Winning Weapons In Law Suits

SAMUEL ADEWALE ADENIJI

Foreword by: E. O. Ayoola, JSC (rtd).
Chairman, I.C.P.C.

WINNING WEAPONS IN LAW SUITS

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Foreword

Mr. Samuel Adeniji's *Winning Weapons in Law Suits,* is a surprising book in several respects. First, it is written not by a practitioner but by a law student. Second, it deals in a lucid style with practical aspects of the law of evidence and of appeal from the perspective of a practitioner. Third, the author has been able to draw on several decided cases in support of the principles expounded in the book. Fourthly, the author has been able to get two eminent judges to write comments on the book, each refreshing to read.

What word is left for the writer of a foreword than to congratulate the author, Mr. Adeniji, for this book which is the third in a series, and to recommend the book as a useful companion for students and practitioners alike.

JUSTICE E. O. AYOOLA
CON, JSC, DCL
CHAIRMAN, ICPC
FEBRUARY 2008.

Preface

When **"Legal Armoury"** was published in 2006 few people gave the book chance. However, the success of the book in the market kindled the determination of Samuel Adewale Adeniji to produce his second book which he titled, **"Criminal Armoury"**. I have been privileged to attest to the great success of the two books. The young author is now out with his third book **"Winning Weapons in Law Suits"**.

Sir Isaac Newton, the great scientist once said: "If I have been able to see farther, it was because I stood on the shoulders of those who were ahead of me".

Samuel Adewale Adeniji started writing his books when he was in 200 level at Olabisi Onabanjo University, Ago-Iwoye. By the time he got to 400 level, he had produced the three books earlier mentioned. No doubt, Mr. Adeniji is a talented, industrious and resourceful young man. But the secret of his success, in my view, partly lies in the fact that he is never tired of seeking the guidance of those he considers relevant in the pursuit of his professional excellence.

"Winning Weapons in Law Suits" is peculiar, having regard to the number of topics discussed. The book offers step-by-step guidance and judicially tested tips that will prepare a lawyer for any case from the High Court to the Supreme Court.

There is perhaps, no greater skill that can help a Lawyer build his career or profession better than being in possession of the basic tools of the trade. This little book will give any Legal Practitioner the tools he needs to become proficient as a Legal Professional.

The topics discussed in the book have been wide-ranging and several. The book provides answers to many questions which often agitate the minds of Lawyers generally.

For instance: How does a Court determine a weak and wobble evidence? What is meant by a speculative document? What are the grounds for rendering an appeal incompetent? What are the purposes and forms of Brief Writing? Under what circumstances will an uncontradicted evidence be rejected by a Court? These are some of the many questions to which answers have been provided in this book. The principles of Law outlined in the book are timeless treasures painstakingly put together by the author. For any Legal practitioner who desires to make a significant impact in the legal profession, this book is the sure anchor.

Mr. Adeniji has to be congratulated for finding the time and the inclination to write this book. At a fairly young age, he is making a tremendous and worthy contribution to Legal knowledge and literature. In this work, he has lived up to the high standard he sets for himself in his previous works.

I have no doubt that "**Winning Weapons in Law Suits**" will be of great use to judges, Law teachers and Law Students. As for Practicing Lawyers, be he a young Legal Practitioner, scared to death by the thought of gathering Legal materials to fight an opponent in Court, or a more seasoned advocate wanting to improve his skill and effectiveness as a lawyer, this book is the answer.

I therefore recommend the book to all and sundry.

HON. JUSTICE L. O. ARASI (RTD)
63 FAJUYI ROAD,
BODE FOAM BUILDING,
ADAMASINGBA, IBADAN.

Comments

"Winning Weapons in Law Suits" is the third book written by Samuel Adewale Adeniji of which I am privileged to comment on. The earlier two books of this prolific and talented young author are already successful in the market.

"Winning Weapons in Law Suits" unlike Samuel Adeniji's earlier books is particularly directed to Legal Practitioners even though it would serve as useful reference to Law students and the reading public. This is because the book deals with the more practical aspects of the Law of evidence which naturally constitutes a real armoury for the growing advocate as it sharpens and enhances his legal skills in the nitty-gritty of the Law of evidence and consequently the art of advocacy.

Also and rather surprisingly the book deals with the technicalities of the procedure for appeals in our superior courts which includes the right to appeal, filing of Notice of Appeal, competence of appeal, brief writing, determination of Grounds of Appeal, issues for determination and effect of non-compliance.

The book, though written in lucid language, nevertheless depicts the author's depth of understanding of the intricacies and nuances of law.

