answer any questions as to his own conduct in court or as to anything which came to his knowledge in court in his capacity as a judge. There is a similar privilege in the case of a magistrate, but in this case a magistrate can be compelled to answer such questions upon a special order of the High Court. This privilege does not extend to questions relating to other matters which occurred in their presence whilst acting in their official capacities (s. 164).

A magistrate or a police officer can claim privilege as to where he got any information as to the commission of any offence. Similarly no officer employed in, or about the business of any branch of the public revenue, can be compelled to answer questions as to where he got any information as to the commission by any person of any offence against the public revenue (s. 165).

149. Affairs of State

Although it is of paramount importance that a party must be able to produce in court every available piece of evidence in support of his case or for the destruction of his opponent's, yet the security and the welfare of the state must be a limiting factor to this right. The limitation in this respect is imposed by section 166 of the Act. Under this section, no one is allowed to produce any unpublished official records relating to the affairs of state or to give evidence of facts contained in such records except with the permission of the head of the particular department concerned. The discretion of the head of department to give or withhold permission in this regard is unfettered and absolute and no court has the power of control over it. But this is subject to any special directions in each particular case which may be given by the President in the case of Federal Government records and the Governors in the case of Regional Government records.

Reference must now be made to the more general provision of section 167 of the Act. The section provides that:

"no public officer shall be compelled to disclose communica-

tions made to him in official confidence, when he considers that the public interests would suffer by the disclosure."

One or two points in this provision should be examined. The first is the meaning of "public officer." This term is not defined anywhere in the Act but the Interpretation Act,[3] section 18 (1) defines a "public officer" as a member of the public service of the Federation or of the public service of a Region within the meaning of the Constitution. Persons who come within the meaning of the term under the Constitution are all persons over whom the Public Service Commission have power of appointment, dismissal and of disciplinary control and some other persons over whom the Commission has no such control, for example the judges of the High Court and the Supreme Court and the members of the Nigeria Police Force.[4] The officials of various statutory boards and corporations will not come within this definition.

The next point which must be examined is whether the view of the official concerned that public interests would suffer by the disclosure is to be accepted by the court as absolutely binding on it. It is submitted that this must be so and the court cannot go behind the decision of the official. If it were otherwise, then the court will have to see and read the document, or where it is oral communication, hear the evidence first before deciding whether by its disclosure the interest of the public would suffer, the very thing which the section seeks to prohibit.[5]

150. Jurors

A juror is not allowed to give evidence of discussions that have taken place between him and the other jurors in the discharge of their duties as jurymen (s. 168). For example, it has been held in England, that an affidavit by a juror, that he did not agree to the damages awarded was not receivable in evidence. This section does not, however, prevent a juror from giving evidence of matters taking place in open court.[6]

[3] Act No. 1 of 1964.
[4] S. 147 of the Constitution of the Federation, ss. 67, 64, 63 and 62 of the Constitutions of Northern, Eastern, Western and Mid-Western Nigeria respectively.
[5] See *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co., Ltd.* [1916] 1 K.B. 822; *Duncan* v. *Cammell Laird & Co., Ltd.* [1942] A.C. 624; *Ellis* v. *The Home Office* [1953] 2 Q.B. 135; *Broome* v. *Broome* [1955] P. 190.
[6] *Nesbitt* v. *Parrett* (1902) 18 T.L.R. 510.

151. Legal Practitioners

A legal practitioner is not allowed to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client. Also he is not permitted to disclose the contents or the condition of any document with which he has become acquainted in the course and for the purpose of his professional employment. He must not diclose any advice he may have given to his client in the course and for the purpose of such employment. This privilege is that of the client and not of the legal practitioner and it therefore can be waived only by the client (s. 169 (1)). These provisions are also applicable to interpreters and the clerks and agents of legal practitioners (s. 170). It is immaterial whether or not the attention of the legal practitioner, the interpreter, clerk or agent is directed to the fact of the existence of the privilege, and the obligation not to disclose continues after the employment has ceased (s. 169 (2) and (3)). The principle upon which this privilege is based is as stated by Holden J., in *Iris Winifred Horn* v. *Robert Rickard*[7] as follows:

> "Every client is entitled to feel safe when making disclosures to his solicitor or counsel, and there are cases establishing firmly that counsel cannot be called to give any evidence which would infringe the client's privilege of secrecy."

This general principle is subject to two main exceptions. First, any communications made in furtherance of any illegal purpose is not privileged (s. 169 (1) (*a*)); nor, secondly, is any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment privileged (s. 169 (1) (*b*)).

In all cases the client can waive this privilege and it is he alone and not the legal practitioner who can waive it. The mere fact that the client has gone to the witness box to give evidence either on his own or on summons by another party is not proof that he has waived the privilege, nor is the mere fact that he or any party to a suit has called the legal practitioner as a witness sufficient to prove that he has waived the immunity. The client will, however, be taken to have consented to waive the immunity if he questions the legal practitioner on matters which would otherwise have been priviledged (s.171).

[7] 1963 N.N.L.R. 67 at 68.

A person who has consulted a legal practitioner and who has been advised by him cannot be compelled to disclose to the court any confidential communication which has taken place between him and the legal practitioner "unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given but no others" (s. 172).

152. Doctor and Patient: Priest and Penitent

There is no part of the Evidence Act giving privilege to communications made between a doctor and his patient and between a priest and a penitent. It is therefore obvious that any communications passing between a doctor and his patient is not privileged. This is much to be regretted but the law is the same here as in England, and a change by legislation in both countries is, respectfully, called for.

Similarly there is no privilege attaching to any communications between a priest and a penitent. These communications are fairly common between a Roman Catholic priest and members of his religious sect and they usually take the form of confessions of offences ranging from minor to rather serious ones. Whether this position should be altered by legislation so as to allow a privilege in this type of case is rather debatable and is dependent upon one's religious beliefs or disbeliefs.

153. Production of Title Deeds and Other Documents

A witness who is not a party in a suit cannot be compelled to produce his title deeds to any property nor can he be compelled to produce any document by virtue of which he holds any property on pledge or on mortgage. Similarly he cannot be compelled to tender any document the production of which might tend to incriminate him. In all these cases the privilege can be effectively waived only by an agreement in writing between him and the person seeking the production of the documents in question (s. 173).

This privilege extends also to a person who is in possession of another person's documents where the latter is entitled to the privilege. A is in possession of B's title deeds or other documents mentioned in the last paragraph and B is entitled under the rule in the last paragraph to refuse to produce them. Under the present rule A cannot be compelled to produce them unless B consents to their production (s. 174).

154. The Privilege Against Self-incrimination

The general principle is that no witness is bound to answer any question if his answer, in the opinion of the court, will have a tendency to expose the witness or the witness's spouse to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for (s. 175).

The first point to note is that a person cannot refuse to go to the witness box to give evidence merely because he thinks that he might be asked incriminating questions. This privilege does not amount to incompetency but only relates to the answering of individual questions.[8]

The next point is that it is the duty of the court in all cases to decide whether the question would have the tendency to expose the witness or his spouse to a criminal charge etc. If the question is one which will obviously call for an incriminating answer then the court will probably rule in favour of the privilege without further investigation. But if the question is not one which must obviously be answered in a way to incriminate the witness or his spouse the court may have to conduct further investigation into the matter to decide whether in fact the answer which the witness will make is likely to incriminate him.

There are some matters which may militate against allowing the privilege in certain cases. If there is only a theoretical possibility and not an actual probability that the witness might be prosecuted, the privilege will not be allowed. For example in the English case, *R.* v. *Boyes*,[9] a witness who had been granted a pardon was compelled to answer a question with reference to the subject matter even though strictly speaking he might still be impeached for the offence. Similarly if the offence is a very minor one and committed a long time ago the court may not allow the privilege. But, it is submitted, the fact that the penalty or forfeiture to be suffered by the witness is cognisable only in a customary court will not prevent the court from allowing the privilege.

The procedure adopted in the courts is as follows: When the question is asked, the judge or magistrate tells the witness that he needs not answer the question. At times the witness himself, or more usually his counsel on his behalf, craves the indulgence of the

[8] See *Boyle* v. *Wiseman* (1855) 10 Exch. 360; 156 E.R. 483.
[9] (1861) 1 B. & S. 311; 121 E.R. 730.

court not to answer the question on the grounds that it will criminate him. If the judge or magistrate agrees with him, as will be done in obvious cases, then he is told by the judge or magistrate not to answer the question. If the judge or magistrate does not agree with him, then he may have to give reasons why he thinks that he is entitled to the privilege and in doing so may have to disclose matters adverse to himself. In English law it has been said that

> "it is settled that anything that a person is wrongly compelled to say after he has claimed his privilege will be treated as having been said involuntarily, with the result that it will be inadmissible in subsequent criminal proceedings brought against him,"[10]

and there is no doubt that Nigerian courts will follow this.

There are some exceptions to this general rule under the Act (s. 175) which will now be discussed. An accused person who goes to the witness box to give evidence in pursuance of his right under section 159[11] may be asked and is bound to answer any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged only and not as to other offences for which he is not standing trial (s. 175 (*a*)). In certain circumstances, however, he can be compelled to answer some other questions. The circumstances are laid down in section 159 and these have been discussed elsewhere.[12]

A witness cannot claim privilege under the present heading only because his answer may establish or tend to establish the fact that he owes a debt or is otherwise liable to any civil suit either at the instance of the state or at the instance of any other person (s. 175 (*b*)). Furthermore there is no privilege for a witness who is giving evidence under section 458 of the Criminal Procedure Act[13] in an enquiry directed by the Attorney-General.

155. Statements without Prejudice

When there is a dispute between two parties, it is usual for them to enter into negotiations with a view to arriving at a settlement. It is usual also that these negotiations are understood, by the parties to be conducted without prejudice to their rights to bring

[10] Cross, *Evidence*, 2nd ed., p. 233. See *R.* v. *Garbett* (1847) 1 Den. 236.
[11] §§130, 140, *ante*. [12] §§56–59, *ante*. [13] Cap. 43.

actions in court subsequently if negotiations break down. During these negotiations admissions of facts are made either orally or in a letter. If the letter in the latter case is headed "without prejudice" and is written with a bona fide intention of arriving at a settlement, the letter cannot be put in evidence in a subsequent action without the consent of both parties to the negotiations. Similarly evidence of oral admissions made during such negotiations is privileged if the negotiations were understood by both parties to have been conducted without prejudice to their right to bring action later. The rationale of this rule lies in the fact that it is in the best interest of the public that parties should be able to settle their dispute amicably without recourse to the courts, if possible. It is a settled principle that once the first of a series of letters is headed "without prejudice" the whole series will be privileged[14] unless there is clear indication that the parties have regarded the chain as broken and a new one started, the new one not being conducted under another "without prejudice" understanding between them.

It should be noted, however, that merely heading a document "without prejudice" does not carry along with it privilege unless the document relates to negotiations towards the settlement of an issue which has arisen or likely to arise between the parties. Thus a contract between parties headed "without prejudice" does not make the document privileged. In *Societe Commerciale De L'Ouest Africains* v. *Michael Ayodele Olusoga and Anor.*,[15] the second defendant signed a document undertaking to guarantee the fidelity of the first defendant to the plaintiffs in whose employment the first defendant was. On top of it he wrote the words "without prejudice." On being sued under the document the second defendant pleaded that the document could not be received in evidence against him because of the words "without prejudice." It was held that the phrase must be ignored as it could have no meaning at all when attached to such a document.

As pointed out above, privilege under this heading is not confined to written statements alone but extends to oral negotiations between the parties, provided the meetings were understood by the parties to have been held "without prejudice." In *McTaggart* v. *McTaggart*,[16] it was held that the discussions which took place in

[14] *Paddock* v. *Forester* (1842) 3 Man. & G. 903; 133 E.R. 1404.
[15] (1936) 13 N.L.R. 104. [16] [1949] P. 94. See also *Mole* v. *Mole* [1951] P. 21.

the meetings for the purposes of reconciliation between a husband and his wife with a probation officer were privileged but since the parties themselves gave evidence of them they must be taken as having waived their privilege. This principle has been extended by the English courts to cover cases of "without prejudice" negotiations between a husband and his wife before a clergyman who was a friend of the family,[17] and may be extended to similar negotiations before a doctor and a solicitor. Although it was held in *Bostock* v. *Bostock*[18] that the privilege would not attach to negotiations before a solicitor, this decision was doubted in the latter case of *Mole* v. *Mole*[19] and the better view is that privilege must extend to such negotiations.

Finally the point has to be made that the privilege will not attach to any colateral facts discovered during the "without prejudice" negotiations provided the said facts have no bearing on the points in dispute between the parties. The privilege extends only to the parties to the dispute and will not extend to third parties nor will it extend to other disputes between the parties to the negotiations. As it was held in *McTaggart* v. *McTaggart*, *supra*, both parties may agree to waive the privilege.

[17] *Henley* v. *Henley* [1955] P. 202.
[18] [1965] P. 153.
[19] [1951] P. 21.

CHAPTER 21

CORROBORATION

156. General Rule

In Nigerian law, the general rule is that no particular number of witnesses is required for the proof of any fact (s. 178 (1) of the Evidence Act) and generally speaking a person can be convicted of any offence on the oath of a single adult witness just as a plaintiff in a civil suit can succeed on the evidence of a single witness without any other confirmation of the witness's evidence by the testimony of another witness or by any other circumstance. This does not mean however, that the court *must* act on the evidence of a single witness, and it is perhaps fair to say that the court will be exceedingly careful in convicting an accused person on the evidence of a single witness without more especially for serious offences, like murder. To the general rule, however, there are a number of exceptions which will be discussed presently, but before doing so, it will be necessary to state that in cases where the evidence of a witness needs to be corroborated by some other evidence the nature of this other evidence may not be the same in all cases.

157. Evidence of an Accomplice

Under section 177 (1) of the Act, where the only proof against a person charged with an offence is the evidence of an accomplice uncorroborated in any material particular implicating the accused, the judge must warn the jury that it is unsafe to convict the accused upon such evidence though they have a legal right to do so, and where the case is not tried with a jury, he shall direct itself to the same effect.

The first important point in this provision is the meaning of an accomplice. There is no definition of an accomplice given in the Act and as the West African Court of Appeal has pointed out in *Nweke* v. *R.*[1] no formal definition is possible because, by and large, this is a question of fact in each particular case. Hallinan J., has however, said in *R.* v. *Okoye & Anor.*[2] that "a witness is only an accomplice

[1] (1955) 15 W.A.C.A. 29.
[2] (1950) 19 N.L.R. 103.

if he is a person who might on the evidence be convicted of the offence with which the accused is charged." The Supreme Court took the same view when in *William Idahosa & Ors.* v. *R.*[3] they adopted the definition given in Halsbury's *Laws of England* to the effect that "persons are accomplices who are *participes criminis* in respect of the *actual crime charged* whether as principals or accessories before or after the fact in the case of felonies or misdemeanours."[4]

The position of different types of persons who have the foreknowledge that an offence was going to be committed and of certain other persons connected with the commission of the offence will now be examined.

158. A Person who has Mere Knowledge that an Offence was to be Committed

The mere fact that a person knows that another was going to commit an offence and does not prevent its commission does not make that person an accomplice. In *R.* v. *Okoye & Anor.*, *supra*, the first accused informed a police officer that he and others planned to break into an office strong-room and steal therein. He offered to give a share of the booty to the police officer if he arranged for the police not to disturb them. The police officer said it was all right but went and reported to a senior police officer who arranged for the thieves to be caught. At the trial it was argued for the accused persons that since the police witnesses failed to carry out their duty to prevent the commission of an offence under section 53 of the Criminal Procedure Act, they had thereby become accomplices. Hallinan J., said that

> "putting this argument at its highest, the police could only be convicted of perversely and without lawful excuse omitting to perform a statutory duty contrary to section 198 of the Criminal Code; they could not be convicted of aiding and abetting, counselling or procuring the offences charged in the present information. They are therefore not accomplices."

In this type of case no warning as to corroboration need be given by the judge to the jury.

[3] 1965 N.M.L.R. 85.
[4] 3rd ed., Vol. 10, p. 549. See also *R.* v. *Ezechi* [1962] All N.L.R. 113 at 116.

159. Agent Provocateur

The position is quite different, however, where the police or other witness did not only know that an offence was going to be committed but in fact instigated its commission. Such an instigator will properly be regarded as an accomplice. In this sort of case he will be called an *agent provocateur*. An *agent provocateur* has been defined as "a person who entices another to commit an express breach of the law which he would not otherwise have committed, and then proceeds or informs against him in respect of such offence." In *R.* v. *Israel David & Ors.*,[5] the accused persons wanted to sell a boy, a relation of one of them, to a native doctor. The native doctor informed the police about this, and two police officers were detailed to act as prospective buyers. The accused persons and the police officers, in the guise of buyers, negotiated the sale of the boy for £300. After this the police disclosed their identity and arrested the accused persons. Upon these facts, Charles J., held that "the police officers and the native doctor, the latter acting under police instructions, assumed the role of *agents provocateur* and incited the accused to further their alleged conspiracy by attempting to carry it to completion." With the greatest respect to the learned judge this view is completely at variance with the definition quoted above. In the later case of *R.* v. *Gilbert Fanugbo*[6] where the facts were similar to those in *R.* v. *Israel David & Ors.* Beckley J., held that the police officers in those circumstances cannot be regarded as *agents provocateur*. He said:

> "Where there is no evidence that the police instigated or incited him (the accused) to commit an offence, the police cannot be regarded as *agents provocateurs*. . . . The word 'provocateur' is a French word meaning 'instigator,' 'incitor.' Where an accused person has manifested a clear intention to commit an offence and the police facilitate the commission of the offence by the accused in order that the accused may be caught, the police officers and their aids cannot and should not, be regarded as *agents provocateurs*."

The evidence of a person who can properly be regarded as an

[5] (1960) W.N.L.R. 170.
[6] Unreported, but see Abeokuta Criminal case No. AB/7C/63. See also *Att.-Gen., Western Nigeria* v. *Lamidi Ajetunmoni & Ors.*, unreported, but see Abeokuta Criminal case No. AB/16C/63.

agent provocateur must be suspect. It is the duty of a court which admits such evidence to warn itself that it is unsafe to convict upon it unless it is corroborated in some material particular by independent evidence tending to show that both the alleged crime was committed and that the accused participated in it.[7]

160. A Person Taking Part in Negotiations Leading to the Commission of an Offence

To be distinguished from the last two types of persons who have foreknowledge that an offence was going to be committed is the case of a person who takes part in the negotiations leading to the commission of an offence. This is usually with reference to official corruption offences, and the case of *Johnson Obi* v. *Inspector-General of Police*[8] affords a very good example. The accused person, a police corporal, had threatened to arrest two native court messengers and a councillor for illegally investigating a case of attempted murder. They went and told a village chief who summoned a meeting in which the accused said that if he was not to arrest the messengers and the councillor he must be given £60. The chief suggested £50 which was agreed to and given to the accused. He was charged with demanding money with menaces contrary to section 406 of the Criminal Code. It was held that the chief and another witness who took part in the negotiations were accomplices. Similarly in the later case of *Johnson Ereku* v. *R.*,[9] the Federal Supreme Court held that a person who had acted as an intermediary in the asking and receiving of a bribe by a police officer (contrary to s. 116 (1) of the Criminal Code) was an accomplice. In such a case he is an accomplice of the giver as well as an accomplice of the receiver.[10]

161. Tainted Witness

The term "tainted witness" does not appear in the Evidence Act or any other Nigerian Act and a definition of it would appear to be impossible. It is not even clear if this is an intermediate stage between an accomplice and a non-accomplice but the term has been used by the Supreme Court in the famous 1963 "treasonable felony" trials involving the leader of opposition in Parliament, and

[7] *R.* v. *Israel David & Ors.*, *op. cit.* at p. 174. See also *Brannan* v. *Peek* (1947) 63 T.L.R. 592. [8] (1959) W.R.N.L.R. 68. [9] (1959) W.R.N.L.R. 77.
[10] *Odangala Ogbu* v. *R.*, 1959 N.R.N.L.R. 22 at 25, *per* Brett F. J.

therefore needs looking into a little more carefully. It is the case of *R.* v. *Michael Adedapo Omisade & Ors.*[11] A, B, C, and others conspired together to commit treason, that is to overthrow the Federal Government of Nigeria by force of arms. D was invited into meetings of the conspirators which were ostensibly for innocent purposes at the first but in which, subsequently, plans towards the conspiracy were discussed. D attended such meetings for about nine months before withdrawing from attending further meetings. He swore not to say anything about it to the police and in fact did not make a report for another ten months. A full bench of the Supreme Court consisting of five judges held that the witness was not an accomplice whose evidence required corroboration. Dissenting on this point, Mbanefo Ag. J.S.C. (Chief Justice of Eastern Nigeria) was of the view that he was an accomplice or at least a "tainted witness," as has been suggested by one of the counsel for the defence. He said that "even if he (the witness) could not be regarded as an accomplice in the strict sense (although I am of the opinion that he is) he is one on whose evidence it would be unsafe to act without corroboration."[12] With the greatest respect to the most eminent judges who concurred in the majority judgment, it is hardly consistent with general principles as enunciated in the other cases discussed in this chapter to hold that the witness was not an accomplice or at the least a tainted witness whose evidence requires corroboration.

Similar to the tainted witness is a person who may not be strictly an accomplice but is a witness with some purpose of his own to serve. Edmund Davies J., said in *R.* v. *Prath*[13] that "in cases where a person may be regarded as having some purpose of his own to serve, the warning against uncorroborated evidence should be given." This principle was applied by the Supreme Court in *William Idahosa & Ors.* v. *R.*[14] where it was held that two witnesses for the Crown in a murder case who were charged on a separate charge with the murder of the deceased were clearly interested persons who might have some purpose of their own to serve. The Supreme Court was of the view that the evidence of the witnesses "ought to be regarded with considerable caution, and the trial court should have been wary in reaching a verdict of guilty on the uncorroborated evidence of such witnesses."

[11] 1964 N.M.L.R. 67.
[12] (1960) 44 Cr. App. R. 83 at 86.
[13] *Ibid.*, at p. 90.
[14] 1965 N.M.L.R. 85 at 88 (S.C.).

162. A Person who Witnesses the Commission of an Offence

The mere presence of a person at the commission of an offence does not make one an accomplice to the offence.[15] In *R.* v. *Udo Akpan Essien Ukut & Ors.*,[16] the evidence against the appellants was that of two witnesses who hearing shouts in the night, went to the scene and saw the three appellants killing the deceased. In the Federal Supreme Courts, Unsworth F.J., having held that the witnesses could not be regarded as accomplices, said: "It is sufficient for us to say that there is abundant authority for the proposition that a special warning is not required in respect of the evidence of persons who witness a crime in circumstances such as those in the present case." In *Imoke Onyikoro & Ors.* v. *R.*,[17] the appellants were members of a society whose declared purpose, as announced earlier by the first appellant, was to try thieves in the first appellant's house where a thief would be asked to pay money and, if he failed to pay, would be killed. The appellants were convicted of the murder of one man who was alleged killed in pursuance of this illegal purpose. The case for the Crown depended entirely upon the evidence of one witness who was a member of the society when the crime was committed and was still a member at the time of the trial of the appellants. He was not present during the actual killing and took no part in it but stood outside the house and watched through the door. On the day following the murder he was made to pay £5 for his failing to help in the killing. It was held that he was not an accomplice and that his evidence did not require corroboration. The question whether he was a "tainted witness" was not examined by the court.

The point must, however, be made that circumstances may exist which make it possible for a person who has witnessed the commission of an offence to be regarded as an accomplice provided his presence at the commission of the offence amounts to encouragement. In *Wilcox* v. *Jeffery*,[18] A, an American saxophone player, was allowed to land in England only on the condition that he would not take up an appointment there. A, in breach of this condition played at a concert thus committing an offence. W, who knew about A's condition of entry into England, nevertheless paid for a ticket to watch the concert. He attended the concert and later published a

[15] *R.* v. *Ukpe* (1938) 4 W.A.C.A. 141; *R.* v. *Coney* (1882) 8 Q.B.D. 534.
[16] (1960) 5 F.S.C. 183. [17] 1959 N.R.N.L.R. 103. [18] [1951] 1 All E.R. 464.

laudatory report of it in the *Jazz Illustrated*, a magazine of which he was the editor. Lord Goddard held that W was an accomplice to A's offence on the ground, *inter alia*, that W's "payment to go there was an encouragement."

163. Victim of the Offence

There is no difficulty in the case where the witness was obviously the victim of the offence, for example, a woman who is raped, a girl under the prescribed age who is defiled, etc. In such a case neither the woman nor the girl can be regarded as an accomplice. This does not extend to the parties to homosexual and similar offences.[19] In *R.* v. *Dare & Ors.*[20] in consideration of a loan of a sum of money advanced to him by the accused, D handed over to the accused his son M to remain with him as a pawn until the money was repaid. On a charge of slave dealing contrary to section 369 (3) of the Criminal Code, it was held that M was a victim and could not be regarded as an accomplice. Difficulties may, however, arise in official corruption offences under the Criminal Code or the Penal Code. Generally speaking, the fact that a man has given a bribe affords evidence upon which a trial court may, and generally ought, to find that he is an accomplice in the offence of taking the bribe; but if there are other facts and circumstances which go to show that his position is that of a victim of the man who takes the bribe, then the court may find that he is not an accomplice. The giver of the bribe may safely be regarded as a victim if the case is one of extortion as well as one of bribery.[21] In *Thomas Charles Okeke* v. *Commissioner of Police*,[22] the West African Court of Appeal pointed out that "it is quite untenable in argument that those who met the monetary demand of the appellant were accomplices to the demand. Nor, in meeting the demand, could they be regarded otherwise than as victims of the appellant's rapacity." The charge in the case was brought under section 404 of the Criminal Code. The charge in the later case, *R.* v. *Usuma Pategi & Ors.*,[23] was brought under section 405 of the same Code. The first accused was employed as forest guard charged with the duty of inspecting farms in order to check contraventions of the forestry laws. As he was

[19] Ss. 214 and 217 of the Criminal Code and s. 284 of the Penal Code.
[20] (1939) 5 W.A.C.A. 122.
[21] *Abu Osidola* v. *Commissioner of Police*, 1959 N.R.N.L.R. 42.
[22] (1948) 12 W.A.C.A. 303, *per* Abbott J., at p. 305.
[23] 1957 N.R.N.L.R. 47.

new to the area, the second and third accused persons were instructed to act as his guides. They went from village to village demanding and receiving money so that they might not arrest the villagers for offences against the forestry laws. It was held that "in the present case the witnesses for the crown were victims not accomplices. They feared the threat of prosecution." Both sections 404 and 405 of the Criminal Code contain an element of extortion in them. But in *Nweke* v. *R.*[24] the charge was brought under section 116 of the Criminal Code which does not have an element of extortion in it and yet the complainant was treated as a victim. It should be noted, however, that on a charge of obtaining a bribe, a person who has voluntarily acceded to a request for money in order to obtain a preference not otherwise open to him, cannot be regarded as a victim in giving what he must have known was a bribe for that purpose.[25] The point to be made is that whether a complainant is a victim or an accomplice is a question of fact in each case.

164. Evidence of a Co-accused

The next problem is how far the evidence of a co-accused requires corroboration. The first question to answer is whether a co-accused is an accomplice because, if this question is answered in the positive then corroboration is a necessity and nothing more need be said about it. But the tendency, which, happily is now disappearing, of some Nigerian judges following English common law decisions without full, and sometimes no consideration of our statutory law led the courts at a certain period of time to an erroneous conclusion on this point.

Section 177 (2) of the Evidence Act clearly provides that:

> "where accused persons are tried jointly and any of them gives evidence on his own behalf which incriminates a co-accused the accused who gives such evidence shall not be considered to be an accomplice."

In spite of this, Hubbard J., in *Oriaku & Anor.* v. *Police*[26] decided that this subsection should be read as meaning that an accused shall not be considered as an accomplice merely because his evidence incriminates a co-accused, it being understood, how-

[24] (1955) 15 W.A.C.A. 29.
[25] *R.* v. *Ezechi* [1962] All N.L.R. 113 (S.C.).
[26] (1952) 20 N.L.R. 74.

ever, that if the court finds the co-accused guilty and the case against the co-accused rests on his evidence, then corroboration is necessary; for, according to the learned judge, his evidence is that of an accomplice. In this case the learned judge did not advert to the earlier decisions of the West African Court of Appeal in *R.* v. *Emmanuel Adebowale & Ors.*[27] and *Hamuzat Badmos* v. *Commissioner of Police.*[28] In the *Hamuzat Badmos* case, the West African Court of Appeal said:

> "This section (s. 177 (2)) of the Evidence Ordinance is taken from the headnote of the case *R.* v. *Barnes and Richards*[29] which case has been subject of some criticism. And whatever may be said about it, section 177 (2) . . . is the law at present in force in this country. It is clear and unambiguous and there can be no doubt as to its meaning, which is that when an accused person tried jointly with another, gives evidence on his own behalf which incriminates the other, he shall not be considered to be an accomplice. This does not mean that he must be believed. . . . Where any co-accused to whom this section applies incriminates another in giving evidence in his defence, no doubt every court keeps in mind, when deciding credibility to be given to the co-accused's evidence, that he is an accomplice."

The use of the last word in this quotation is rather unfortunate; in the context it could only have been meant to indicate that such evidence should be suspiciously regarded and cautiously accepted. Indeed the pronouncement of the same court in the case of *R.* v. *Rufai Alli & Anor.*[30] decided the following year lends support to this view. In that case the court said:

> "we are of the opinion, however, that the evidence of a co-accused who seeks to exculpate himself and incriminate another should receive the most careful scrutiny and should only be accepted as conclusive as to the guilt of his co-accused where the court after such scrutiny is satisfied that he is a witness of truth."[31]

In spite of the decisions of the West African Court of Appeal in above-mentioned cases it is surprising that Brown C.J. (North) still

[27] (1941) 7 W.A.C.A. 142.
[28] (1948) 12 W.A.C.A. 361.
[29] (1940) 27 Cr. App. R. 154.
[30] (1949) 12 W.A.C.A. 432.
[31] *Ibid.*, at pp. 433–434.

followed the judgment in the *Oriaku* case, *supra*, in a case he decided almost eight years after the two West African Court of Appeal decisions. It is the case of *Peter Ajaegbu* v. *Inspector-General of Police*.[32] Although the learned Chief Justice said that he was not free from doubt whether the decision in the *Oriaku* case did not add something to section 177 (2), yet he was prepared to follow it because, as he said, it appeared to him to be good sense. This line of reasoning, with the greatest respect to the learned Chief Justice, is very difficult to understand. It is certainly not the duty of any court to alter a statute so as to make it reasonable to the court, if the provisions of the statute are clear. Quite rightly, however, Hedges Ag. C.J. (West as he then was) in the case *Inspector-General of Police* v. *Audu Ango & Ors.*[33] refused to be persuaded to follow the *Oriaku* case. He said:

> "My attention has been drawn to a decision of my learned brother, Hubbard J., in the Supreme Court of Nigeria (now the High Court), in the case of *Oriaku & Anor.* v. *Police*. That decision is not binding on me but it has persuasive authority and certainly I treat it with great respect. . . . I am afraid, however, that with great respect, I must differ from Hubbard J., in his interpretation of section 177 (2) of the Evidence Ordinance."

The matter has now been put beyond any shadow of doubt by latter decisions to be mentioned presently and the *Oriaku* case and any other cases based on it or deciding the matter in the same way must be taken as having been over-ruled. The correct position is that an accused person cannot be regarded as an accomplice when he gives evidence in the trial in which he and another accused person are involved and such evidence incriminates the co-accused. Such evidence requires no corroboration though it is suspect and must be acted upon with the greatest caution possible. In *R.* v. *Agbeze Onuegbe*[34] the four appellants and one Ejembi were charged with murder. A *nolle prosequi* was entered in respect of Ejemi who then gave evidence for the prosecution. On the evidence he was clearly an accomplice. The first appellant gave evidence in his own defence and in so doing incriminated the other appellants. It was

[32] 1956 N.R.N.L.R. 104.
[33] 1955–1956 W.R.N.L.R. 168 at 171.
[34] (1957) 2 F.S.C. 10.

held that whereas the evidence of Ejembi required corroboration, that of the first appellant did not. Foster-Sutton F.C.J., said:

> "The learned trial judge construed the section (s. 177) as leaving the court with a discretion as to whether or not it should administer a warning in such a case. If the legislature has so intended it would, no doubt, have said 'it shall not be obligatory upon the court to consider such a person an accomplice,' but it did not, it said 'shall not be considered to be an accomplice.' In saying this, we trust that it will not be thought we mean to convey that it is not open to a trial court to reject the evidence of a co-accused on some other ground, for example, that it does not believe the witness."

In *Inspector-General of Police* v. *Lawrence Akinbayode*,[35] the appellant and another person were charged jointly with stealing, forgery and uttering a forged document. The other person in his defence gave evidence which incriminated the present appellant who was convicted on the uncorroborated evidence of that accused. It was held that that evidence needed no corroboration. In a case of this nature where it was only the evidence of one accused person against the other, prudence and elementary concepts of justice and equity required that the court should warn itself against the dangers of convicting a person on such uncorroborated evidence. As Morgan J. (as he then was) pointed out in the case, prudence should dictate "that in a case such as this, when no facts have been proved in evidence to help the court to determine which of two accused persons is speaking the truth it is dangerous to convict one on the evidence of the other alone."

It only remains to say that in all recent cases the courts have taken the views expressed in above two cases.[36] The conclusions to be drawn from all the cases is that the evidence of an accused person which incriminates a co-accused person required no corroboration, neither does it require, as a matter of practice, that such a direction should be given to the jury, but the court is free to do so.[37] If no direction is given the appeal court will not quash the

[35] 1958 W.R.N.L.R. 161.

[36] *Abot Gyang & Anor.* v. *R.* (1954) 14 W.A.C.A. 584; *Inspector-General of Police* v. *Sunday Edosomwan*, 1957 W.R.N.L.R. 161; *Odungala Ogbu* v. *R.*, 1959 N.R.N.L.R. 22; *R.* v. *Abuah* [1961] All N.L.R. 635 (F.S.C.); *R.* v. *Samaila Asabia & Ors.* [1961] All N.L.R. 673; and *Adamu Maiduguri* v. *R.*, 1963 N.N.L.R. 1.

[37] *Joseph Ogunbayode Ogundipe & Ors.* v. *R.* (1954) 14 W.A.C.A. 458.

conviction provided the trial court properly directed the jury that such evidence should be suspiciously regarded and carefully scrutinised before accepting same.

165. Evidence of Children

As we have seen[38] children of any age are competent to give evidence provided they are possessed of sufficient intellect to be able to understand the questions put to them and give rational answers to them. As we have pointed out, such children can give evidence on oath if they understand the nature of an oath or they may give unsworn testimony if they are unable to understand the nature of an oath (s. 182 (1)). In the former case, no corroboration is required although in acting on such evidence the court must do so with very great caution as children are more likely to be influenced by third persons than adults. Even where such influence does not exist and a child is giving evidence in all honesty, he is nevertheless likely to allow his imaginations to run away with him. For these reasons the judge must direct the jury that they may convict on the sworn evidence of a child but that there is a risk of doing so.[39] As we pointed out in paragraph 137, *supra*, it was held in *William Omosivbe* v. *Commissioner of Police*[40] that a conviction could be had on the uncorroborated sworn testimony of a child. However, the younger the child the greater the risk of acting on such a testimony.

As to the unsworn testimony of children, the Act specifically provides that a person shall not be liable to be convicted of an offence unless such evidence is corroborated by some other material evidence in support thereof implicating the accused (s. 182 (3)). Generally a child who is unable to know the nature of an oath and who is therefore only able to give unsworn testimony is more likely to be younger than one who does and hence the justification for the rule of law requiring corroboration in this case and not in the other. A girl of ten in *R.* v. *Francis Kufi*[41] was, however, after the normal examination, held to be incapable of understanding the nature of an oath, and was allowed to give evidence not on oath as she was found to be sufficiently intelligent to understand the duty of speaking the truth. In this case it was held that the admission of

[38] See §137, *ante*.
[39] *R.* v. *Dossi* (1913) 13 Cr. App. R. 158.
[40] (1959) W.R.N.L.R. 209.
[41] (1960) W.N.L.R. 1.

the offence (of unlawful carnal knowledge of the girl) by the accused to the father of the girl provided the required corroboration.

An unsworn testimony of another child cannot provide the corroboration required for the unsworn testimony of a child which itself requires corroboration,[42] but the sworn testimony of another child or of an adult can serve as sufficient corroboration.

166. Treason and Treasonable Offences

One very important exception to the rule that the court can convict a person of an offence on the testimony of one witness only is the one provided for in section 178 (2) (*a*) of the Act. That subsection provides that no person charged with treason, concealment of treason, treasonable felonies and promoting native war, contrary to sections 37, 40, 41 and 42 of the Criminal Code respectively, "can be convicted except on his own plea of guilty or on the evidence of one witness to one overt act and one other witness to another overt act of the same kind of treason or felony."

This point came for consideration by the highest court in the land in the famous 1963 treasonable felony trials involving the leader of opposition in Parliament, the case of *R.* v. *Michael Adedapo Omisade & Ors.*[43] In this case it was held by the full bench of the Supreme Court that it is not necessary that a witness must be able to testify to an overt act in its entirety but it is sufficient if a number of witnesses give evidence of "snippets" which add up to proof of an overt act.[44] It was also held that an accomplice is a competent witness in the cases being considered under this heading, the rule created by section 177 (1) being one of general application applying equally to all offences.

The rule that at least two witnesses are required in proof of treason (barring where an accused person has pleaded guilty) is, however, inapplicable in cases in which the overt act of the treason alleged is the killing of the head of state or a direct attempt to endanger the life or injure his person. In this case the evidence of a single witness is sufficient to sustain a conviction (s. 178 (2) (*b*)).

[42] *R.* v. *Manser* (1943) 25 Cr. App. R. 18.
[43] 1964 N.M.L.R. 67.
[44] This view was reaffirmed by the Supreme Court in *Anthony Enahoro* v. *R.*, 1965 N.M.L.R. 205 at 280.

167. Other Offences Requiring Corroboration: Perjury

There are a few named offences for which conviction cannot be had on the uncorroborated testimony of a single witness, and these will now be examined; but before doing this, it is necessary to state that in all the cases the sections of the Criminal Code creating the offences specifically make provision for the requirements of corroboration apart from the provisions of the Evidence Act.

The first of such offences is perjury. Section 178 (3) of the Act provides that a person cannot be "convicted of committing perjury or of counselling or procuring the commission of perjury, upon the uncorroborated testimony of one witness, contradicting the oath on which perjury is assigned, unless circumstances are proved which corroborate such witness." And section 199 of the Criminal Code which creates the offence of perjury specifically provides that a person cannot be convicted of committing the offence or of counselling or procuring the commission of it upon the uncorroborated testimony of one witness. In *R.* v. *Salami Ogunubi*[45] it was strenuously argued that it was not necessary to have more than the uncorroborated testimony of one witness as to the falsity of the statement but that what was required was merely the corroboration of the fact that the accused made the statement alleged. These arguments were rejected and it was held that corroboration was required not merely as to the making of the alleged false statement but also as to the falsity of it.

It is necessary to note that the provision does not require the testimony of another witness if corroboration can be obtained otherwise. For example, a clear admission of the falsity of the statement would be sufficient corroboration but a mere contradiction of the impugned statement would not be sufficient.