I have no hesitation however in recommending this book to judges, practising lawyers, law teachers and law students.

Finally, I congratulate Mr. Samuel Adeniji for yet another notable contribution to the development of the law and the legal profession.

HON. JUSTICE (PROFESSOR) M. A. OWOADE
COURT OF APPEAL
CALABAR DIVISION, NIGERIA

Comment

SAMUEL A. ADENIJI in this book "Winning Weapons in Law Suits" has dealt with a technical area of law which the uninitiated, that is, non lawyers consider a nightmare and many lawyers a jungle. The author's incisive and painstaking treatment of the subject matter of this book, the appellate process has contributed in making this esoteric area of adjectival law less jungle-like.

Hon. Justice C.A. Oputa writing generally on appellate jurisdiction said:

"It is the glory and happiness of our excellent constitution, that to prevent any injustice, no man is to be concluded by the first judgement but that if a man apprehends himself to be aggrieved he has the Court of Appeal and the Supreme Court to resort to, for relief and redress" *

"Winning Weapons in Law Suits" offers useful hints to enhance the pursuit of successful appeals as well as the defence of impeccable judgement of trial courts.

In essence, it seeks to ensure the party on the right side of the law "laughs last" and "laughs best".

Justices and Judges of appellate and trial courts respectively, legal practitioners, law teachers, law students and general public, especially those interested in working of judicial system will find this book a useful addition to the existing literature in this often neglected field of Nigerian jurisprudence.

* C. A. Oputa "Towards Greater Efficiency in the Dispensation of Justice in Nigeria in Yemi Akinseye-George (ed) Laws, Justice and Stability in Nigeria: Essays in Honour of Justice Kayode Eso, Ibadan, J.S.M.B., 1993, p. 1 at 11.

"Winning Weapons in Law Suits" is written in a clear, concise and plain language with adequate reference to judicial pronouncements.

Samuel A. Adeniji deserves commendation for his remarkable effort in the preparation of this material. It is hoped that he will continue to make useful contributions to the world of learning.

JOHN O. A. AKINTAYO
LECTURER,
FACULTY OF LAW,
UNIVERSITY OF IBADAN,
NIGERIA

Acknowledgement

To God alone be the glory. "Winning Weapons in Law Suits" is the third in its series of the practicing books I have been priviledged to write through the GRACE OF GOD upon my life as an undergraduate.

The first book is titled "LEGAL ARMOURY". The second book is titled "CRIMINAL ARMOURY", and the third one is this book.

This book, I believe, will answer to its name to the users in legal battle or any other para-legal battles. I want to strongly, appreciate the efforts of those great personalities GOD has been using for me in one capacity or the other.

Indeed, according to **ISAAC NEWTON** who said **"if I have been able to see farther it was because I stood on the shoulders of those who were ahead of me"**

All I am saying hitherto is a BIG THANK YOU to all my fathers and mothers whom I am greatly indebted to.

SAMUEL A. ADENIJI
L. L. B. IV
FACULTY OF LAW
OLABISI ONABANJO UNIVERSITY
AGO-IWOYE, OGUN STATE,
NIGERIA.

Dedication

I dedicate this book to THE ALMIGHTY GOD, THE GREAT ADVOCATE AND MY MENTOR, GREAT FATHER, I AM VERY GREATFUL.

Table of Authorities

CASES

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RULE

BOOKS

Abbreviations

AC	Appeal Cases.
All ER	All England Law Reports
All NLR	All Nigerian Law Reports.
Exch	Exchequer
FR	Federal Reporter.
IC Rob. Ad. Rep.	
KB	King's Bench
LJ(NS)	
LRICD	
NCLR	Nigerian Constitutional Law Report
NLR	Nigerian Law Report
NMLR	Nigerian Monthly Law Report
NSCC	Nigerian Supreme Court Cases
NSCQR	Nigerian Supreme Court Quarterly Reports
NWLR	Nigerian Weekly Law Report
QBD	Queen's Bench Division
SC	Supreme Court Judgement
SCNQR	Supreme Court Nigerian Quarterly Report
WACA	West African Court of Appeal
WLR	Weekly Law Report
WNLR	Western Nigerian Law Report
WRN	Weekly Report of Nigeria

Chapter One

Right of Appeal

Who may Appeal?

It must be pointed out that it is the constitutional right of every party to any civil or criminal proceedings to appeal against any decision of the trial or even appellate court with or against which he is dissatisfied or aggrieved. He can exercise this right up to the highest level of our judicial hierarchy – i.e. the Supreme Court where the law permits.