168. Exceeding Speed Limit

By section 178 (4) a person charged under the Road Traffic Act[46] with driving at a speed greater than the allowed maximum cannot be convicted solely on the evidence of one witness that in his opinion the accused was driving at such a speed. Although as we have seen[47] evidence of opinion of persons who are not experts is generally speaking inadmissible, this is one of the occasions in

[45] (1932) 11 N.L.R. 91.
[46] Cap. 184.
[47] See §80, *ante*.

which, it is admissible. It would appear that the evidence of the opinions of two credible witnesses that the accused was driving at a speed greater than that allowed, will be sufficient provided that their opinions relate to the speed of the accused over the same stretch of road and at the same time.[48] It has been held under a similar provision of the English Road Traffic Act, 1934,[49] in the case *Nichola* v. *Penny*[50] that a police officer's evidence that he followed the accused in a police car and consulted its speedometer which showed that the accused was driving at an excessive speed, was sufficient for a conviction. This should be so because in this sort of case, the evidence is no more the evidence of the opinion of a witness but that of his opinion backed up by evidence of a fact—the reading of the speedometer; but it will be open to the accused to cast a doubt on the accuracy of the speedometer.

169. Sedition

Section 178 (5) provides, *inter alia*, that a person cannot be convicted of the offence of uttering seditious words upon the uncorroborated testimony of one witness. Similar provision is contained in the Criminal Code itself. The offence is created by section 51 (1) (*b*) of the Code and section 52 (3) stipulates that "no person shall be convicted of an offence under paragraph (*h*) of subsection 1 of section 51 of the uncorroborated testimony of one witness." This provision does not, however, apply to the publication of seditious publications (s. 51 (1) (*c*) of the Code) or to the other offences under the section of the Code, all of which do not therefore require corroboration.

170. Sexual Offences

The remaining provisions of section 178 (5) relate to sexual offences and they are to the effect that a person cannot be convicted of certain named sexual offences upon the uncorroborated testimony of one witness. The offences are; defilement of girls under thirteen years of age, defilement of girls between thirteen and sixteen years of age and of idiots, procuration, and procuring the defilement of women by threats or fraud or administering drugs contrary to sections 218, 221, 223, and 224 of the Criminal Code respectively. All these various sections of the Code provide also that

[48] See *Brighty* v. *Peasson* [1938] 4 All E.R. 127.
[49] S. 2 (3) of the Road Traffic Act, 1934 (24 & 25 Geo. 5, c. 50), which replaced s. 10 (3) of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43).
[50] [1950] 2 K.B. 466.

a person cannot be convicted of the offences upon the uncorroborated testimony of one witness.

Similarly by an amendment of the Act, similar offences under the Penal Code require corroboration. These are the offences of procuration of a minor girl (s. 275 of the Code) and sexual intercourse with a girl of under fourteen years of age (s. 282 (1) (*e*)).[51] Even without this amendment the courts would have been ready to read the provision as to corroboration into offences under the Penal Code which are similar to those provided for in the Criminal Code.[52]

In all these cases, the trial court must direct the jury or itself that corroboration is necessary as a matter of law. Failure to give such a direction will be fatal to a conviction. Similarly even if the direction is given, the conviction will be quashed if in fact there is no evidence which can properly be regarded as corroboration. What will amount to corroboration for this purpose as well as for all other purposes will be discussed under paragraph 173 below and all that can be said at the moment is that corroboration may come from the testimony of another witness or from some other independent fact of the case or the conduct of the accused including a confession of the offence by him.[53]

Barring the sexual offences already referred to corroboration is not required as a matter of law in any other cases of sexual offences and therefore in such a case any conviction based entirely on the uncorroborated evidence of the prosecutrix will be sustained. But it would appear that the Nigerian courts, following the English courts, now take the view that in the case of sexual offences where corroboration is not required as a matter of law it will be required as a matter of practice of the courts. The courts take the view that in such cases it is incumbent on the judge to direct the jury that it is not safe to convict on the uncorroborated testimony of the prosecutrix but that they may do so if they are satisfied of the truth of the testimony. If a direction on these lines are not given then any conviction recorded by the trial court will be quashed by the appeal court.[54] In *Inspector-General of Police* v. *Suara Sun-*

[51] See The Adaptation of Legislation Order in Council, 1960 N.R.L.N. 120 of 1960.
[52] See *R.* v. *Datti Kano*, unreported, but see Kano Criminal Case No. JD/64C/62.
[53] *R.* v. *Francis Kufi* (1960) W.N.L.R. 1.
[54] See the English Cases: *R.* v. *Jones* (1925) 19 Cr. App. R. 40; *R.* v. *Freebody* (1938) 25 Cr. App. R. 69; *R.* v. *Burgess* (1950) 40 Cr. App. R. 144; etc.

monu,[55] the appellant was charged with indecent assault, contrary to section 360 of the Criminal Code. Ademola C.J. (West as he then was), said:

> "It is not a rule of law that in sexual offences (clearly the learned Chief Justice did not mean to include those already discussed in the last two paragraphs of this section) an accused person should not be convicted on the uncorroborated evidence of a prosecutrix, but the proper direction is that it is not safe to convict on the uncorroborated evidence of the prosecutrix, but that the jury may, after paying attention to the warning, nevertheless convict if they are satisfied of the truth of the evidence."

This, with respect, summarises the true position in all sexual offences, other than those discussed in the first two paragraphs of this section.

171. Corroboration in Civil Cases: Breach of Promise of Marriage

As was pointed out in the opening part of this chapter, the general rule of law is that a plaintiff can succeed in his claim upon the testimony of only a credible witness which may be himself or some other person. To this general rule there is only one exception provided for in the Evidence Act, whilst the courts have, as a matter of practice, decided that corroboration is necessary in some other cases. All these will now be discussed.

The only exception contained in the Act relates to actions for breach of promise of marriage. Section 176 provides as follows:

> "No plaintiff in any action for breach of promise of marriage can recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise."

This provision is similar to that of section 2 of the English Evidence (Further Amendment) Act, 1869,[56] under which it has been held that the defendant's constant references to the plaintiff as his fiancee some time before the alleged engagement was sufficient corroboration.[57] In general the conduct of the defendant to the plaintiff will be sufficient because the provision does not require the

[55] 1957 W.R.N.L.R. 23.
[56] 32 & 33 Vict., c. 68.
[57] See *Wilcox* v. *Gotfrey* (1872) 26 L.T. 481.

testimony of another witness but "some other material evidence in support of such promise."

In some cases mere silence to deny an allegation of the existence of the promise to marry made in the presence and to the hearing of the defendant may provide the required corroboration. But this will depend upon the facts of each case. In the English case, *Bessela* v. *Stern*,[58] the plaintiff gave evidence that the defendant promised to marry her. A witness called by her who was her sister, deposed to the fact that she had heard her say to him, "you always promised to marry me, and you don't keep your word," and that the defendant made no reply to that apart from giving the plaintiff money and asking her to go away. It was held that the defendant's silence amounted to an admission of the promise and that therefore the evidence of the witness could be treated as material evidence in support for the purpose of the provision. But "the fact that the defendant did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration" (s. 176).[59]

172. Matrimonial Causes

There is no statutory provision requiring that corroboration is necessary for the proof of any of the matrimonial offences. The courts have however, developed the following rules as regards corroboration.

When the alleged matrimonial offence is either adultery or cruelty, then no corroboration is required although it is desirable to have it. In practice the courts are reluctant to grant a petition based on either of these offences on the mere evidence of the petitioner unless such evidence is very strong and convincing.

In *Olufela Sowande* v. *Mildred Sowande*,[60] Dickson J. summarised the position as follows: "Of course, it is quite plain that a court will not necessarily refrain from pronouncing a decree simply because the evidence is uncorroborated,", but the court would hesitate before granting a divorce on the sole and unsupported testimony of a petitioner.[61] The need for corroboration is greater in an undefended case than in a defended one. In a proper case the court will act on the uncorroborated testimony of the petitioner. In *Josephine*

[58] (1877) 2 C.P.D. 265.
[59] This provision incorporates the English decision in the leading case of *Wiedemann* v. *Walpole* (1891) 2 Q.B. 534.
[60] 1960 L.L.R. 58.
[61] See *Fromhold* v. *Fromhold* (1952) 1 T.L.R. 1522 at 1526.

Adukc Oshinloye v. *Folorunsho Adewale Oshinloye*,[62] Dickson J., said that

> "in the case of cruelty it is the practice of the court to require corroboration, and not a rule of law; and it has never been decided that the court is not entitled in a proper case where it is not in doubt where the truth lies, to act upon the uncorroborated testimony of the petitioner."

Divorce is more easily granted on the unsupported testimony of a petitioner in a defended suit than in an undefended one because in undefended cases, the possibility of collusion is greater than in defended ones.

The nature of the supporting evidence depends on the circumstances of each case. In *Ademola* v. *Ademola & Anor.*[63] where the petition for divorce was based on the alleged adultery of the respondent with the co-respondent, it was held that the failure of the respondent to enter an appearance or file an answer to the petition was ample corroboration of the fact alleged by the petitioner that she had confessed to the adultery to the petitioner.

173. The Nature of Corroboration

As a preliminary point, it is necessary to state that if in all the cases above where corroboration is required, such corroboration is not forthcoming, any verdict recorded in the absence of such corroboration will be quashed.[64] Similarly if evidence which is not corroboration is treated as such, any verdict recorded in this circumstance will be quashed, unless the appeal court is of the opinion that no substantial miscarriage of justice had occurred. In *Solomon Dabiri* v. *Inspector-General of Police*,[65] the appellant was convicted of stealing on the evidence of accomplices. De Lestang C.J. (Lagos) said:

> "the question which arises for decision is whether the conviction can stand where apart from one matter properly treated as corroboration other matters which are not corroboration are treated as such as well. In my view when this happens there is a misdirection . . . and this court will squash the conviction unless it can apply section 38 of the High Court

[62] 1960 L.L.R. 18. See also the English case, *Kafton* v. *Kafton* [1948] 1 All E.R. 435.
[63] 1957 W.R.N.L.R. 208.
[64] See *R.* v. *Anthony De Morgan Okagbue* (1958) 3 F.S.C. 27.
[65] 1960 L.L.R. 1.

> of Lagos Act. That section provides that on the hearing of an appeal in a criminal case the High Court may notwithstanding that it is of opinion that the point raised in the appeal could be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred. In my view that section can be applied in the circumstances of the present case only if the corroboration upon which the learned magistrate properly acted was strong."[66]

As it was not considered strong in this case, the appeal was allowed. If the trial court wrongly holds that evidence which requires corroboration does not require corroboration, for example, if the court holds that an accomplice is not an accomplice and that therefore his evidence which should require corroboration does not, a conviction recorded on that basis will be quashed on appeal. In *Johnson Obi* v. *Inspector-General of Police*[67] it was held that since the trial court had found the witnesses who were accomplices not to be accomplices and had based its finding of fact on that basis, and that since in the circumstances it was impossible to say that the trial court would if it had properly directed itself inevitably have come to the same conclusion as it did, the appeal was allowed, even though there was evidence which could have amounted to corroboration.

When a piece of evidence requires corroboration, what to look for is any independent testimony in support of the evidence. As was pointed out by the West African Court of Appeal in *R.* v. *Sekun & Ors.*[68]

> "in most cases where the question of corroboration arises the question is 'Is there independent testimony which affects the accused by tending to connect him with the crime?' But it is also essential, that there should be some evidence, direct or circumstantial, which confirms the evidence given by the accomplice that the crime has been committed. . . . It is of course not necessary that there should be confirmation by independent evidence of everything the accomplice says, but only some independent evidence connecting the accused with the crime."[69]

[66] See also *Ben Okafor* v. *Commissioner of Police*, 1965 N.M.L.R. 89 (S.C.).
[67] (1959) W.R.N.L.R. 68.
[68] (1941) 7 W.A.C.A. 10.
[69] See also *Latifu Saraki* v. *R.*, 1964 N.M.L.R. 28 and *R.* v. *Richard Adedapo Omisade*, 1964 N.M.L.R. at 77.

As Lord Hewart C.J. said in the English case, *R.* v. *Whitehead*,[70] "in order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated." A person cannot corroborate himself, otherwise as the learned Chief Justice pointed out, the witness only needs to repeat his story some twenty-five times in order to get twenty-five corroborations of it. In *R.* v. *Christie*,[71] another English case, the accused was charged with indecent assault upon a little boy who gave unsworn evidence. The boy's mother and a policeman gave evidence of what the boy told them shortly after the incident and how he described the assault and identified the accused. The House of Lords held that these witnesses could not corroborate the evidence of the boy.

It is a well recognised principle that the evidence of one requiring corroboration cannot serve as corroboration to the evidence of another requiring corroboration: *R.* v. *Michael Adedapo Omisade & Ors.*[72] Thus the unsworn testimony by a child cannot serve as corroboration to the testimony of another unsworn child;[73] nor can one accomplice corroborate the other.[74]

The evidence which is offered as corroboration must tend to show (i) that the offence was committed and (ii) that the accused is implicated in it. These two conditions must both be satisfied. In *Thomas Idiemo* v. *Inspector-General of Police*,[75] the accused was charged with stealing mineral concentrate. The magistrate after warning himself that one witness was an accomplice, proceeded to treat the fact that there was marked similarity between the mineral pointed out by the witness as having been stolen from the workings and a sample taken therefrom, as corroboration of the witness's evidence. It was held that although this evidence might show that a theft of the mineral in question had been committed, it did not amount to corroboration as it did not implicate the appellant in the actual theft. In *R.* v. *Ogale Nweze & Ors.*,[76] the principal evidence against one of the accused persons who were charged with robbery was that of an accomplice. The trial judge found corroboration in the evidence of another witness whose evidence only showed that the accused had been associating with some of the other accused persons for some time before the robbery. It was held that this was not sufficient corroboration as it did not tend to connect him with

[70] [1929] 1 K.B. 99 at 102.
[71] [1914] A.C. 545.
[72] 1964 N.M.L.R. 67.
[73] *R.* v. *Manser* (1934) 25 Cr. App. R. 18.
[74] *R.* v. *Noakes* (1832) 5 C. & P. 326; 172 E.R. 996.
[75] (1957) 2 F.S.C. 26.
[76] (1957) 2 F.S.C. 27.

the offences charged. Had there been a charge of conspiracy different considerations might have applied.[77] In *R.* v. *Griliopoulos & Ors.*[78] it was similarly held in a charge of receiving stolen property that other instances of receiving by the accused person could not furnish corroboration of the evidence of an accomplice.

In *R.* v. *Michael Adedapo Omisade & Ors.*,[79] Ademola C.J.N., delivering the judgment of the Supreme Court said:

> "In considering whether evidence is corroborative, one must take it as a whole: it will not do to say—take this item for instance, it is not corroboration: take this other item, and so forth; one must take all the little items together and consider whether they all add up to corroborate as a whole."

But if the different items when taken together do not amount to any more than mere suspicion, then they cannot amount to corroboration. In *Ben Okafor* v. *Commissioner of Police*,[80] the accused was charged with highway robbery. The police, suspecting a number of persons including the accused, of being involved in the robbery, conducted an identification parade. The judge having held that the evidence of the parade as showing the implication of the accused in the offence was weak, decided that corroboration was necessary. He found these in the following items of evidence: (a) when the accused was being questioned by a chief and the police investigating the case, he ran away and in so doing some currency notes fell out of a bag he was carrying, but these were not shown to be part of the stolen money. (b) The accused later showed a spot to the police where he said he saw some people sharing money. On that spot, some wrappers used for wrapping currency notes were found but these were not shown to have come from the stolen money. (c) Furthermore, the appellant's defence of alibi was contradicted by his witness. (d) Lastly, evidence was given that one of the robbers wore a mask, and the theory was that it must have been the accused who wished to avoid being recognised by one of the persons robbed to whom he was well known. The Supreme Court held that each of these four items of evidence might raise suspicion, together they made the suspicion strong, but that their union together could nevertheless not give them a quality, the

[77] See also *R.* v. *Samuel Amo Ekpata & Ors.* (1957) 2 F.S.C. 1.
[78] (1953) 20 N.L.R. 114.
[79] 1964 N.M.L.R. 67 at 77.
[80] 1964 N.M.L.R. 89.

quality of being corroborative evidence in the true sense, which none of them had.

Corroboration can take different forms apart from the usual form of testimony by another witness. It may be deduced from the conduct of the accused.[81] In *Johnson Ereku* v. *R.*[82] the accused was an inspector of police. On the report of an accident he gave instructions that the driver of one of the vehicles and its owner be prosecuted. The summonses were served. Before they were due to appear in court, both the driver and the owner sent another person to beg the accused on their behalf. It was alleged that the accused demanded money through the intermediary which money was paid to the accused through the same person. On the day following this alleged payment, the accused took the summonses from the driver and the owner of the lorry, tore them, and wrote on the police case file that the file be put away without giving any reasons. It was held on these facts that the conduct of the accused in reversing his instruction corroborated the evidence of the accomplices, that is, the intermediary and the givers of the bribe.

A document written by the accused may be sufficient corroboration.[83] Also admission of the offence to other persons may be sufficient corroboration. In *R.* v. *Francis Kufi*[84] the accused was charged with indecent assault against a girl of ten years of age. It was held that the admission of the offence by the accused to the father of the girl was sufficient corroboration.[85] And in *R.* v. *Ejim Onovo & Ors.*[86] the accused persons, who were charged with murder, after making statements to the police, escorted the police to the spot where the body of the deceased was found. It was held that the finding of the body is corroboration of the confession contained in the statements.[87] In *Gabriel Efobi & Anor.* v. *Commissioner of Police*[88] the accused persons were charged with offering a bribe to an Assistant Superintendent of Police. During the interview at which the bribe was offered a tape-recorder which had been hidden in the room, recorded the interview. It was held that the tape-recording was admissible and that it provided corroboration of the evidence of the Assistant Superintendent of Police.

[81] *R.* v. *Enoch Falayi & Ors.* (1949) 12 W.A.C.A. 492.
[82] (1959) W.R.N.L.R. 77 (F.S.C.).
[83] *R.* v. *Abuah* [1961] All N.L.R. 635 (F.S.C.).
[84] (1960) W.N.L.R. 1.
[85] See also *Inspector-General of Police* v. *Hilary Ogwu*, 1963 L.L.R. 43.
[86] (1958) 3 F.S.C. 26.
[87] See also *Edene Ugarma* v. *R.* (1950) 4 F.S.C. 218.
[88] 1963 N.N.L.R. 1.

CHAPTER 22

THE TAKING OF ORAL EVIDENCE AND THE EXAMINATION OF WITNESSES

174. Introductory Remarks

It is not, strictly speaking, within the purview of a book on the law of evidence to deal with the methods of bringing witnesses to court for purposes of giving evidence: those methods are properly within the ambit of the law of procedure—criminal and civil. Similarly, the order in which witnesses are produced and examined is specifically assigned to the law of procedure by section 184 of the Evidence Act. But the taking of oral evidence and the examination of witnesses are provided for in sections of the Act following section 184. All such sections will be discussed below, but before doing that it is necessary to state that that section further provides that in the absence of any law or rule of practice regulating the matter of the order of production and examination of witnesses, the court shall make use of its discretion. In this regard, it would appear that the courts would be satisfied to follow the practice in English courts. In *Okoro Una Igwede & Ors.* v. *R.*,[1] two witnesses for the accused gave evidence before he, the accused, gave his own evidence. Brett F.J., said that

> "while there is no statutory rule to prohibit this, we think it desirable that the English practice should be followed, under which if an accused person intends both to give evidence himself and to call witnesses as to fact, his evidence is normally taken before that of his witnesses."

Whilst on this point it is necessary to state that in a criminal case "when the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution" (s. 159 (*e*)). An accused person who elects to give evidence under section 159 must give his evidence from the witness box or other place from where other witnesses give their evidence. But this is not to be construed as preventing an accused person from exercising

[1] (1959) 4 F.S.C. 104.

his right not to give evidence at all or to make a statement without being sworn (s. 159 (*f*) and (*g*)). In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the accused person himself has given evidence for his defence does not of itself confer on the prosecution the right of reply (s. 159 (*h*)).