The right to appeal from one court to another particularly from a lower superior Court of record to a higher superior court of record is guaranteed by the constitution. By virtue of Section 233 of the 1999 Constitution, the Supreme Court to the exclusion of any other court of record in the land, entertains appeals from the Court of Appeal or from any other body as stipulated by law. Where the ground of appeal is on law alone or on the interpretation or application of any provisions of the constitution the appeal from the decision of the Court of Appeal to the Supreme Court is as of right. But where the ground of appeal involves mixed law and facts alone the leave of the Court

of Appeal or Supreme Court is required except appeal under Section 241 (1) (a) 1999 Constitution[1]

It should be understood and settled that an appeal, is by way of a re-hearing[2] Therefore, nexus must be drawn between grounds of appeal, and issues for determination.

Grounds of appeal must relate to and challenge the validity of the decision appealed against, while the issues for determination must arise from the grounds of appeal. Grounds of appeal must attack that *ratio decidendi* and not the *obiter dicta* of the decision. Where no issue is formulated from a ground of appeal or where the issues formulated by the appellant do not relate to the grounds of appeal, such issue(s) must be deemed abandoned and liable to be struck out[3]

It is trite law that appeals are creatures of statutes. So, the jurisdiction of the Court of Appeal or Supreme Court to adjudicate on any matter brought before it, is statutory and also guided by the Rules of the Court. The failure by any appellant or appellants to comply with the statutory provisions or requirement prescribed by the relevant law/laws or Rules (which are in the nature of a subsidiary legislation and perforce, must be obeyed) under which such appeals may be competent and proper before the Court. will certainly deprive the Appellate Court, jurisdiction to entertain and/or adjudicate on the appeal.

1. Metal Construction (W.A.) Ltd v. Migliore & ors (1990) 1 NWLR (pt 126) 299; Oluwole v. LSDOC (1983) 5 SC 1; Ogbechie v. Onochie (1986) 2 NWLR (pt 23) 484.
2. Sabrue Motors Nig. Ltd v. Rajab Enterprises Nig. Ltd (2002) 4 SCNJ pg. 270 @ 282; Standard Eng. Ltd v. N.B.C.I (2006) 25 NSCQR p. 654 @ 668.
3. Adelekan v. Ecu-Line NV (2006) All FWLR (pt 321) p. 1213, @ 1223.

A right of appeal is not a matter of tokenism. It is an important and overriding right which enables the appellate Court to consider with gravity the issues agitated in a particular appeal. It is not open to an appellate court to assume that the trial court would not have been influenced in the process of arriving at its conclusion by the totality of the evidence called by parties. Especially where the appellant raises issue "whether the decision of the trial court can be supported in the face of unresolved conflicts between the findings and the final decision of the Court

There would be a need for the appellate court to consider the totality of the evidence before the trial Court and to decide whether viz;

(1) there were unresolved conflicts in the evidence of witnesses and

(2) the findings made by the trial court justified the final conclusion arrived at by the trial court. To be able to respond to such an issue, the appellate court would need to consider the totality of the evidence before the trial Court.

Furthermore, the right to appeal from one court to another, particularly from a lower Superior Court of record to a higher superior Court of record is guaranteed by the Constitution. By virtue of Section 233 of the 1999 Constitution, the Supreme Court, to the exclusion of any other Court of record in the land, entertains appeals from the Court of Appeal[4]

4. N.C.C v. Motophone Ltd (2003) 12 FR p.47 @ 51.

In the exercise of the appellate jurisdiction of the Supreme Court, appeals lie in civil cases, at the instance of the parties to the action or with the leave of the Supreme Court or the Court of Appeal, at the instance of any other person having interest in the subject matter of the action.

In Criminal Cases, appeal lies at the instance of the accused or the prosecutor. A complainant in a criminal prosecution has no right of appeal as he is not a party to the proceedings, neither can he be a "person aggrieved"[5]

The Supreme Court in the case of **Engineering Enterprises Ltd v. A.G. Kaduna State**[6] held that every appellant has a right of appeal once his grounds of appeal are competent[7]

The ground of appeal consists of the reasons for the dissatisfaction of the judgement or ruling of the lower Court. Therefore, where the ground of appeal is on law alone or on the interpretation or application of any provisions of the constitution, the appeal from the decision of the Court of Appeal to the Supreme Court is as of right. But where the ground of appeal involves mixed law and facts or facts alone the leave of the Court of Appeal or Supreme Court is required[8]

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5. I.G.P v. Adegoke Adelabu In Re: Chief D. T. Akinbiyi 1955/56 WNNLR 100.
6. (1987) 2 NWLR (pt 57)
7. First Bank Nig. v. May Med. & Diagnostic (2001) 6 NSCQR (PT 1) P. 61 @ 71.
8. Section 233(3) of the 1999 Constitution; Metal Construction (W.A.) Ltd v. Migliore & ors (1990) 1 NWLR (pt 126) 299; Oluwole v. LSDPC (1983) 5 SC 1; Ogbechie v. Onochie (1986) 2 NWLR (pt 23) 484; Ojora & ors v. Odunsi (1964) All NLR 55.

Persons entitled to appeal to the Court of Appeal are those in similar circumstance as for appeal to Supreme Court stated above[9]

The right of appeal is a creature of the statute. Section 243 of the 1999 Constitution provides for the type of right which applicant seeks to exercise:-

(243) - Any right of appeal to the Court of Appeal from the decisions of the Federal High Court or a High Court conferred by this constitution shall be:-

(a) Exercisable in the case of civil proceedings at the instance of a party thereto, or with the leave of the Federal High Court or the High Court or the Court of Appeal at the instance of any other person having an interest in the matter, and in the case of criminal proceedings at the instance of an accused person or, subject to the provisions of this constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney - General of a state to take over, to continue or to discontinue such proceedings, at the instance of such other authorities or persons as may be prescribed" As regards the interpretation of the above provision, the Court of Appeal stated.

From the foregoing, any person other than one who had been a party to the proceedings giving rise to the decision to be appealed against of necessity must obtain leave of this Court

[9] Aiyeketi v. Reg. Trustees (2003) 10 FR p. 174 @ 181.

for the right of appeal as created to become operable. The provision makes it mandatory on the part of such an intending Appellant to make bare, on an application before us, what his interest in the matter determined in the proceedings and the subsequent decision therefrom is in order to obtain the necessary leave that will entitle the exercise of an otherwise inoperable right[10]

The Constitution of this country and the law and practice in the administration of justice have vested in the aggrieved person a right of appeal to a Superior Court against any decision in respect of which he is aggrieved on the grounds of law or fact on which he considers the Court is in error[11] The grounds of appeal therefore are the reasons why the decision is considered by the aggrieved to be wrong. The purpose of the grounds alleged is to isolate and accentuate for attack the basis of the reasoning of the decision challenged[12]

An appeal over a particular decision of a Court may be an appeal in interlocutory decisions or final decisions.

Also, a proper exercise of a constitutional right of appeal is not intended to harass, irritate, annoy or interfere with the course of justice. But it aims at protecting the rights in the litigation of the party exercising the constitutional right. This cannot in my respectful view be regarded as reckless or frivolous, so as to constitute an abuse of the judicial process.

10. Management Enterprise Ltd v. Otusanya (1987) 2 NWLR (pt 55) 179.
11. Ejowhomu v. Edok-Eter Ltd (1986) 5 NWLR (pt 39) 1; Aqua Ltd v. Ondo State Sport Council (1988) 4 NWLR (pt 91) 622).
12. Sunlife Assurance Co. Canada v. Jakvis (1944) A. C. 111.

Therefore, it is an essential quality of an appeal fit to be disposed of by an appellate Court that there should exist between the parties a matter in actual controversy which the appellate Court undertake to decide as a living issue[13]

Grounds of Appeal

Grounds of appeal could be summarily defined as a reason/or set of reasons for the dissatisfaction of a particular judgement or ruling. It can also be defined as the reasons why the decision is considered by the aggrieved person to be wrong.

So, a ground of appeal and any issue arising for determination therefrom, must be related to the judgement, ruling or order appealed against[14]

The question is what is a decision or judgement? Section 318 of the 1999 Constitution defines a decision to mean, "in relation to a Court, any determination of that Court and includes judgement, decree, order, conviction, sentence or recommendation". It therefore, follows from the provisions of Section 318 of the 1999 Constitution that an appeal can only lie to the appellate Court in respect of any issue decided by the Court below.[15]

On the Necessity of Grounds of Appeal

It must be noted that grounds of appeal are, no doubt, the soul of an appeal. They are the reasons why the decision being appealed against is considered wrong by the aggrieved

13. Sunlife Assurance Co. Canada v. Jakvis (1944) A. C. 111.
14. Management Ent. v. Otusanya (1987) 1 NWLR (pt 162) 265.
15. This could be High Court, Federal High Court etc or Court of Appeal.