175. The Taking of Oral Evidence: The Oath

Generally a civil suit or a criminal case is tried by the court taking oral evidence from all witnesses for all the parties to the action, and except, as is to be discussed presently, all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oaths Act[2] (s. 179 of the Evidence Act). In some cases however, the court may take cognisance of admissions made by parties to a suit in the court even though not made on oath. In *Chief Aaron Nwizuk & Ors.* v. *Chief Warribo Eneyok & Ors.*,[3] after hearing evidence on both sides, the trial judge went to inspect the land in dispute in the presence of the parties. Both parties at the time of the inspection made some admissions that parts of their evidence in court had been false. In dismissing the claim of the plaintiffs, the court referred to an account of the inspection and the said admissions. It was argued on appeal that the trial judge was wrong in acting on the admissions as they were not made on oath. It was held that "the statements were as much oral admissions by a party in court as if they had been made in a court room. They were matters before the court which the trial judge could take into consideration without the observance of section 179 of the Evidence Act."

The practice of the courts is to ask a witness as soon as he steps into the witness box whether he is a Christian, or a Moslem or whether he belongs to any other religious body. If he belongs to any of these he is sworn in accordance with the provisions of the Oaths Act.[4] If he does not, then he is allowed to make an affirmation before giving his evidence.

The fact that a person to whom the oath has been administered had no religious belief at the time he took the oath does not for any purpose whatsoever, affect the validity of such oath[5] (s. 180). If a

[2] Act No. 23 of 1963 which replaced Oaths and Affirmations Act (Cap. 142).
[3] (1953) 14 W.A.C.A. 354.
[4] See s. 5 of that Act.
[5] See also s. 7 of that Act, and s. 9 of the Oaths and Affirmations Law (Cap. 88 of the Western Nigeria Laws, 1959).

person declares to the court that his religion does not permit the taking of an oath the court may allow such a person to give evidence not on oath provided the court thinks it just and expedient. Similarly a person who has no religious beliefs may be allowed to give evidence not on oath (s. 181 (1)). In all cases where evidence not given upon oath has been received, a record of this and the reasons for such reception must be recorded in the minutes of the proceedings (s. 181 (2)). A child who is unable to understand the nature of an oath may be allowed to give unsworn testimony or make a deposition not on oath provided the court is of the opinion that the child is possessed of sufficient intelligence to justify the reception of the evidence, that he understands the duty of speaking the truth.[6] A deposition taken under this rule is admissible in evidence in all proceedings where such deposition if made by an adult would be admissible (s. 182 (1) (2)). A child who has wilfully given false evidence under these rules under circumstances which would have made him guilty of perjury had he given the evidence on oath, would be guilty of an offence against section 191 of the Criminal Code or section 158 (1) of the Penal Code (s. 182 (4)). The question of the corroboration of such evidence was discussed in the last chapter.[7]

176. The Taking of Oral Evidence: Some Special Provisions

After the witness has been sworn or he has affirmed, or in the case of a child has been allowed to give his evidence unsworn, the next thing is for the court to commence taking oral evidence from him. Before commencing to take the evidence of the first witness in the case, however, the court usually orders witnesses on both sides to be kept out of court and out of hearing. Section 186 (1) provides that the court may on the application of either party, or of its own motion do this but this does not apply to parties to the case nor to their legal advisers even if they are to be called as witnesses. Apart from ordering witnesses out of court, "the court may during any trial take such means as it considers necessary and proper for preventing communication with witnesses who are within the court house or its precincts awaiting examination" (s. 186 (2)).

When a party to a suit proposes to give evidence of any fact, the

[6] See s. 9 of the Oaths Act.

[7] §165, *ante*.

court may ask him to give the evidence in what manner the fact would be relevant; and the court must admit the evidence if it thinks that the fact if proved would be relevant and not otherwise. If certain evidence is inadmissible unless certain other fact is proved, that other fact must be first proved before the evidence is admitted unless the party tendering the evidence undertakes to the satisfaction of the court to give proof of such fact subsequently (s. 185 (1) (2)).

> "If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact."[8]

Many witnesses in Nigerian courts are unable to speak English, the language of the courts, and it therefore becomes necessary for such witnesses to give their evidence through interpreters. In this regard, it is necessary to mention the rule of practice evolved by the courts that interpreters should be sworn before commencing to interpret evidence given in court. In *George Aiyewunmi* v. *Commissioner of Police*[9] the West African Court of Appeal said that

> "there is no rule of law in Nigeria, either statutory or at common law, requiring that an interpreter should be sworn, and that, while it is a most salutary rule of practice that interpreters should invariably be sworn, the fact that the interpreter has not been sworn is not in itself an illegality involving the quashing of the conviction. It would be otherwise were the court of trial not satisfied that the interpretation was in fact accurate . . ."

Finally mention must be made of the provision relating to the taking of the evidence of first and second class chiefs, but this demands no particular discussion. Section 183 provides as follows:

> "where in any suit brought by or against a first or second class chief in either his official or personal capacity such chief desires to give, or where in any other suit the evidence of such a chief is required, the evidence of the chief shall not be given at the hearing of the suit, but shall be taken in the form of

[8] S. 185 (3).

[9] (1948) 12 W.A.C.A. 388.

deposition or otherwise in accordance with the terms of an order to that effect to be made by the court, and the evidence so taken shall be admissible at the hearing if when it was taken the other party to the suit had an opportunity of being present and of cross examining:

Provided that the evidence of the chief shall be given at the hearing of the suit if he so desires, or if the court, having regard to all the circumstances, considers it to be necessary that his evidence should be so given and makes an order to that effect."

177. Examination-in-chief

Generally a witness gives evidence in court by answering a series of questions put to him by his counsel or the parties to the proceeding. This method of putting questions to witnesses with a view to obtaining material evidence from him is called the examination of the witness. The examination of a witness by the party who calls him is called his examination-in-chief (s. 187 (1)). Usually a witness is first examined-in-chief before he is cross-examined by any other party who may so desire (s. 188 (1)). The purpose of examination-in-chief is to obtain evidence in support of the facts in issue or relevant to the facts in issue as contended by the party calling the

ness.

cardinal rule to be followed in the examination-in-chief of a ss is that leading questions cannot be asked if objected to by dverse party except with the permission of the court (s. 195 . A leading question is one which suggests the answer which the rson putting the question wishes or expects to receive (s. 194). Thus on a charge of assault brought against A, it is not permissible to ask a witness "Did you see A hit P?" The proper approach will be to ask P what he saw A do at the material place and time.

The court is however, empowered to permit leading questions as to matters which are introductory or undisputed, for example the name, address, occupation of the witness (if these are not in dispute) or matters which in the opinion of the court has been already sufficiently proved (s. 195 (2)). There is another occasion in which leading questions may be asked during examination-in-chief. The party calling a witness who has been allowed to be treated as a "hostile witness" can ask him leading questions. Before discussing this, the point must be made that if no objection is taken to a leading question and the trial judge exercises his discretion to admit

evidence thus let in, the appeal court may not necessarily allow an appeal on that count even though the evidence thus admitted is a vital one. In *Momo Garba & Anor.* v. *R.*[10] after suffering an attack which ultimately caused his death, the deceased told the first person who found him injured that he was going to die, that he had been beaten, and that one Momo had instigated the beating. The evidence as to the deceased's statement of impending death was extracted by a leading question. No objection to the form of question was taken until the question had been put and answered. It was held that the trial judge rightly exercised his discretion in allowing the question to be put, in the particular circumstances, and in those circumstances, in admitting the answer in evidence, and that the appeal could not be allowed on that score.

178. Hostile Witness

A hostile witness is one who by his conduct shows that he is hostile to the party calling him. If the court is satisfied from the general conduct of the witness that he is hostile to the party calling him, then the court, in its discretion, may allow the party calling the witness to put leading questions to him or (which comes to the same thing) cross-examine him. The mere fact that the witness had made a statement previously which is inconsistent with his evidence in court is not sufficient because there is a general rule preventing a party from discrediting his witness. After all a party who produces a witness to the court wants the court to hold that the witness is a person to be believed. Apart from this, there is also a rule against giving general evidence of bad character against a witness. Section 206 of the Act provides that

> "the party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall in the opinion of the court, prove hostile contradict him by other evidence, or by leave of the court, prove that he has made at other times a statement inconsistent with his present testimony."

This provision which is similar to that of section 3 of the English Criminal Procedure Act, 1865,[11] stipulates that a hostile witness

[10] (1959) 4 F.S.C. 162.
[11] 28 & 29 Vict. c. 18. Under the provision of the English Act, a person may, where his witness proves "adverse" contradict him by other evidence. In *Greenough* v. *Eccles* (1859) 5 C.B.N.S. 786 at 800, however, it was held that "adverse" in the provision means "hostile."

may be contradicted by other evidence. It is the second part, however which is more difficult of application. First it must be shown, by leave of the court, that the witness had made a statement, usually in writing, inconsistent with his testimony in the witness box. But before the previous statement can be put to the witness, "the circumstances of the supposed statement, sufficient to designate the occasion on which he made the statement must be mentioned to the witness and he must be asked whether or not he has made such statement" (s. 206). If he admits making the previous statements, or if it is proved to the satisfaction of the court that he made the previous statement, then the party calling him may cross examine him on the lines of the previous statement (s. 207).

179. Cross-examination

After the party calling a witness has finished examining him in chief, any other party in the case may examine the witness, and this process is called cross-examination of the witness (s. 187 (2)).

In a civil suit if there are two or more defendants, each defendant is entitled to cross-examine any witness for the plaintiff; such cross-examination is usually conducted in the order in which their names appear in the writ of summons. If there are two or more plaintiffs whose interests conflict (for example in claims for declaration of title to the same piece of land after the different claims have been consolidated) each plaintiff is entitled to cross-examine the witnesses for the other plaintiff as well as for the defendants. Cross-examination of a plaintiff's witness by the other plaintiff must be done before cross-examination by the defendants. Similarly in a criminal proceeding where there are two or more accused persons each accused person must be allowed to cross-examine all the witnesses for the prosecution as well as those for other accused persons before they are re-examined (s. 189). In this sort of case, witness for an accused person must be cross-examined by other accused persons before the cross-examination by the prosecution (s. 190).

There is no rule against the asking of leading questions in cross-examination (s. 196), and as a matter of practice, competent advocates sometimes employ leading questions effectively. Cross-examination must relate to relevant facts as already discussed but it need not be confined to the facts to which the witness testified on

his examination in chief (s. 188 (2)). Witnesses to character may be cross-examined (s. 193).

Generally, cross-examination is subject to the rule against the admissibility of evidence. For example, a witness cannot be asked questions on cross-examination so as to let in the contents of inadmissible confession. As much as possible, every statement of fact made by the witness in his examination-in-chief which is disputed by the party cross-examining must be challenged on cross-examination, and he (the party cross-examining) must also put his own side of the case to the witness for him to deny or admit.

When a witness is giving evidence of a contract, grants or other disposition of property he may be asked whether the contract etc. is contained in a document. If his answer is in the affirmative, or if he is about to give evidence as to the contents of any document which in the opinion of the court ought to be produced, then the other party may object to such evidence being given until the document is produced or until facts have been proved which entitle the party who called the witness to give secondary evidence of it. "A witness may, however, give oral evidence of statements made by other persons about the contents of a document if such statements are in themselves relevant facts" (s. 197 (1) (2)).

The main purpose of cross-examination is to elicit from the witness evidence which is favourable to the party cross-examining or which tends to destroy the case for the party producing the witness. Its other purpose is to cast a doubt upon the accuracy of the evidence already given by the witness. In fulfilment of these two purposes, the Act specifically provides, among other things, that questions may be asked which tend:

(*a*) to test the accuracy, veracity or credibility of the witness; or

(*b*) to discover who the witness is and what is his position in life; or

(*c*) to shake the credit of the witness, by injuring his character.[12]

An accused person who is giving evidence in his defence is subject to different rules. He cannot be asked, and if he is asked, he cannot be compelled to answer, any question tending to show that he has committed or been convicted of or been charged with any offence

[12] S. 199.

other than that with which he is charged or that he is of bad character. The exceptions to this have already been discussed.[13]

If a question is asked in pursuance of section 199 and the question relates to a matter not relevant to the proceedings, except in so far as it affects the credit of the witness by injuring his character, the court is to decide whether or not the witness is to be compelled to answer it. If the court is of the opinion that the witness need not answer it, then it is for the court to warn him that he need not answer it (s. 200 (1)). If in spite of that warning he nevertheless answers the question it will be properly admitted and can be acted upon.

In exercising its discretion to allow or not to allow a question, the court is to be guided by the following considerations:

(*a*) Any question which would seriously affect the opinion of the court as to the credibility of the witness is proper.

(*b*) Any question which relates to matters so remote in time, or is of such a character that any answer given would not or at best would only slightly affect the opinion of the court as to the credibility of the witness is improper.

(*c*) If there is a great disproportion between the importance of the imputation made against a witness's character and the importance of his evidence, then the question is improper.[14]

When a witness refuses to answer a question in pursuance of his right under this section, the court may draw the inference that if he had given an answer, the answer would have been unfavourable (s. 200 (3)).

Before a party or his counsel asks a question coming under section 200, he must have reasonable grounds that the imputation contained in the question is well founded (s. 201). If a counsel asks a question in pursuance of his right under the section and the court is of the opinion that he has no reasonable grounds for making the imputation contained in the question, then the court may make a report of the counsel to the person or body responsible for the discipline of legal practitioners (s. 202).

The court in its discretion may also disallow questions which appear to the court

[13] See §§56–59, *ante*.
[14] S. 200 (2).

(*a*) to be indecent or scandalous,
(*b*) to be intended to insult or annoy the witness, or
(*c*) to be needlessly offensive in form even though proper.

A question coming under (*a*) may be disallowed even though it may have some bearing on the questions before the court; but if it relates to the facts in issue or to matters necessary for the determination of whether or not the facts in issue existed then the court may allow it (ss. 203 and 204).

180. Exclusion of Evidence to Contradict Answers to Questions Testing Veracity

There is an old English common law rule that when

> "questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answer he (the witness) gives. No witness can be prepared to support his character as to particular facts, and such colateral inquiries would lead to endless confusion."[15]

Whatever answer a witness gives to a question which is relevant only for the purposes of testing his veracity must be taken as final. In *Att.-Gen.* v. *Hitchcock*,[16] in an information under the revenue laws, a witness, who had given material evidence as to the fact in issue, was asked on cross-examination whether he had not said that the officers of the Crown offered him a bribe to give that evidence. He denied that he had ever said so. It was held that evidence was inadmissible to show that he had made such a statement. But this does not mean that the jury is not free to regard such an answer as untrue. A similar rule is contained in section 205 of the Act which provides that

> "When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him."

Under this rule the answer of a prosecutrix in a charge of rape who denies under cross-examination an allegation that she had volun-

[15] *Harris* v. *Tippett* (1811) 2 Camp. 637; 170 E.R. 1277, *per* Lawrence J.
[16] (1847) 1 Ex. 91; 154 E.R. 38.

tary intercourse with other men is final.[17] But the question whether she had had voluntary intercourse with the accused on previous occasions is relevant, and her denial to it can be contradicted by other evidence[18] (s. 210).

One other matter mentioned by section 205 requires a mention and this is, that a person who gives a false answer to a question under this heading is liable to be punished for making false statements under oath, affirmation, or declaration under section 191 of the Criminal Code or section 158 of the Penal Code.[19] He is liable to imprisonment for seven years under both Codes.

Finally mention must be made of the two exceptions to the prohibition against giving evidence to contradict answers to questions testing the veracity of a witness. The proviso to section 205 is to the effect that:

> "(*a*) if a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction;
>
> (*b*) if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested he may be contradicted."

Proviso (a) must be taken to mean what it says: evidence in rebuttal of denial of a previous conviction for *any* offence by a witness is admissible. Under proviso (b) evidence in rebuttal of a denial by the witness that he is a relation of one of the parties to the suit, or that he has quarrelled with one of them[20] or that he is otherwise biased in favour of one party or the other, is admissible. In *Thomas* v. *David*,[21] in an action against the maker of a promisory note, one of the subscribing witnesses was asked if she did not constantly sleep with her master, the plaintiff. She denied this and it was held that the defendant could be allowed to call another witness to prove that she did so and that this was not collateral to the issue. If, however, the question had been, whether the witness had walked the streets as a prostitute, that would be collateral to the issue, and the defendant would not be entitled to call another witness to contradict her.

[17] See *R.* v. *Holmes* (1871) L.R. 1 C.C.R. 334.
[18] See *R.* v. *Riley* (1887) 18 Q.B.D. 481.
[19] See Adaptation of Legislation Order in Council, 1960 (N.R.L.N. 120 of 1960).
[20] *R.* v. *Shaw* (1888) 16 Cox C.C. 503.
[21] (1836) 7 C. & P. 350; 173 E.R. 156.

181. Previous Inconsistent Statement

A witness may be cross-examined as to any previous statement made by him in writing or reduced into writing by someone else (for example, depositions, and statements made to the police not written by the witness himself) provided the statement is relevant to matters in question in the suit or proceeding. The statement need not be shown to the witness nor does it need to be proved, but if it is intended to contradict his testimony in the witness box by the previous written statement, then his attention must first be called to those parts of it which are to be used for the purpose of contradicting him. After this the statement must be proved (ss. 198 and 208). A statement which is proved and admitted in this connection is not proof of the facts contained in it; its purpose is only to impugn the testimony of the witness. It must be remembered, however, that such a statement may amount to an admission if it was made by a party to the suit.

It is extremely difficult to see any distinction between the provision of section 198 and the main provision of section 208 except to say that the latter must be confined to the cases in which the previous statement were made by the witnesses themselves in writing. But there is a proviso under section 208 which is not contained in section 198.[22] Under this proviso the court may at any time during the trial require the production of the written statement for its inspection. After its production the court may make use of it for purposes of the trial as it thinks fit, but it cannot direct the jury to choose between the written statement and the evidence of the witness in the court.[23]

Where during cross-examination, a witness is asked whether or not he had made a written statement relative to the subject-matter of the trial, and he does not distinctly admit that he had in fact made the statement, the party cross-examining the witness must then point out to him the circumstances surrounding the making of the statement sufficient to designate the particular occasion on which the witness had made the statement. Having been told the circumstances surrounding the making of the statement, the witness is again asked if he would admit making the statement. If he still refuses to admit making the statement, the party cross-

[22] See the English Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 5.
[23] *R.* v. *Birch* (1924) 18 Cr. App. R. 26.

examining may then prove that the witness in fact made the statement (s. 207).[24]

182. Re-Examination

After the cross-examination, the party who has called the witness and has examined him in chief may examine him again. This second examination is called re-examination (s. 187 (3)). Re-examination must be confined to the explanation of matters referred to in cross-examination, and no new matters can be introduced. The court, however, has a discretion to allow any new matters to be introduced during re-examination; where this is allowed, the other party must be allowed to cross-examine the witness but only on the new matters (s. 188 (3)).

Leading questions must not be asked during re-examination if the adverse party objects to these being asked. The position is the same as under examination-in-chief: the court has a discretion to allow leading questions on undisputed matters or matters which, in the opinion of the court have already been sufficiently proved (s. 195).

183. Power of the Judge, the Jury, or Assessors to put Questions to Witnesses

Subject to what is to follow, the judge has wide powers under section 222 to put questions to a witness in the course of a trial. In order to discover or to obtain proper proof of relevant facts, the judge or any other person empowered by law to take evidence, may ask any question he pleases, in any form, and at any time, of any witness or of the parties about any fact relevant or irrelevant. He may also order the production of any document or thing, and neither the parties to the proceedings or their agents have the right to make any objection to any such question or order, nor have they any right to cross-examine the witness on any answer he may give to the court, except by leave of the judge. It should be noted, however, that this does not empower the judge to base his judgment on inadmissible evidence or irrelevant facts. This provision does not authorise a judge to compel a witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 161 to 175, if the question were asked or the document were called for by the adverse

[24] See the 1865 Act, s. 4.

party. The section does not permit a judge to ask any question which it would be improper for any other person to ask under section 200 or 201 (discussed above), nor does it permit him to dispense with primary evidence of any document, except in the cases where this is permitted by the law.

In addition to the above powers of a judge, reference must be made to the power of the court to call or recall a witness and re-examine the witness. This power is contained in section 200 of the Criminal Procedure Act,[25] and section 237 (1) of the Criminal Procedure Code Law.[26] Both sections contain similar provisions: they give a court power at any stage of any trial, inquiry or other proceedings under the Act and the Law respectively, to summon any person as a witness or recall and re-examine any person already examined. It was held in *R.* v. *Victoria Aderogba*,[27] that where a presiding judge calls a witness under the former section (and, it is submitted, under the latter also), neither the prosecution nor the defence is entitled to examine or cross-examine him without the leave of the judge, which leave should be granted to any side to whom the evidence is adverse. The court cannot make use of this provision so as to clear any doubts he may have about the guilt of an accused person.[28] The power under this provision should be used with caution and should normally be confined to evidence in rebuttal of matters raised by the defence for the first time.[29] In *R.* v. *Asuquo Edem & Ors.*,[30] the appellants were charged with murder. They each gave evidence and during the evidence of one of them, he introduced fresh matter relating to customary law in cases of suspected witchcraft, which, if true, would have seriously discredited the evidence of the prosecution. The trial judge then called a chief who had been sitting in court to testify to his knowledge of customary law on the question thus raised. It was held that the judge was correct in so doing as the matter of customary law arose improviso.

Section 223 provides that "in cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper."

[25] Cap. 48. [26] Cap. 30 of the Laws of Northern Nigeria, 1963.
[27] (1960) 5 F.S.C. 212.
[28] *Horvat* v. *Police* (1952) 20 N.L.R. 52.
[29] *West* v. *Police* (1952) 20 N.L.R. 71.
[30] (1943) 9 W.A.C.A. 25.

184. Impeaching the Credit of a Witness

We have already seen how far a party who has called a witness can discredit him,[31] it is the purpose of this section to discuss how far a party to a proceeding can discredit any witness generally. Section 209 of the Act provides as follows:

> "The credit of a witness may be impeached in the following ways by any party other than the party calling him or with the consent of the court by the party who calls him—
> (*a*) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;
> (*b*) by proof that the witness has been bribed, or has received any other corrupt inducement to give his evidence;
> (*c*) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted."

When a witness is shown to have made a previous statement inconsistent with his evidence in court, the judge is free to direct the jury that his evidence is unreliable. But this does not mean that the previous statement can be regarded as evidence upon which the court can act,[32] unless, of course, the witness swears to the truth of the facts contained in the statement. In *Inspector-General of Police* v. *Hilary Ewekay*,[33] de Comarmond C.J. (Lagos) said:

> "I have often had occasion to direct attention to the point that although the production of a previous extra-judicial contradicting statement may destroy or nullify what a witness has said in court, yet it is not evidence of the truth of the facts contained in the extra-judicial statement unless the witness admits that he has tried to mislead the court and then swears to the truth of the facts contained in his previous statement (even where this is done, the court may deem it safer to reject the evidence altogether)."

When a witness declares that another witness is unworthy of credit, he may not upon his examination-in-chief give reasons for his belief. He may, however, be asked his reasons in cross-examination and the answers which he gives cannot be contradicted and

[31] See §178, *ante*.
[32] *R.* v. *Afolabi Adeyemi*, 1961 L.L.R. 70.
[33] 1957 L.L.R. 11.

must be regarded as final. But if it is discovered that his answer is false, he may be prosecuted under section 191 of the Criminal Code, or section 158 of the Penal Code (s. 211).

When it is sought to impeach the credibility of a person who had made a statement which is relevant under section 33 or section 34 (already discussed[34]), the witness being dead or being unable otherwise to give evidence, all matters may be proved which might have been proved if the person had been called as a witness and had denied on cross-examination the truth of the matters suggested. It must be noted, however, that this is not only confined to impeaching the statement, as in a similar manner all matters may be proved in order to confirm the person's credit (s. 214).

185. Refreshing Memory

As a rule, a witness is not allowed to give his evidence by referring to a prepared statement. He is expected to tell the story as best as he can remember it. To this general rule there are some exceptions which will now be discussed.

A witness may, while under examination-in-chief or cross-examination or even re-examination, refer to any writing made by himself at the time of the transaction in question in order to refresh his memory. He is, also, allowed to refresh his memory by referring to any writing made by himself soon after the transaction in question. In this case, however, his being so allowed will depend upon whether the court is of the view that at the time he made the writing the transaction was still fresh in his memory (s. 215 (1)). The view of the court in this regard must be governed by the facts of each case. In *Jimo Amoo & Ors.* v. *R.*,[35] the trial judge allowed a witness to refresh his memory by the reading to him of his deposition at the preliminary investigation, which deposition was taken some five weeks after the incidents to which the witness deposed. The Federal Supreme Court held that the trial judge erred in allowing the witness to make use of the deposition to refresh his memory in these circumstances.[36] Similarly and under the same conditions as above, a witness is allowed to refresh his memory by referring to any writing made by any other person and read by the witness at the time the transaction took place or so soon after as the

[34] Chap. 4, *ante*.
[35] (1959) 4 F.S.C. 113; (1959) W.R.N.L.R. 109.
[36] See also *Jones* v. *Stroud* (1825) 2 C. & P. 196. *Cf.*, *Burrough* v. *Martin* (1809) 2 Camp. 112; 170 E.R. 1098.

court may consider that it was still fresh in his memory, if when he read it he knew it to be correct (s. 215 (2)). Under this provision a witness will be allowed to refresh his memory with regard to a voyage by referring to the ship's log, even though the entries were made by another person and after the events entered therein and even though the witness did not inspect the log book until sometime after the entries had been made.[37]

Another exception to the general rule stated above is that an expert is permitted to refresh his memory by reference to professional treatises even though not written by him or by any person known to him (s. 215 (3)).

A witness is permitted to testify to the facts which are contained in all the documents referred to in the last two paragraphs although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the documents (s. 216).

Any document which has been used by a witness to refresh his memory must be produced and shown to the adverse party if he requires it, and the adverse party is at liberty to cross-examine the witness on it (s. 217).

186. Production of Documents

A person may be summoned to produce a document and give evidence. In this case he will be a witness and liable to cross-examination. But a person, whether a party or not, who is summoned to produce a document without being summoned to give evidence, does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness. If such a person causes the document to be produced in court, the court may dispense with his personal attendance (ss. 191 and 192). If he, however, goes to the witness box and tenders the document after being sworn, he becomes a witness and he is liable to be cross-examined. In *Michael Onwuamaka* v. *Albert Okolie*,[38] a person who was called by the respondent to produce the record of previous proceedings which record was required in the suit, went to the witness box and tendered the record on oath. The trial magistrate refused the appellant the right to cross-examine him on the ground that he was called merely to produce a docu-

[37] See the English Criminal Procedure Act, 1865, s. 4.
[38] 1955–56 W.R.N.L.R. 159.

ment. In holding that the trial magistrate was in error, Onyeama Ag. J. (as he then was) said:[39]

> "It is to be observed that section 192 of the Evidence Ordinance speaks of 'a person summoned' and not of 'a witness.' I am of the opinion, in view of section 179 of the Evidence Ordinance, that a witness under the Evidence Ordinance is anyone who gives evidence in any proceedings upon oath or affirmation, and by virtue of sections 181 and 182 of the Ordinance. It follows from this that the person who put in the certified copy of the Native Court proceedings, upon being sworn, became a witness for all purposes and was therefore liable to cross-examination."

A witness who is summoned to produce a document in court must, if it is in his possession or power, bring it to court irrespective of whether he has any objection to its production or to its admissibility. The validity of any objection to the production and the admissibility of any document are matters for determination by the court. In determining the admissibility of a document the court may inspect the document or take evidence as he may consider necessary (s. 218 (1) and (2)). If in the process of determining the admissibility of a document it is necessary to cause it to be translated, the court may, if it thinks it necessary, direct the translator to keep the contents of the document secret, unless the document is to be given in evidence. If the translator disobeys such a direction he is liable to be charged with an offence of disclosure of official secrets contrary to section 97 (1) of the Criminal Code or section 98 of the Penal Code (s. 218 (3)).

What has just been said in the last paragraph is subject to the provisions of section 219. Under that section, any of the Ministers of State may in any proceedings object to the production of a document if after consideration he is satisfied that the production of such a document is against public interest. This provision similarly applies to oral evidence which any of the persons named may, after consideration, feel satisfied will be against public interest to give. Any such objection if taken before trial must be by affidavit but if it is taken during a trial it must be by a certificate produced by a public officer. And any such objection, whether by affidavit or by a certificate is conclusive and the court cannot inspect such docu-

[39] *Ibid.*, at p. 161.

ments or be informed as to the nature of such oral evidence and the court is bound to give effect to such affidavit or certificate.

When a party, during a court proceeding, calls for a document which he has given the other party notice to produce, and the document is produced and inspected by the party calling for its production then he is bound to tender it in evidence if the party producing it requires him to do so (s. 220). A party who has refused to produce a document which he has had notice to produce, cannot afterwards use it as evidence without the consent of the other party or the order of the court (s. 221).

Chapter 23

THE SERVICE IN A REGION OF WITNESS SUMMONS AND OTHER PROCESSES ISSUED IN ANOTHER REGION

187. Service of Witness Summons etc. in Another Region

To procure the presence of a witness in court for the purpose of testifying in a civil case or the presence of any person to produce books or documents, it is usual, and sometimes essential when it is feared that such presence cannot otherwise be obtained, to apply for the issue of a subpoena or summons on the witness or the person concerned. When the witness or the person concerned is resident within the jurisdiction of the court hearing the case, no difficulty arises: the bailiff and other officers of the court within its jurisdiction are bound to execute any process of the court. The different rules of court make provisions for this situation and for the situation where the person to be served with the subpoena or summons resides in the Region but outside the jurisdiction of the issuing court, and nothing more be said about these here. A completely different problem, however, arises where the person to be served with these processes reside in another Region, the Federal capital of Lagos being regarded as a Region for this purpose and will be so regarded with regard to the discussions which follow hereafter.

Section 228 (1) of the Act provides that when such a process has been issued by any court in any Region in the exercise of its civil jurisdiction in accordance with any power conferred by law requiring any person to appear and give evidence or to produce books or documents in any proceedings, such process, by leave of the court issuing it, may be served on such person in any other Region. The leave will be granted only upon proof that the testimony of such person or the production of such books or documents is necessary in the interests of justice; and it will be granted only on such terms as the court may deem fit to impose. If a person on whom a subpoena or summons has been served in accordance with this provision fails to attend at the time and place mentioned in the subpoena or summons, the court may issue a warrant for his apprehension as the court might have issued had the subpoena or summons been meant for service and had in fact been served in the

Region in which it was issued. Before this can be done, however, it must be proved not only that the subpoena or the summons has been served, but what is equally important, that the sum of money prescribed by law for payment to such a person was tendered to him for his expenses (s. 228 (2)). Any warrant issued under this power may be executed in the other Region in the manner provided in Chapter XII, that is, sections 477 to 486 of the Criminal Procedure Act in the case of warrants issued for the apprehension of persons charged with an offence (s. 228 (3)).

Sometimes, also, it may be necessary to obtain, for the purpose of a proceeding before the court, evidence from a person serving a term of imprisonment in another Region. In this circumstance section 229 (1) provides that where it appears to a court that the attendance before it of a person who is undergoing a sentence of imprisonment in another Region is necessary for the purpose of obtaining evidence in any proceeding before the court, it may issue an order directed to the superintendent or other officer in charge of the prison or place where the person is undergoing the sentence requiring him to produce the person at the time and place specified in the order. Any order made under this section may be served upon the superintendent or other officer to whom it is directed in the other Region. Once the order has been served, the superintendent or other officer is bound to produce in such custody as he thinks fit the person referred to in the order at the time and place specified in it (s. 229 (2)). In this case, no money need be paid or deposited in court before the order is obeyed, but, on the production before the court of the person named in the order, the court may make such order as to the costs of compliance with the order as may seem just to it (s. 229 (3)).

All above provisions apply to processes issued in the High Courts and the magistrates' courts (s. 227); and they all apply to the Northern Cameroons (now part of Northern Nigeria).[1]

[1] Adaptation of Laws (Cameroons Provisions) Order, 1960, L.N. 156 of 1960 as amended by Adaptation of Laws (Miscellaneous Provisions) Order, 1964, L.N. 112 of 1964.

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CHAPTER 62

EVIDENCE

(Federation)

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Chapter 62

EVIDENCE

(Federation)

An Act to Consolidate, Define and Amend the Law of Evidence

[June 1, 1945]

Part I—Preliminary

Short Title and Interpretation

Short title and application

1. (1) This Act may be cited as the Evidence Act.

(2) Parts I to XII inclusive shall apply to the Regions, and to Lagos as if it were a Region.

(3) Part XIII shall apply to the Federation of Nigeria.

(4) This Act shall apply to all judicial proceedings in or before any court established in the Federation of Nigeria but it shall not apply—

(*a*) to proceedings before an arbitrator; or

(*b*) to a field general court martial; or

(*c*) to judicial proceedings in or before a native court unless the Governor in Council shall by order confer upon any or all native courts in the Region jurisdiction to enforce any or all of the provisions of this Act.

Interpretation

2. (1) Definitions:

"bank" and "banker" mean any person, persons, partnership or company carrying on the business of bankers and also include any savings bank established under the Savings Bank Act, and also any banking company incorporated under any charter heretofore or hereafter granted, or under any Act heretofore or hereafter granted, or under any Act heretofore or hereafter passed relating to such incorporation;

"bankers' books"—the expressions relating to bankers' books include ledgers, day books, cash books, account books and all other books used in the ordinary business of a bank;

"court" includes all judges and magistrates and, except arbitrators, all persons legally authorised to take evidence;*

*In the case of Northern Nigeria, substitute ("court" means the High Court of Justice of the Northern Region, a District Court, a magistrates court or, subject to the provisions of subsections (4) and (5) of Section 1, a native court, and includes all persons, except arbitrators, legally authorised to take evidence): The Adaptation of Legislation Order in Council, 1960 (N.R.L.N. 120 of 1960).

"custom" is a rule which, in a particular district, has, from long usage, obtained the force or law;

"document" includes books, maps, plans drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;

"fact" includes—

(*a*) any thing, state of things, or relation of things, capable of being perceived by the senses;

(*b*) any mental condition of which any person is conscious;

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

"proceedings" includes arbitrations under the Arbitration Act, and "court" shall be construed accordingly;

"statement" includes any representation of fact, whether made in words or otherwise;

"The Commonwealth" unless the context otherwise requires, includes Eire;

"wife" and "husband" mean respectively the wife and husband of a monogamous marriage.

(2) A fact is said to be—

(*a*) "proved" when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does exist;

(*b*) "disproved" when after considering the matters before it the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist;

(*c*) "not proved" when it is neither proved nor disproved.

PART II—RELEVANCY

Relevance of Facts

Relation of relevant facts

3. One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

Presumptions

4. (*a*) Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved unless and until it is disproved, or may call for proof of it.

(*b*) Whenever it is directed by this Act that the court shall presume a

fact, it shall regard such fact as proved unless and until it is disproved.

"*Conclusive proof*"

(*c*) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Saving as to certain evidence

5. Nothing in this Act shall—

(*a*) prejudice the admissibility of any evidence which would apart from the provisions of this Act be admissible; or

(*b*) enable documentary evidence to be given as to any declaration relating to a matter of pedigree, if that declaration would not have been admissible as evidence if this Act had not passed.

Evidence may be given of facts in issue and relevant facts

6. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others: Provided that—

(*a*) the court may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appears to it to be too remote to be material in all the circumstances of the case; and

(*b*) this section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force.

Relevancy of facts forming part of same transaction

7. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Facts which are the occasion, cause or effect of facts in issue

8. Facts which are the occasion, cause or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Motive, preparation and previous or subsequent conduct

9. (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) The conduct of any party, or of any agent to any party, to any proceedings, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

"*Conduct*"

(3) The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than state-

ments; but this provision shall not affect the relevancy of statements under any other section.

(4) When the conduct of any person is relevant, any statement made to him or in his presence and hearing which affects such conduct is relevant.

Facts necessary to explain or introduce relevant facts

10. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Things said or done by conspirator in reference to common intention

11. (1) Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in execution or furtherance of their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it; but statements made by individual conspirators as to measures taken in the execution or furtherance of any such common intention are not deemed to be relevant as such as against any conspirators, except those by whom or in whose presence such statements are made.

(2) Evidence of acts or statements deemed to be relevant under this section may not be given until the court is satisfied that, apart from them, there are *prima facia* grounds for believing in the existence of the conspiracy to which they relate.

When facts not otherwise relevant become relevant

12. Facts not otherwise relevant are relevant—

(*a*) if they are inconsistent with any fact in issue or relevant fact;

(*b*) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact probable or improbable.

Certain facts relevant in proceedings for damages

13. In proceedings in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.

What customs admissible

14. (1) A custom may be adopted as part of the law governing a particular set of circumstances if it can be noticed judicially or can be

proved to exist by evidence. The burden of proving a custom shall lie upon the person alleging its existence.

Judicial notice

(2) A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

Evidence of customs

(3) Where a custom cannot be established as one judicially noticed it may be established and adopted as part of the law governing particular circumstances by calling evidence to show that persons or the class of persons concerned in the particular area regard the alleged custom as binding upon them: Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.

Relevant facts as to how matter alleged to be custom understood

15. Every fact is deemed to be relevant which tends to show how in particular instances a matter alleged to be a custom was understood and acted upon by persons then interested.

Facts showing existence of state of mind, or of body, or bodily feeling

16. (1) Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

(2) A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Facts bearing on question whether act was accidental or intentional

17. When there is a question whether an act was accidental or intentional, 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 the act was concerned, is relevant.

Existence of course of business when relevant

18. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Admissions

"Admission" defined

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

Admissions by party to proceeding or his agent

20. (1) Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards, in the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

by suitor in representative character

(2) Statements made by parties to suits, suing or sued in a representative character, are not admissions unless they were made while the party making them held that character.

by party interested in subject-matter

(3) Statements made by—

(*a*) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who made the statement in their character of persons so interested; or

by person from whom interest derived

(*b*) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

Admissions by persons whose position must be proved as against party to suit

21. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Admissions by persons expressly referred to by party to suit

22. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Proof of admissions against persons making them, and by or on their behalf

23. Admissions are relevant and may be proved as against the person who makes them or his representative in interest, but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:

(*a*) an admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third parties under section 33;

(*b*) an admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time

when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable; and

(c) an admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

When oral admissions as to contents of documents are relevant. Part V

24. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the provisions of Part V, or unless the genuineness of a document produced is in question.

Admissions in civil cases when relevant

25. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given: Provided that nothing in this section shall be taken to exempt any legal practitioner from giving evidence of any matter of which he may be compelled to give evidence under section 169.

Admissions not conclusive proof, but may estop. Part VIII

26. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions of Part VIII.

Confessions

Definition of "confession"

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.

Voluntary confessions relevant against maker

(2) Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.

Effect of confessions on co-accused

(3) 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 persons in whose presence it was made unless he adopted the said statement by words or conduct.

Confession caused by inducement, threat or promise when irrelevant in criminal proceedings

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.

Facts discovered in consequence of information given by accused

29. Where information is received from a person who is accused of an offence, whether such person is in custody or not, and as a consequence of such information any fact is discovered, the discovery of that fact, together with evidence that such discovery was made in consequence of the information received from the accused, may be given in evidence where such information itself would not be admissible in evidence.

Confession made after removal of duress, relevant

30. If such a confession as is referred to in section 28 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been fully removed, it is relevant.

Confession otherwise relevant not to become irrelevant because of promise of secrecy

31. If such 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 practised on the accused person 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 those 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 in other proceedings amounting to a confession is admissible

32. Evidence amounting to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had reference to the same subject-matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him; but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.

Statements by Persons who cannot be called as Witnesses

Cases in which statement of relevant fact by person who is dead is relevant. Dying declaration

33. Statements, written or verbal, of relevant facts made by a person who is dead are themselves relevant facts in the following cases:

(*a*) when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question; such statements are relevant only in trials for murder or manslaughter of the deceased person and only when such person at the time of making such declaration believed

himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery;

or is made in course of business

(*b*) when the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him or 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;

or against interest of maker with special knowledge

(*c*) when 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;

or gives opinion as to public right or custom, and matters of general interest

(*d*) when the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversey as to such right, custom or matter had arisen;

or relates to existence of relationship

(*e*) subject to the conditions hereinafter mentioned, when the statement relates to the existence of any 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.

The conditions above referred to are as follows:

(*i*) such a statement 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;

(*ii*) 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; except that—

(*a*) a declaration by a deceased parent that he or she did not marry the other parent until after the birth of a child is relevant to the question of the illegitimacy of such child upon any question arising as to the right of the child to inherit real or personal property under the Legitimacy Act; and

(*b*) in proceedings for the legitimacy of any person a declaration made by a person who, if a decree of legitimacy were granted, would stand towards the petitioner in any of the

relationships mentioned in paragraph (ii) hereof, is deemed relevant to the question of the identity of the parents of the petitioner;

(*iii*) it must be made before the question in relation to which it is to be proved had arisen, but it does not cease to be deemed to be relevant because it was made for the purpose of preventing the question from arising;

Declarations by testators

(*f*) (*i*) the declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will, are deemed to be relevant—

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

(*b*) when the question is whether an existing will is genuine or was improperly obtained; or

(*c*) when the question is whether any and which of more existing documents than one constitute his will;

(*ii*) it is immaterial whether the declarations were made before or after the making or loss of the will.

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated

34. (1) Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or when his presence cannot be obtained without an amount of delay or expense which, in the circumstances of the case, the court considers unreasonable: Provided—

(*a*) that the proceeding was between the same parties or their representatives in interest;

(*b*) that the adverse party in the first proceeding had the right and opportunity to cross-examine; and

(*c*) that the questions in issue were substantially the same in the first as in the second proceeding.

(2) A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Absence of public officers

(3) In the case of a person employed in the public service who is required to give evidence for any purpose connected with a judicial proceeding, it shall be sufficient to account for his non-attendance at the hearing of the said judicial proceedings if there is produced to the court, either a Gazette, or a telegram or letter purporting to emanate

from the head of his department, sufficiently explaining to the satisfaction of the court his apparent default.

When statement may be used in evidence

35. A statement in accordance with the provisions of sections 290 and 291 or section 319 of the Criminal Procedure Act* may afterwards be used in evidence on the trial of any person accused of an offence to which the same relates, if the person who made the statement be dead, or the court be satisfied that for any sufficient cause his attendance cannot be procured, and if reasonable notice of the intention to take such statement was served upon the person against whom it is to be read in evidence and he had or might have had if he had chosen to be present full opportunity of cross-examining the person making the same.

Statement of accused at preliminary investigation

36. Any statement made by an accused person at a preliminary investigation or at a coroner's inquest may be given in evidence.

Statements made in Special Circumstances

Entries in books of account, when relevant

37. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Relevancy of entry in public record, made in performance of duty

38. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

Relevancy of statements in maps, charts and plans

39. Statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Relevancy of statement as to fact of public nature contained in certain Acts or notifications

40. When the court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any enactment or in any proclamation or speech of the President in opening Parliament or any legislation of the United Kingdom still applicable to Nigeria, or in any proclamation or speech of a Governor in the opening of a Regional Legislature or in any statement made in a Government or public notice appearing in the Gazette or in a Regional

*In the case of Northern Nigeria, "section 244 of the Criminal Procedure Code" should be substituted for "sections 290 . . . Act": The Adaptation of Legislation Order in Council, 1960 (N.R.L.N. 120 of 1960).

notice or a Regional public notice appearing in a Regional Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any part of the Commonwealth is a relevant fact.

Certificates of specified Government Officers to be sufficient evidence in all criminal cases

41. (1) Either party to the proceedings in any criminal case may produce a certificate signed by the Government Chemist, the Deputy Government Chemist, an Assistant Government Chemist, a Government pathologist or entomologist, or the Accountant-General (whether any such officer is by that or any other title in the service of a Regional or of the Federal Government); or the Governor, the Deputy Governor or the General Manager of the Central Bank of Nigeria and the production of any such certificate may be taken as sufficient evidence of the facts stated therein: Provided that notwithstanding the provisions herein contained, the court shall have the power, on the application of either party or of its own motion, to direct that any such officer shall be summoned to give evidence before the court if it is of the opinion that, either for the purpose of cross-examination or for any other reason, the interests of justice so require.

(2) The Federal Minister of Health may by notice in the Gazette of the Federation declare that any person named in such notice, being an officer in the public service of the Federation employed in a forensic science laboratory in a rank not below that of Medical Laboratory Technologist, shall for the purposes of subsection (1) be empowered to sign a certificate relating to any subject specified in the notice, and while such declaration remains in force the provisions of subsection (1) shall apply in relation to such person as they apply in relation to an officer mentioned in that subsection: Provided that a certificate signed by such person shall not be admissible in evidence if, in the opinion of the court, it does not relate wholly or mainly to a subject so specified as aforesaid.

Service of certificates on other party before hearing

42. Where any such certificate is intended to be produced by either party to the proceedings, a copy thereof shall be sent to the other party at least ten clear days before the day appointed for the hearing and if it is not so sent the court may, if it thinks fit, adjourn the hearing on such term as may seem proper.

Genuineness of certificate to be presumed

43. The court shall, in the absence of evidence to the contrary, presume that the signature to any such certificate is genuine and that the person signing it held the office which he professed at the time when he signed it.

Facts Relevant in Special Circumstances

Family or communal tradition in land cases

44. Where the title to or interest in family or communal land is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant.

Acts of possession and enjoyment of land

45. Acts of possession and enjoyment of land may be evidence of ownership or of a right of 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 therewith by locality or similarity that what is true as to the one piece of land is likely to be true of the other piece of land.

Evidence of scienter upon charge of receiving stolen property

46. 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—

(*a*) the fact that other property stolen within the period of twelve months preceding 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.

This last-mentioned fact may not be proved unless—

(*i*) seven days' notice in writing has been given to the offender 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.

How much of a Statement is to be Proved

What evidence is to be given when statement forms part of a conversation, document, book or series of letters or papers

47. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances in which it was made.

Judgments of Courts of Justice when Relevant

Previous judgments relevant to bar a second suit or trial

48. The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial.

Relevancy of certain judgments in certain jurisdiction

49. (1) A final judgment, order or decree of a competent court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

(2) Such judgment, order or decree is conclusive proof—

(*a*) that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

(*b*) that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

(*c*) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease; and

(*d*) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

Relevancy and effect of judgments other than those mentioned in section 49

50. Judgments, orders or decrees other than those mentioned in section 49 are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Other than those mentioned in sections 48 to 50, when relevant

51. Judgments, orders or decrees, other than those mentioned in sections 48, 49 and 50, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this or any other Act.

Fraud or collusion in obtaining judgment, or non-jurisdiction of court, may be proved

52. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 48, 49 or 50 and which has been proved by the adverse party, was delivered by a court without jurisdiction, or was obtained by fraud or collusion.

Judgment conclusive of facts forming ground of judgment

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

Effect of judgment not pleaded as estoppel

54. (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 a 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.

Judgment conclusive in favour of judge

55. When any action is brought against any person for anything done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent thereto, are conclusive proof of the facts therein stated, whether they are or are not necessary to give the defendant jurisdiction, if, assuming them to be true, they show that he had jurisdiction.

Opinions of Third Persons when Relevant

Opinions of experts

56. (1) When the court has to form an opinion upon a point of foreign law, native law or custom, or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, native law or custom, or science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts.

"*experts*"

(2) Such persons are called experts.

Opinions as to foreign law

57. (1) Where there is a question as to foreign law the opinions of experts who in their profession are acquainted with such law are admissible evidence thereof, though such experts may produce to the court books which they declare to be works of authority upon the foreign law in question, which books the court, having received all necessary explanations from the expert, may construe for itself.

(2) Any question as to the effect of the evidence given with respect to foreign law shall, instead of being submitted to the jury, in the case of trial with a jury, be decided by the judge alone.

Opinions as to native law and custom

58. In deciding questions of native law and custom the opinions of native chiefs or other persons having special knowledge of native law and custom and any book or manuscript recognised by natives as a legal authority are relevant.

Facts bearing upon opinions of experts

59. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Opinion as to handwriting, when relevant

60. (1) When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

(2) A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Opinion as to existence or "general custom or right" when relevant

61. (1) When the court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed are relevant.

(2) The expression "general custom or right" includes customs or rights common to any considerable class of persons.

Opinions as to usages, tenets, when relevant

62. When the court has to form an opinion as to—

(*a*) the usages and tenets of any body of men or family; or

(*b*) the constitution and government of any religious or charitable foundation; or

(*c*) the meaning of words or terms used in particular districts or by particular classes of people.

the opinions of persons having special means of knowledge thereon, are relevant facts.

Opinion on relationship, when relevant

63. When the court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings for a divorce or in a petition for damages against an adulterer or in a prosecution for bigamy.

Grounds of opinion, when relevant

64. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Opinions generally irrelevant

65. The fact that any person is of opinion that a fact in issue, or relevant to the issue, does or does not exist is irrelevant to the existence of such fact except as provided in sections 56 to 64 of this Ordinance.

Character, when Relevant

In civil cases, character to prove conduct imputed irrelevant

66. In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

In criminal cases, previous good character relevant

67. In criminal proceedings the fact that the person accused is of a good character is relevant.

Evidence of character of the accused in criminal proceedings

68. (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 paragraph (*d*) of the proviso to section 159.

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

Character as affecting damages

69. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

In libel and slander notice must be given of evidence of character

70. In actions for libel and slander in which the defendant does not by his defence assert the truth of the statement complained of, the defendant is not entitled on the trial to give evidence in chief with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence.

Meaning of word "character"

71. In sections 66 to 70 the word "character" means reputation as distinguished from disposition, and except as previously mentioned in those sections, evidence may be given only of general reputation, and not of particular acts by which reputation or disposition is shown.

PART III—PROOF

Facts which need not be Proved

Fact judicially noticeable need not be proved

72. No fact of which the court must take judicial notice need be proved.

Facts of which court must take judicial notice

73. (1) The court shall take judicial notice of the following facts:

(*a*) all laws or enactments and any subsidiary legislation made thereunder having the force of law now or heretofore in force, or hereafter to be in force, in any part of Nigeria;

(*b*) all public Acts passed or hereafter to be passed by Parliament and all subsidiary legislation made thereunder, and all local and personal Acts directed by Parliament to be judicially noticed;

(*c*) the course of proceeding of Parliament and of the Federal Legislative Houses of Nigeria and of the legislative Houses of the Regions of Nigeria;

(*d*) the assumption of office of the President and of any seal used by the President;

(*e*) all seals of which English courts take judicial notice; the seals of all the courts of Nigeria; the seals of notaries public, and all seals which any person is authorised to use by any Act of Parliament or other enactment having the force of law in Nigeria;

(*f*) the existence, title and national flag of every State or Sovereign recognised by Nigeria;

(*g*) the divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Gazette or fixed by Ordinance;

(*h*) the territories within the Commonwealth or under the dominion of the British Crown;

(*i*) the commencement, continuance and termination of hostilities between the Federal Republic and any other State or body of persons;

(*j*) the names of the members and officers of the court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all legal practitioners and other persons authorised by law to appear or act before it;

(*k*) the rule of the road on land or at sea;

(*l*) all general customs, rules and principles which have been held to have the force of law in or by any of the superior courts of law or equity in England or the Federal Supreme Court of Nigeria or former Supreme Court now known as the High Court of Lagos, or by the High Court of the Region and all customs which have been duly certified to and recorded in any such court;

(*m*) the course of proceeding and all rules of practice in force in the

High Court of Justice in England and in the High Court of the Region.

(2) In all cases in the preceding subsection and also on all matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference.

(3) If the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Facts admitted need not be proved

74. No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

PART IV—ORAL EVIDENCE AND THE INSPECTION OF REAL EVIDENCE

Proof of fact by oral evidence

75. All facts, except the contents of documents, may be proved by oral evidence.

Oral evidence must be direct

76. Oral evidence must, in all cases whatever, be direct—

(*a*) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact;

(*b*) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;

(*c*) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says 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:

Provided that—

(*i*) the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable;

(*ii*) if oral evidence refers to the existence or condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection, or may inspect or may order or permit a jury to inspect any

movable or immovable property, the inspection of which may be material to the proper determination of the question in dispute. In the case of such inspection being ordered or permitted, the court shall either be adjourned to the place where the subject-matter of the said inspection may be and the proceedings shall continue at that place until the court further adjourns back to its original place of sitting or to some other place of sitting, or the court shall attend and make an inspection of the subject-matter only, evidence, if any, of what transpired there being given in court afterwards. In either case the accused, if any, shall be present.

PART V—DOCUMENTARY EVIDENCE

Affidavits

Court may order proof by affidavit

77. A court may in any civil proceeding make an order at any stage of such proceeding directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination, notwithstanding that a party desires his attendance for cross-examination and that he can be produced for that purpose.

Affidavits to be filed

78. Before an affidavit is used in the court for any purpose, the original shall be filed in the court, and the original or an office copy shall alone be recognised for any purpose in the court.

Before whom sworn

79. Any affidavit sworn before any judge, officer or other person in the Commonwealth to take affidavits, may be used in the court in all cases where affidavits are admissible.

Sworn in foreign parts

80. Any affidavit sworn in any foreign parts out of the United Kingdom or out of any British possession before a judge or magistrate, being authenticated by the official seal of the court to which he is attached, or by a public notary, or before a British minister or consul, may be used in the court in all cases where affidavits are admissible.

Proof of seal and signature

81. The fact that an affidavit purports to have been sworn in manner hereinbefore prescribed shall be prima facie evidence of the seal or signature, as the case may be, of any such court, judge, magistrate or other officer or person therein mentioned, appended or subscribed to any such affidavit, and of the authority of such court, judge, magistrate or other officer or person to administer oaths.

Not to be sworn before certain persons

82. An affidavit shall not be admitted which is proved to have been

sworn before a person on whose behalf the same is offered, or before his legal practitioner, or before a partner or clerk of his legal practitioner.

Defective in form

83. The court may permit an affidavit to be used, notwithstanding it is defective in form according to this Act, if the court is satisfied that it has been sworn before a person duly authorised.

Amendment and re-swearing

84. A defective or erroneous affidavit may be amended and re-sworn by leave of the court, on such terms as to time, costs or otherwise as seem reasonable.

Contents of affidavits

85. Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.

No extraneous matter

86. An affidavit shall not contain extraneous matter, by way of objection, or prayer, or legal argument or conclusion.

Grounds of belief to be stated

87. When a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.

Informant to be named

88. When such belief is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstances of the information.

Provisions in taking affidavits

89. The following provisions shall be observed by persons before whom affidavits are taken:

to be properly entitled

(*a*) every affidavit taken in a cause or matter shall be headed in the court and in the cause or matter;

description of witness

(*b*) it shall state the full name, trade or profession, residence, and nationality of the deponent;

in first person

(*c*) it shall be in the first person, and divided into convenient paragraphs, numbered consecutively;

erasures to be attested

(*d*) any erasure, interlineation or alteration made before the affidavit is sworn, shall be attested by the person before whom it is taken,

who shall affix his signature or initial in the margin immediately opposite to the interlineation, alteration or erasure;

if improperly written

(*e*) where an affidavit proposed to be sworn is illegible or difficult to read, or is in the judgment of the person before whom it is taken so written as to facilitate fraudulent alteration, he may refuse to swear the deponent, and require the affidavit to be rewritten in an unobjectionable manner;

witness to sign

(*f*) the affidavit when sworn shall be signed by the witness or, if he cannot write, marked by him with his mark, in the presence of the person before whom it is taken;

form of jurat

(*g*) (*i*) the jurat shall be written without interlineation, alteration or erasure immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the person before whom it is taken;

date and place

(*ii*) it shall state the date of the swearing and the place where it is sworn;

in presence of person taking affidavit

(*iii*) it shall state that the affidavit was sworn before the person taking the same;

illiterate or blind witness

(*iv*) where the deponent is illiterate or blind it shall state the fact, and that the affidavit was read over (or translated into his own language in the case of a witness not having sufficient knowledge of English), and that the witness appeared to understand it;

marksman

(*v*) where the deponent makes a mark instead of signing, the jurat shall state that fact, and that the mark was made in the presence of the person before whom it is taken;

joint affidavit

(*vi*) where two or more persons join in making an affidavit their several names shall be written in the jurat and it shall appear by the jurat that each of them has been sworn to the truth of the several matters stated by him in the affidavit;

if affidavit altered to be re-sworn

(*h*) the person before whom it is taken shall not allow an affidavit, when sworn, to be altered in any manner without being re-sworn;

new jurat

(*i*) if the jurat has been added and signed the person before whom it is taken shall add a new jurat on the affidavit being re-sworn; and in the new jurat he shall mention the alteration;

new affidavit

(*j*) the person before whom it is taken may refuse to allow the affidavit to be re-sworn, and may require a fresh affidavit;

declarations without oath

(*k*) the person before whom an affidavit may be taken may take without oath the declaration of any person affirming that the taking of any oath whatsoever is, according to his religious belief, unlawful, or who, by reason of immature age or want of religious belief, ought not, in the opinion of the person taking the declaration, to be admitted to make a sworn affidavit. The person taking the declaration shall record in the attestation the reason of such declaration being taken without oath.

Admissibility of Documentary Evidence

Admissibility of documentary evidence as to facts in issue

90. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:

(*a*) if the maker of the statement either—

(*i*) had personal knowledge of the matters dealt with by the statement; or

(*ii*) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (i so far as the matters dealt with thereby are not within h personal knowledge) in the performance of a duty to reco information supplied to him by a person who had, or migl reasonably be supposed to have, personal knowledge of those matters; and

(*b*) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence—

(*a*) notwithstanding that the maker of the statement is available but is not called as a witness;

(*b*) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or as the court may approve, as the case may be.

(3) Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered medical practitioner, and where the proceedings are with a jury, the court may in its discretion reject the statement notwithstanding that the requirements of this section are satisfied with respect thereto, if for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted.

Weight to be attached to evidence

91. (1) In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.

(2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by this Act shall not be treated as corroboration of evidence given by the maker of the statement.

Primary and Secondary Documentary Evidence

Proof of contents of documents

92. The contents of documents may be proved either by primary or by secondary evidence.

Primary evidence

93. (1) Primary evidence means the document itself produced for the inspection of the court.

(2) Where a document has been executed in several parts, each part shall be primary evidence of the document.

(3) Where a document has been executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart shall be primary evidence as against the parties executing it.

(4) Where a number of documents have all been made by one uniform process, as in the case of printing, lithography, or photography, each shall be primary evidence of the contents of the rest; but where they are all copies of a common original, they shall not be primary evidence of the contents of the original.

Secondary evidence

94. Secondary evidence includes—

(*a*) certified copies given under the provisions hereinafter contained;

(*b*) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(*c*) copies made from or compared with the original;

(*d*) counterparts of documents as against the parties who did not execute them;

(*e*) oral accounts of the contents of a document given by some person who has himself seen it.

Proof of documents by primary evidence

95. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given

96. (1) Secondary evidence may be given of the existence, condition or contents of a document in the following cases:

(*a*) when the original is shown or appears to be in the possession or power—

(*i*) of the person against whom the document is sought to be proved; or

(*ii*) of any person legally bound to produce it; and when, after the notice mentioned in section 97, such person does not produce it;

(*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(*c*) when the original has been destroyed or lost and in the latter case all possible search has been made for it;

(*d*) when the original is of such a nature as not to be easily movable;

(*e*) when the original is a public document within the meaning of section 108;

(*f*) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in Nigeria, to be given in evidence;

(*g*) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection;

(*h*) when the document is an entry in a banker's book.

(2) The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of subsection (1) is as follows:

(*a*) in paragraphs (*a*), (*c*) and (*d*) any secondary evidence of the contents of the document is admissible;

(*b*) in paragraph (*b*) the written admission is admissible;

(*c*) in paragraph (*e*) or (*f*) a certified copy of the document, but no other kind of secondary evidence, is admissible;

(*d*) in paragraph (*g*) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents;

(*e*) in paragraph (*h*) the copies cannot be received as evidence unless it be first proved that the book in which the entries copied were made was at the time of making one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that 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, and that the copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit.

(3) When a seaman sues for his wages he may give secondary evidence of the ship's articles and of any agreement supporting his case, without notice to produce the originals.

Rules as to notice to produce

97. Secondary evidence of the contents of the documents referred to in paragraph (*a*) of subsection (1) of section 96, shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to a legal practitioner employed by such party, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the court considers reasonable in the circumstances of the case: Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the court thinks fit to dispense with it:

(*a*) when the document to be proved is itself a notice;

(*b*) when, from the nature of the case, the adverse party must know that he will be required to produce it;

(*c*) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(*d*) when the adverse party or his agent has the original in court;

(*e*) when the adverse party or his agent has admitted the loss of the document.

Proof that bank is incorporated under law

98. The fact of any bank having duly made a return to the Commissioners of Inland Revenue in Great Britain may be proved in any legal proceedings by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the said Commissioners of Inland Revenue; the fact that any savings bank is established under the Savings Bank Act, may be proved by a certificate purporting to be under the hand of the Director of Posts and Telegraphs or officer of the postal department in charge of such savings bank; the fact of any banking company having been incorporated under any charter hereafter or herebefore granted may be proved by the production of a certificate of a partner or officer of the bank that it has been duly incorporated under such charter.

Proof of Execution of Documents

Proof of signature and handwriting of person alleged to have signed or written document produced

99. 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.

Identification of person signing a document

100. (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.

Evidence of sealing and delivery of a document

101. (1) Evidence that a person signed a document containing a declaration that a seal was his seal is admissible to prove that he sealed it.

(2) Evidence that the grantor on executing any document requiring delivery expressed an intention that it should operate at once is admissible to prove delivery.

Proof of instrument to validity of which attestation is necessary

102. (1) In any proceedings, whether civil or criminal, an instrument to the validity of which attestation is required by law may, instead of being proved by an attesting witness, be proved in the manner in

which it might be proved if no attesting witness were alive: Provided that nothing in this section shall apply to the proof of wills or other testamentary documents.

(2) If no attesting witness is alive, an instrument to the validity of which attestation is required by law is proved by showing that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person.

Admission of execution by party to attested document

103. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Cases in which proof of execution or of handwriting unnecessary

104. (1) A person seeking to prove the due execution of a document is not bound to call the party who executed the document or to prove the handwriting of such party or of an attesting witness in any case where the person against whom the document is sought to be proved—

(*a*) produces such document and claims an interest under it in reference to the subject-matter of the suit, or

(*b*) is a public officer bound by law to procure its due execution, and he has dealt with it as a document duly executed.

(2) Nothing in this section contained shall prejudice the right of a person to put in evidence any document in the manner mentioned in sections 96 and 122.

Proof when attesting witness denies the execution

105. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested

106. An attested document not required by law to be attested may be proved as if it was unattested.

Comparison of signature, writing, seal or finger impressions with others admitted or proved

107. (1) In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose.

(2) The court may direct any person present in court to write any words or figures or to make finger impressions for the purpose of enabling the court to compare the words, figures or finger impressions so written with any words, figures or finger impressions alleged to have been written or made by such person: Provided that where an accused person

does not give evidence he may not be so directed to write any words or figures or to make finger impressions.

(3) After the final termination of the proceedings in which the court required any person to make his finger impressions such impressions shall be destroyed.

Public and Private Documents

Public documents

108. The following documents are public documents:

(*a*) documents forming the acts or records of the acts—

(*i*) of the sovereign authority;

(*ii*) of official bodies and tribunals; and

(*iii*) of public officers, legislative, judicial and executive, whether of Nigeria or elsewhere;

(*b*) public records kept in Nigeria of private documents.

Private documents

109. All documents other than public documents are private documents.

Certified copies of public documents

110. (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Proof of documents by production of certified copies

111. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of other official documents

112. The following public documents may be proved as follows:

(*a*) Acts of Parliament or laws of a Regional Legislature, proclamation, treaties or other Acts of State, orders, notifications, nominations, appointments and other official communications of the Government of Nigeria or the Government of Nigeria in any Region thereof or of any local or native authority—

(*i*) which appear in the official Gazette of Nigeria or of a Region,

by the production of such Gazette, and shall be prima facie proof of any fact of a public nature which they were intended to notify;

(*ii*) by a copy thereof certified by the officer who authorised or made such order or issued such official communication;

(*iii*) by the records of the departments certified by the heads of those departments respectively or by the Minister or in respect of matters to which the executive authority of a Region extends by the Governor or any person nominated by him; or

(*iv*) by any document purporting to be printed by order of Government;

(*b*) the proceedings of the Legislative Council or of a Federal Legislative House—
by the minutes of that body or by published Acts or abstracts, or by copies purporting to be printed by order of Government;

(*c*) the proceedings of a Regional Legislative House—
by the minutes of that body or by published Laws, or by copies purporting to be printed by order of Government.

(*d*) the proceedings of a municipal body in Nigeria—
by a copy of such proceedings, certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body;

(*e*) Acts of Parliament of the United Kingdom and other statutes therefore enacted including proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government—
by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer;

(*f*) the Acts or Ordinances of any other part of the Commonwealth, and the subsidiary legislation made under the authority thereof—
by a copy purporting to be printed by the Government Printer of any such country;

(*g*) treaties or other acts of State of the United Kingdom or proclamations, treaties or acts of State of any other country—
by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign;

(*h*) books printed or published under the authority of the Government of a foreign country, and purporting to contain the statutes, code or other written law of such country, and also printed and published books of reports of decisions of the courts of such country, and books proved to be commonly admitted in such courts as evidence of the law of such country, shall be admissible as evidence of the law of such foreign country;

(*i*) any judgment, order or other judicial proceeding outside Nigeria, or any legal document filed or deposited in any court—

(*i*) by a copy sealed with the seal of a foreign or other court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge must attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal; or

(*ii*) by a copy which purports to be certified in any manner which is certified by any representative of Nigeria or if there is no such representative appointed, then by any representative of the United Kingdom in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records;

(*j*) public documents of any other class elsewhere than in Nigeria by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a consul or diplomatic agent that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

Presumptions as to Documents

Presumption as to genuineness of certified copies

113. (1) The court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in Nigeria who is duly authorised thereto to be genuine, provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Presumption as to documents produced as record of evidence

114. Whenever any document is produced before any court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any judge or magistrate,* or by any such officer as aforesaid, the court shall presume—

*"or District Judge" in the case of Northern Nigeria: The Adaptation of Legislation Order in Council, 1960 (N.R.L.N. 120 of 1960).

(*a*) that the document is genuine;
(*b*) that any statements as to the circumstances in which it was taken, purporting to be made by the person signing it, are true; and
(*c*) that such evidence, statement or confession was duly taken.

Presumption as to gazettes, newspapers, and other documents

115. The court shall presume the genuineness of every document purporting to be the London Gazette or the official Gazette of Nigeria or of a Region or the Gazette of any part of the Commonwealth or to be a newspaper or journal, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Presumption as to document admissible in the Commonwealth without proof of seal or signature

116. When any document is produced before any court, purporting to be a document which, by the law in force for the time being in any part of the Commonwealth would be admissible in proof of any particular in any court of justice in any part of the Commonwealth, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the court shall presume—

(*a*) that such seal, stamp or signature, is genuine, and
(*b*) that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in the part of the Commonwealth where the document is produced.

Presumption as to powers of attorney

117. The court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a notary public, or any court, judge, magistrate,* consul or representative of Nigeria, or as the case may be of Her Majesty, was so executed and authenticated.

Presumption as to public maps and charts

118. (1) All maps or charts made under the authority of any Government, or of any public municiapl body, and not made for the purpose of any proceedings, shall be presumed to be correct, and shall be admitted in evidence without further proof.

(2) Where maps or charts so made are reproduced by printing, lithography, or other mechanical process, all such reproductions purporting to be reproduced under the authority which made the originals shall be admissible in evidence without further proof.

*In the case of Northern Nigeria insert "District Judge" after "Magistrate": N.R.L.N. 120 of 1960.

Presumption as to books

119. The court may presume that any book to which it may refer for information on matters of public or general interest, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Presumption as to telegraphic messages

120. The court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption as to due execution of documents not produced

121. The court shall presume that every document, called for and not produced after notice to produce given under section 97, was attested, stamped and executed in the manner required by law.

Presumption as to documents twenty years old

122. Where any document, purporting or proved to be twenty years old, is produced from any custody which the court in the particular case considers proper, the court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Meaning of expression "proper custody"

123. Documents are said to be in proper custody within the meaning of sections 115 to 122 if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

Presumption as to date of document

124. When any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practised, and would, if practised, injure any person, or defeat the objects of any law.

Presumption as to stamp of a document

125. When any document is not produced after due notice to produce,

and after being called for, it is presumed to have been duly stamped unless it be shown to have remained unstamped for some time after its execution.

Presumption as to sealing and delivery

126. When any document purporting to be, and stamped as, a deed, appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered although no impression of a seal appears thereon.

Presumption as to alterations

127. (1) No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document or with the consent of the party to be charged under it or his representative in interest. The provisions of this subsection shall extend to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave.

(2) Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed.

(3) Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will.

(4) There is no presumption as to the time when alterations and interlineations appearing on the face of writings not under seal were made except that it is presumed that they were so made that the making would not constitute an offence.

(5) An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.

(6) An alteration which in no way affects the rights of the parties or the legal effect of the instrument is immaterial.

Presumption as to age of parties to a document

128. The persons expressed to be parties to any conveyance shall, until the contrary is proved, be presumed to be of full age at the date thereof.

Presumption as to statements in documents twenty years old

129. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions.

Presumptions as to deeds of corporations

130. In favour of a purchaser a deed shall be deemed to have been

duly executed by a corporation aggregate if its seal be affixed thereto in the presence of and attested by its clerk, secretary, or other permanent officer or his deputy, and a member of the board of directors, council, or other governing body of the corporation; and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.

PART VI—THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

Evidence of terms of judgments, contracts, grants and other dispositions of property reduced to a documentary form

131. (1) When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence: Provided that any of the following matters may be proved:

(*a*) fraud, intimidation, illegality; want of due execution; the fact that it is wrongly dated; existence, or want or failure, of consideration; mistake in fact or law; want of capacity in any contracting party, or the capacity in which a contracting party acted when it is not inconsistent with the terms of the contract; or any other matter which, if proved, would produce any effect upon the validity of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto;

(*b*) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them;

(*c*) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property;

(*d*) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property;

(*e*) any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.

(2) Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, grant or disposition of property.

(3) Oral evidence of the existence of a legal relationship is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.

Evidence as to the interpretation of documents

132. (1) Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local and provincial expressions, of abbreviations and words used in a peculiar sense.

(2) Evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.

(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.

(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer, or which indentifies any person or thing mentioned in it. Such facts are hereinafter called the circumstances of the case.

(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.

(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.

(7) If the document applies in part but not with accuracy or not completely to the circumstances of the case, the court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may equally well apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.

(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.

(9) If the document is of such a nature that the court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.

Application of this Part

133. (1) Sections 131 and 132 apply only to parties to documents, and their representatives in interest, and only to cases in which some civil right or civil liability is dependent upon the terms of a document in question.

(2) Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove.

(3) Any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.

Provisions as to wills

(4) Nothing in this Part contained shall be taken to affect any of the provisions of any enactment as to the construction of wills.

PART VII—PRODUCTION AND EFFECT OF EVIDENCE

Of the Burden of Proof

Burden of proof

134. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

On whom burden of proof lies

135. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Burden of proof in civil cases

136. (1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

(2) If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all the issues in the pleadings have been dealt with.

(3) Where there are conflicting presumptions, the case is the same as if there were conflicting evidence.

Burden of proof beyond reasonable doubt

137. (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of section 140, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

(3) If the prosecution prove the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the accused.

Burden of proof as to particular fact

138. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in course of a case be shifted from one side to the other; in considering the amount of evidence necessary to shift the burden of proof regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

Burden of proving fact to be proved to make evidence admissible

139. (1) The burden of proving any fact necessary to be proved in order—

(*a*) to enable a person to adduce evidence of some other fact; or

(*b*) to prevent the opposite party from adducing evidence of some other fact,

lies on the person who wishes to adduce, or to prevent the adduction of, such evidence, respectively.

(2) The existence or non-existence of facts relating to the admissibility of evidence under this section is to be determined by the court.

Burden of proof in criminal cases

140. (1) Where a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged is upon such person.

(2) The burden of proof placed by this Part upon an accused charged with a criminal offence shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether on cross-examination or otherwise, that such circumstances in fact exist.

(3) Nothing in section 137, 141 or in subsection (1) or (2) of this section shall—

(*a*) prejudice or diminish in any respect the obligation to establish by evidence according to law, any act, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or

(*b*) impose on the prosecution the burden of proving that the circumstances or facts described in sub-section (2) do not exist; or

(*c*) affect the burden placed on an accused person to prove a defence of intoxication or insanity.

Proof of facts especially within knowledge

141. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Exceptions need not be proved by prosecution

142. Any exception, exemption, proviso, excuse, qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation, or other document creating the offence, may be proved by the accused, but need not be specified or negatived in the charge, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the prosecution.

Presumption of death from seven years' absence and other facts

143. (1) A person shown not to have been heard of for seven years by those, if any, who, if he had been alive, would naturally have heard of him, is presumed to be dead unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it.

(2) For the purpose of determining title to property where two or more persons have died in circumstances in which it is uncertain which survived the other, they are presumed to have died in order of seniority.

(3) There is no presumption as to the age at which a person died who is shown to have been alive at a given time.

Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent

144. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Burden of proof as to ownership

145. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Proof of good faith in transactions where one party is in relation of active confidence

146. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Birth during marriage usually conclusive proof of legitimacy

147. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown—

(*a*) either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition of the husband; or

(*b*) that the circumstances of their access, if any, were such as to render it highly improbable that sexual intercourse took place between them when it occurred:

Provided that neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other where the legitimacy of the woman's child would be affected, even if the proceedings in the course of which the question arises are proceedings instituted in consequence of adultery, nor are any declarations by them upon that subject deemed to be relevant, whether the mother or her husband can be called as a witness or not.

Court may presume existence of certain facts

148. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, and in particular the court may presume—

(*a*) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(*b*) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or states of things usually cease to exist, is still in existence;

(*c*) that the common course of business has been followed in particular cases;

(*d*) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(*e*) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

Presumptions of regularity and of deeds to complete title

149. (1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.

(2) When it is shown that any person acted in a public capacity it is presumed that he had been duly appointed and was entitled so to act.

(3) When a person in possession of any property is shown to be en-

titled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.

(4) When a minute is produced purporting to be signed by the chairman of a company incorporated under the Companies Act, and purporting to be a record of proceedings at a meeting of the company, or of its directors, it is presumed, until the contrary is shown, that such meeting was duly held and convened and that all proceedings thereat have been duly had, and that all appointments of directors, managers and liquidators are valid.

PART VIII—ESTOPPEL

Estoppel

150. When one person has, 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 representative 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.

Estoppel of tenant

151. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

Estoppel of bailee, agent and licensee

152. No bailee, agent or licensee is permitted to deny that the bailor, principal or licensor, by whom any goods were entrusted to any of them respectively, was entitled to those goods at the time when they were so entrusted: Provided that any such bailee, agent or licensee may show that he was compelled to deliver up any such goods to some person who had a right to them as against his bailor, principal or licensor, or that his bailor, principal or licensor wrongfully and without notice to the bailee, agent or licensee, obtained the goods from a third person who has claimed them from such bailee, agent or licensee.

Estoppel of person signing bill of lading

153. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that some goods or some part thereof may not have been so shipped, unless such holder of the bill of lading had actual notice at the time of receiving the same that

the goods had not been in fact laden on board: Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder or some person under whom the holder holds.

PART IX—WITNESSES

Competence of Witnesses Generally

Who may testify

154. (1) All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

(2) A person of unsound mind is not incompetent to testify unless he is prevented by his mental infirmity from understanding the questions put to him and giving rational answers to them.

Dumb witnesses

155. (1) A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open court.

(2) Evidence so given shall be deemed to be oral evidence.

Case in which banker not compellable to produce books

156. A banker or officer of a bank shall not, in any legal proceeding to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved in manner provided in section 96 or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the court made for special cause.

Parties to civil suit, and their wives or husbands

157. Subject to the proviso contained in section 147, in all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.

Competency in criminal cases

158. Subject to the provisions of this Part, in criminal cases the accused person, and his or her wife or husband, and any person and the wife or husband of any person jointly charged with him and tried at the same time, is competent to testify.

Competency of person charged to give evidence

159. 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—

(*a*) a person so charged shall not be called as a witness in pursuance of this section except upon his own application;

(*b*) the failure of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution;

(*c*) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;

(*d*) 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—

(*i*) 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

(*ii*) 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, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(*iii*) he has given evidence against any other person charged with the same offence;

Evidence of person charged

(*e*) when the only witness to the facts of the case called by the defence is the person charged he shall be called as a witness immediately after the close of the evidence for the prosecution:

Accused to give evidence from witness box

(*f*) every accused person called as a witness in pursuance of this section shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses give their evidence;

Statement can be made by person charged

(*g*) nothing in this section shall affect the right of the person charged to make a statement without being sworn;

Right of reply

(*h*) in cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

Evidence by husband or wife: when compellable

160. (1) When a person is charged—

(*a*) with an offence under any of the enactments contained in sections 217, 218, 219, 221, 222, 223, 224, 225, 226, 231, 300, 301, 340, 341, 357 to 362, 369, 370 and 371 of the Criminal Code; or

(*b*) subject to the provisions of section 36 of the Criminal Code with an offence against the property of his or her wife or husband*; or

(*c*) with inflicting violence on his or her wife or husband; the wife or husband of the person charged shall be a competent and compellable witness for the prosecution or defence without the consent of the person charged.

When competent

(2) When a person is charged with an offence other than one of those mentioned in the preceding subsection the husband or wife of such person respectively is a competent and compellable witness but only upon the application of the person charged.

Communications made during marriage

(3) Nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage or a wife compellable to disclose any communication made to her by her husband during the marriage.

Failure to give evidence not to be commented on

(4) The failure of the wife or husband of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution.

Communications during Mohammedan marriage privileged

161. When a person charged with an offence is married to another person by a marriage other than a monogamous marriage such last named person shall be a competent and compellable witness on behalf of either the prosecution or the defence: Provided that in the case of a marriage by Mohammedan law neither party to such marriage shall be compellable to disclose any communication made to him or her by the other party during such marriage.

Competency in Proceedings Relating to Adultery

Evidence by spouse as to adultery

162. The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings whether a party thereto or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless he or she has already given evidence in the same proceeding in disproof of the alleged adultery.

Communications during Marriage

Communications during Marriage

163. No husband or wife shall be compelled to disclose any communi-

* In the case of Northern Nigeria, delete paragraphs (*a*) and (*b*) and substitute therefor the following: "(*a*) with an offence under section 200, 201, 237, 238, 271, 275, 276, 278, 279, 281, 283, 284, 285, 383, 384, 385, 386, 387, 388, 389 or 390 of the Penal Code; or": N.R.L.N. 120 of 1960.

cation made to him or her during marriage by any person to whom he or she is or has been married; nor shall he or she be permitted to disclose any such communication, unless the person who made it, or that persons' representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for an offence specified in subsection (1) of section 160.

Official and Privileged Communications

Judges and Magistrates

164. No judge and, except upon the special order of the High Court of the Region, no magistrate* shall be compelled to answer any questions as to his own conduct in court as such judge or magistrate*, or as to anything which came to his knowledge in court as such judge or magistrate*; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Information as to commission of offences

165. No magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence, and no officer employed in or about the business of any branch of the public revenue shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Evidence as to affairs of State

166. Subject to any directions of the Minister in any particular case, or of the Governor where the records are in the custody of a Region, no one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Official communications

167. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Communications between jurors

168. A juror may not give evidence as to what passed between the jurymen in the discharge of their duties, except as to matters taking place in open court.

Professional communication

169. (1) No legal practitioner shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such legal practitioner by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the

* Insert "or District Judge" in the case of Northern Nigeria: N.R.L.N. 120 of 1960.

course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment: Provided that nothing in this section shall protect from disclosure—

(*a*) any such communication made in furtherance of any illegal purpose;

(*b*) any fact observed by any legal practitioner in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of such legal practitioner was or was not directed to such fact by or on behalf of his client.

(3) The obligation stated in this section continues after the employment has ceased.

Section 169 to apply to interpreters and clerks

170. The provisions of section 169 shall apply to interpreters, and the clerks and agents of legal practitioners.

Privilege not waived by volunteering evidence

171. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 169, and, if any party to a suit or proceedings calls any such legal practitioner as a witness, he shall be deemed to have consented to such disclosure only if he questions such legal practitioner on matters, which, but for such question, he would not be at liberty to disclose.

Confidential communication with legal advisers

172. No one shall be compelled to disclose to the court any confidential communication which has taken place between him and a legal practitioner consulted by him, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

Production of title-deeds of witness not a party

173. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production which might tend to incriminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of documents which another person could refuse to produce

174. No one shall be compelled to produce documents in his possession which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

Witness not to be compelled to incriminate himself

175. No one is bound to answer any question if the answer thereto would, in the opinion of the court, have a tendency to expose the witness or the wife or husband of the witness to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for: Provided that—

(*a*) a person charged with an offence, and being a witness in pursuance of section 159 of this Act, may be asked and is bound to answer any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;

(*b*) no one is excused from answering any question only because the answer may establish or tend to establish that he owes a debt or is otherwise liable to any civil suit either at the instance of the State or any other persons;

(*c*) nothing in this section contained shall excuse a witness at any inquiry by direction of the Attorney-General of the Federation, or of the Attorney-General of a Region, under Part XLIX of the Criminal Procedure Act, from answering any question required to be answered under the provisions of section 458 of that Act.*

Corroboration

In actions for breach of promise

176. No plaintiff in any action for breach of promise of marriage can recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise. The fact that the defendant did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration.

Accomplice

177. (1) 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 with 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 so direct itself.

Co-accused not an accomplice

(2) Where accused persons are tried jointly and any of them gives evidence on his own behalf which incriminates a co-accused the accused who gives such evidence shall not be considered to be an accomplice.

Number of witnesses

178. (1) Except as provided in this section, no particular number of witnesses shall in any case be required for the proof of any fact.

* Delete paragraph (*c*) of this proviso in the case of Northern Nigeria: N.R.L.N. 120 of 1960.

Treason and treasonable offences

(2) (*a*) No person charged with treason or with any of the felonies mentioned in sections 40, 41 and 42 of the Criminal Code can be convicted, except on his own plea of guilty, or on the evidence in open court of two witnesses at the least to one overt act of the kind of treason or felony alleged, or the evidence of one witness to one overt act and one other witness to another overt act of the same kind of treason or felony.

(*b*) This subsection does not apply to cases in which the overt act of treason alleged is the killing of the Sovereign, or a direct attempt to endanger the life or injure the person of the Sovereign.

Evidence on charge of perjury

(3) A person shall not be convicted of committing perjury, or of counselling or procuring the commission of perjury, upon the uncorroborated testimony of one witness, contradicting the oath on which perjury is assigned, unless circumstances are proved which corroborate such witness.

Exceeding speed limit

(4) A person charged under the Road Traffic Act with driving at a speed greater than the allowed maximum shall not be convicted solely on the evidence of one witness that in his opinion he was driving at such speed.

Sedition and sexual offences

(5) A person shall not be convicted of the offences mentioned in paragraph (b) of subsection (1) of section 51 or in section 218, 221, 223 or 224 of the Criminal Code* upon the uncorroborated testimony of one witness.

PART X—TAKING ORAL EVIDENCE AND THE EXAMINATION OF WITNESSES

The taking of Oral Evidence

Oral evidence to be on oath or affirmation

179. Save as otherwise provided in sections 181 and 182 all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oaths and Affirmations Act.

Absence of religious belief does not invalidate oath

180. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, does not for any purpose affect the validity of such oath.

Cases in which evidence not given upon oath may be received

181. (1) Any court may on any occasion, if it thinks it just and ex-

* In the case of Northern Nigeria delete "paragraph (*b*) . . . Code" and substitute therefor "section 275 or paragraph (*e*) of subsection (1) of section 282 of the Penal Code": N.R.L.N. 120 of 1960.

pedient, receive the evidence, though not given upon oath, of any person declaring that the taking of any oath whatsoever is, according to his religious belief, unlawful, or who, by reason of want of religious belief, ought not, in the opinion of the court, to be admitted to give evidence upon oath.

(2) The fact that in any case evidence not given upon oath has been received, and the reasons for the reception of such evidence, shall be recorded in the minutes of the proceedings.

Unsworn evidence of child

182. (1) In any proceeding for any offence the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understand the nature of an oath, may be received, though not given upon oath, if, in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) If the court is of opinion as stated in subsection (1), the deposition of a child may be taken though not on oath and shall be admissible in evidence in all proceedings where such deposition if made by an adult would be admissible.

(3) A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.

(4) If any child whose evidence is received as aforesaid wilfully gives false evidence in such circumstances that he would if the evidence had been given on oath have been guilty of perjury, he shall be guilty of an offence against section 191 of the Criminal Code and, on conviction, shall be dealt with accordingly.*

Evidence of first and second class chiefs

183. Where in any suit brought by or against a first or second class chief in either his official or personal capacity such chief desires to give evidence, or where in any other suit the evidence of such a chief is required, the evidence of the chief shall not be given at the hearing of the suit, but shall be taken in the form of a deposition or otherwise in accordance with the terms of an order to that effect to be made by the court, and the evidence so taken shall be admissible at the hearing if when it was taken the other party to the suit had an opportunity of being present and of cross-examining: Provided that the evidence of the chief shall be given at the hearing of the suit if he so desires, or if the court, having regard to all the circumstances, considers it to be necessary that his evidence should be so given and makes an order to that effect.

* In the case of Northern Nigeria, delete this subsection and substitute the following: "(4) Any child whose evidence is received as aforesaid and who wilfully gives false evidence shall be guilty of an offence against subsection (1) of section 158 of the Penal Code": N.R.L.N. 120 of 1960.

The Examination of Witnesses

Order of production and examination of witnesses

184. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the court.

Judge to decide as to admissibility of evidence

185. (1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant and not otherwise.

(2) If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the court is satisfied with such undertaking.

(3) If the relevancy of one alleged fact depends upon another alleged fact being first proved, the court may, in its discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Ordering witnesses out of court

186. (1) On the application of either party, or of its own motion, the court may order witnesses on both sides to be kept out of court; but this provision does not extend to the parties themselves or to their respective legal advisers, although intended to be called as witnesses.

Preventing communication with witnesses

(2) The court may during any trial take such means as it considers necessary and proper for preventing communication with witnesses who are within the court house or its precincts awaiting examination.

Examination-in-chief

187. (1) The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination

(2) The examination of a witness by a party other than the party who calls him shall be called his cross-examination.

Re-examination

(3) Where a witness has been cross-examined and is then examined by the party who called him, such examination shall be called his re-examination.

Order of examinations

188. (1) Witnesses shall be first examined-in-chief, then, if any other

party so desires, cross-examined, then, if the party calling him so desires, re-examined.

(2) The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination

(3) The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Cross-examination by co-accused or prosecution witness

189. In criminal proceedings where more than one accused is charged at the same time each accused shall be allowed to cross-examine a witness called by the prosecution before the witness is re-examined.

Cross-examination by co-accused of witness called by an accused

190. Where more than one accused is charged at the same time a witness called by one accused may be cross-examined by the other accused and if cross-examined by the other accused such cross-examination shall take place before cross-examination by the prosecution.

Production of documents without giving evidence

191. Any person, whether a party or not, in a cause may be summoned to produce a document without being summoned to give evidence, and if he cause such document to be produced in court the court may dispense with his personal attendance.

Cross-examination of person called to produce a document

192. A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness.

Witnesses to character

193. Witnesses to character may be cross-examined and re-examined.

Leading questions

194. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

When they must not be asked

195. (1) Leading questions must not, if objected to by the adverse party, be asked in examination-in-chief, or in re-examination, except with the permission of the court.

(2) The court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

When they may be asked

196. Leading questions may be asked in cross-examination.

Evidence as to matters in writing

197. (1) Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

(2) A witness may however give oral evidence of statements made by other persons about the contents of a document if such statements are in themselves relevant facts.

Cross-examination as to previous statements in writing

198. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Questions lawful in cross-examination

199. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(*a*) to test his accuracy, veracity or credibility; or

(*b*) to discover who he is and what is his position in life; or

(*c*) to shake his credit, by injuring his character:

Provided that a person charged with criminal offence and being a witness may be cross-examined to the effect, and under the circumstances, described in paragraph (*d*) of the proviso to section 159.

Court to decide whether question shall be asked and when witness compelled to answer

200. (1) If any such question relates to a matter not relevant to the proceedings, except in so far as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it.

(2) In exercising its discretion, the court shall have regard to the following considerations:

(*a*) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;

(*b*) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that

the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies;

(c) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

(3) The court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

Question not to be asked without reasonable grounds

201. No such question as is referred to in section 200 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

Procedure of court in case of question being asked without reasonable grounds

202. If the court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any legal practitioner, report the circumstances of the case to the Attorney-General of the Federation or other authority to which such legal practitioner is subject in the exercise of his profession.

Indecent and scandalous questions

203. The court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy

204. The court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the court needlessly offensive in form.

Exclusion of evidence to contradict answers to questions testing veracity

205. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with an offence against section 191 of the Criminal Code* and, on conviction, shall be dealt with accordingly: Provided that—

(*a*) if a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction;

(*b*) if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested he may be contradicted.

* In the case of Northern Nigeria, for "section 191 of the Criminal Code" substitute "subsection (1) of section 158 of the Penal Code": N.R.L.N. 120 of 1960.

How far a party may discredit his own witness

206. The party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the court, prove hostile, contradict him by other evidence, or by leave of the court prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such statement.

Proof of contradictory statement of hostile witness

207. If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the trial, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement.

Cross-examination as to previous statements in writing

208. A witness may be cross-examined as to previous statements made by him in writing relative to the subject-matter of the trial without such writing being shown to him, but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: Provided always that it shall be competent for the court at any time during the trial, to require the production of the writing for its inspection, and the court may thereupon make use of it for the purposes of the trial, as it shall think fit.

Impeaching credit of witness

209. The credit of a witness may be impeached in the following ways by any party other than the party calling him or with the consent of the court by the party who calls him—

(*a*) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(*b*) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence;

(*c*) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

Cross-examination of prosecutrix in certain cases

210. When a man is prosecuted for rape or for attempt to commit rape or for indecent assault, it may be shown that the woman against whom the offence is alleged to have been committed was of a generally

immoral character, although she is not cross-examined on the subject. The woman may in such a case be asked whether she has had connection with other men, but her answer cannot be contradicted. She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she may be contradicted.

Evidence of witness impeaching credit

211. A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with an offence against section 191 of the Criminal Code* and, on conviction, shall be dealt with accordingly.

Questions tending to corroborate evidence of relevant fact, admissible

212. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Former statements of witness may be proved to corroborate later testimony as to same fact

213. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

What matters may be proved in connection with proved statement relevant under section

214. Whenever any statement relevant under section 33 or 34 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matters suggested.

Refreshing memory

215. (1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

(2) The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

* In the case of Northern Nigeria, for "section 191 of the Criminal Code" substitute "subsection (1) of section 158 of the Penal Code": N.R.L.N. 120 of 1960.

(3) An expert may refresh his memory by reference to professional treatises.

Testimony to facts stated in document mentioned in section 215

216. A witness may also testify to facts mentioned in any such document as is mentioned in section 215, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Right of adverse party as to writing used to refresh memory

217. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it: such party may, if he pleases, cross-examine the witness thereupon.

Production of documents

218. (1) A witness, subject to the provisions of section 219, summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided by the court.

Inspection of documents

(2) The court, if it sees fit, may inspect the document or take other evidence to enable it to determine on its admissibility.

Translation of documents

(3) If for such a purpose, it is necessary to cause any document to be translated, the court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and, if the translator disobeys such direction, he shall be held to have committed an offence under subsection (1) of section 97 of the Criminal Code.*

Exclusion of evidence on grounds of public interest

219. (1) The Minister, or in respect of matters to which the executive authority of a Region extends, the Governor or any person nominated by him, may in any proceedings object to the production of documents or request the exclusion of oral evidence, when, after consideration, he is satisfied that the production of such document or the giving of such oral evidence is against public interest. Any such objection taken before trial shall be by affidavit and any such objection taken at the hearing shall be by certificate produced by a public officer.

(2) Any such objection, whether by affidavit sworn by the Minister or by certificate under his hand (or by affidavit sworn by or certificate under the hand of the Governor or person nominated by him as aforesaid), shall be conclusive and the court shall not inspect such documents

* In the case of Northern Nigeria, for "subsection (1) of section 97 of the Criminal Code" substitute "section 98 of the Penal Code": N.R.L.N. 120 of 1960.

or be informed as to the nature of such oral evidence but shall give effect to such affidavit or certificate.

Giving as evidence of document called for and produced on notice

220. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Using, as evidence, of document, production of which was refused on notice

221. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the court.

Judge's power to put questions or order production

222. The court or any person empowered by law to take evidence may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order or, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question: Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved: Provided further that this section shall not authorise any judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 161 to 175, if the question were asked or the document were called for by the adverse party; nor shall the judge ask any question which it would be improper for any other person to ask under section 200 or 201, nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Power of jury or assessors to put questions

223. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself might put and which he considers proper.

PART XI—EVIDENCE OF PREVIOUS CONVICTION

Proof of previous conviction

224. (1) Where it is necessary to prove a conviction of a criminal offence the same may be proved—

(*a*) by the production of a certificate of conviction containing the substance and effect of the conviction only, purporting to be signed by the registrar or other officer of the court in whose custody is the record of the said conviction;

(*b*) if the conviction was before a native court by a similar certificate signed by the clerk of court or scribe of the court in whose custody is the record of the said conviction; or

(*c*) by a certificate purporting to be signed by the Director of Prisons or officer in charge of the records of a prison in which the prisoner was confined giving the offence for which the prisoner was convicted, the date and the sentence.

(2) If the person alleged to be the person referred to in the certificate denies that he is such person the certificate shall not be put in evidence unless the court is satisfied by the evidence that the individual in question and the person named in the certificate are the same.

Proof of previous conviction outside Nigeria

(3) (*a*) A previous conviction in a place outside Nigeria may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order and the finger prints of the person or photographs of the finger prints of the person so convicted, together with evidence that the finger prints of the person so convicted are those of the accused person.

Certificates under subsection (3) (*a*) *prima facie evidence*

(*b*) A certificate given under paragraph (*a*) of this sub-section shall be *prima facie* evidence of all facts therein set forth without proof that the officer purporting to sign the same did in fact sign it and was empowered so to do.

Additional mode of proof in criminal proceedings of previous conviction

225. (1) For the purposes of this section "the central registrar" means the person in charge of the principal registry of criminal records established under the provisions of the Prevention of Crimes Act.

(2) A previous conviction may be proved against any person in any criminal proceedings by the production of such evidence of the conviction as is mentioned in this section, and by showing that his finger prints and those of the person convicted are the finger prints of the same person.

(3) A certificate—

(*a*) purporting to be signed by or on behalf of the central registrar; and

(*b*) containing particulars relating to a conviction extracted from the criminal records kept by him; or a photographic copy certified as such of particulars relating to a conviction as entered in the said records; and

(*c*) certifying that the copies of the finger prints exhibited to the certificate are copies of the finger prints appearing from the said records to have been taken from the person convicted on the occasion of the conviction,

shall be evidence of the conviction and evidence that the copies of the

finger prints exhibited to the certificate are copies of the finger prints of the person convicted.

(4) A certificate—

(*a*) purporting to be signed by or on behalf of the superintendent of a prison in which any person has been detained in connection with any criminal proceedings or by a police officer who has had custody of any person charged with an offence in connection with any such proceedings; and

(*b*) certifying that the finger prints exhibited thereto were taken from such person while he was so detained or was in such custody as aforesaid.

shall be evidence in those proceedings that the finger prints exhibited to the certificate are the finger prints of that person.

(5) A certificate—

(*a*) purporting to be signed by or on behalf of the central registrar; and

(*b*) certifying that—

(*i*) the finger prints, copies of which are certified as aforesaid by or on behalf of the central registrar to be copies of the finger prints of a person previously convicted; and

(*ii*) the finger prints certified by or on behalf of the superintendent of the prison or the police officer as aforesaid, or otherwise shown, to be the finger prints of the person against whom the previous conviction is sought to be proved, are the finger prints of the same person,

shall be evidence of the matter so certified.

(6) The method of proving a previous conviction authorised by this section shall be in addition to any other method authorised by law for proving such conviction.

PART XII—WRONGFUL ADMISSION AND REJECTION OF EVIDENCE

Wrongful admission or exclusion of evidence

226. (1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.

(2) The wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the court on appeal that had the evidence so excluded been admitted it may reasonably be held that the decision would have been the same.

"*decision*"

(3) In this section the term "decision" includes a judgment, order, finding or verdict.

PART XIII—SERVICE AND EXECUTION THROUGHOUT NIGERIA OR PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES BEFORE COURTS OF LAGOS, THE SOUTHERN CAMEROONS AND THE REGIONS

(Inserted by L.N. No. 47 of 1955)

Interpretation

227. In this Part—

"court" means a High Court, a district court, or a magistrate's court;

"part of the Federation" means Lagos.

Subpoena or witness summons may be served in another Region

228. (1) When a subpoena or summons has been issued by any court in any Region or part of the Federation in the exercise of its civil jurisdiction in accordance with any power conferred by law requiring any person to appear and give evidence or to produce books or documents in any proceeding, such subpoena or summons may upon proof that the testimony of such person or the production of such books or documents is necessary in the interests of justice by leave of such court on such terms as the court may impose be served on such person in any other Region or part of the Federation.

(2) If a person upon whom a subpoena or summons has been served in accordance with subsection (1) fails to attend at the time and place mentioned in such subpoena or summons such court may on proof that the subpoena or summons was duly served on such person and that the sum prescribed by law was tendered to him for his expenses issue such warrant for the apprehension of such person as such court might have issued if the subpoena or summons had been served in the Region or part of the Federation in which it was issued.

(3) Such warrant may be executed in such other Region or part of the Federation in the manner provided in Chapter XII of the Criminal Procedure Ordinance in the case of warrants issued for the apprehension of persons charged with an offence.

Orders for production of prisoners

229. (1) Where it appears to any court of a Region or part of the Federation that the attendance before the court of a person who is undergoing sentence in any Region or part of the Federation is necessary for the purpose of obtaining evidence in any proceeding before the court, the court may issue an order directed to the superintendent or officer in charge of the prison or place where the person is undergoing sentence requiring him to produce the person at the time and place specified in the order.

(2) Any order made under this section may be served upon the superintendent or officer to whom it is directed in whatever Region or part of the Federation he may be and he shall thereupon produce in such custody as he thinks fit the person referred to in the order at the time and place specified therein.

(3) The court before which any person is produced in accordance with an order issued under this section may make such order as to the costs of compliance with this order as to the court may seem just.

Application to Cameroons

230. The provisions of this Part shall apply to the service and execution in Nigeria of process issued by courts in Northern Cameroons so long as there are in force in those territories reciprocal provisions for the service and execution of process issued by courts in Nigeria.

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