party. Where the validity of grounds of appeal is successfully challenged in an appeal, certainly nothing shall remain of that appeal. Thus, a ground of appeal shall contain precise, clear, unequivocal and direct statement of the decision being attacked. It must, in other words, give the exact particulars of the mistake, error or misdirection alleged and a ground of appeal without particulars, save the general or omnibus ground is defective and incompetent. A ground of appeal must not be argumentative or narrative in compliance with the above rules. If it does so, it ceases to be a ground of appeal but an argument or narration whose rightful place in a proceedings of a Court or Tribunal is at the hearing of the appeal. In no way should the particulars be independent complaints from the appeal itself but auxiliary to it. Thus, any grounds of appeal which are argumentative, unnecessarily lengthy, elaborate, vague and which contains detailed reasons, may be struck out[16]

Basis of Appeal

When there is an appeal, in all cases the subject matter for the determination must be in controversy between the parties. The decision appealed against must have the issue(s). In every appeal, the issue or issues in controversy are fixed and circumscribed by a statement of the part of the decision

16. Engineer Khalil v. Alhaji Yar' Adua & ors (2004) 1 EPR p. 746, @ 770; Oge v. Ede (1995) 3 NWLR (pt 385) 564 @ 584 - 585; Agbaje v. Younan & ors (1974) 3 WSCA 66; CBN v. Okojie (2002) 8 NWLR (pt 768) 48; Azaatee v. Zegor (1994) 5 NWLR (pt 342) 76; Ajewole v. Adetimo (1994) 3 NWLR (pt 335) 737 @ 751 - 751; Bereyin v. Gbado (1989x) 1 NWLR (pt 97) 327.z.

appealed against. Hence, the grounds of appeal must of necessity be based on such issues in controversy[17]

Where a ground of appeal cannot be fixed and circumscribed within a particular issue in controversy in the judgement challenged, such ground of appeal cannot justifiably be regarded as related to the decision. *A fortiori,* no issue for determination can be formulated therefrom.

Brief Writing, Purpose & Form

It is now settled that brief writing has become part of the procedural law of the appellate courts in Nigeria. The form and other modalities that a good brief should take have been laid down in numerous judicial decisions. To that end, it has been clearly stated that the sole purpose of a brief is to present a summary of a party's case on appeal in an accurate and lucid form. It is expected to be in a form that will present the party's case in a succinct and clear form and contain a condensed statement of the propositions of law or fact or both, which a party or his counsel wishes to establish at the hearing of the appeal together with the reasons for making the propositions and the authorities relied on to sustain them.

A good brief should not allow unnecessary repetition and verbosity. It is meant to be succinct, brief and straight to the point in order to be of assistance to the court in its adjudication.

Moreover, the purpose and essence of formulating issue for determination is to narrow down the points or issues in

17. Niger Construction Co. Ltd. V. Okugbemi (1987) 4 NWLR (pt 67) 787.

controversy between the parties in the interest to assist the court in arriving at a more judicious and proper determination of the appeal[18]

The art and skills of brief writing are a gift which the counsel acquires with time and through regular practice and experience. Although the practice of brief writing in our appellate courts was introduced over two decades ago and there are a plethora of decided cases on how to write a good brief, some of our legal practitioners have still not acquired the required skills and art of writing a good brief. A good brief of argument is, under the rules, required to be a succinct, precise and lucid presentation of the party's case on appeal in order to give the court and the opposing party or parties a good view in doing justice to the case. In this way, the learned counsel on both sides of this case understand and identify through their respective brief the issues to be settled in the resolution of the appeal and they (i.e. the Counsel) are thereby assisting in the administration of justice and facilitating the work of both the counsel and the court. Counsel should always remember that there are essentially three qualities a brief should possess: They are clarity, precision and accuracy. Any brief that fails to possess these distinctive characteristics leads to forage into foliage of unnecessary verbiage in attempting to discern what a party is asking the court to resolve[19]

18. Hawad. School v. Mina Ltd & anor (2003) 10FR p.219 @ 226 - 227, 229.
19. Ntoe Ansa v. Arch. Ishie (2005) 22NSCQR (pt 11) p. 790 @799.

Writing of Briefs

The Supreme Court over time has advised that the format for the briefs of argument which the appellant and respondent are enjoined to file should follow the guidelines laid down in the rules e.g. Supreme Court Rules 1999 (as amended)[20] because parties are bound by their briefs under the law.[21]

Writing and filing of briefs only apply in our appellate Courts e.g. Supreme Court, Court of Appeal etc. Briefs therefore include Appellant's brief of argument, Respondent's Brief of Argument and Reply Brief by the Appellant. Though the Court has warned that the Reply Brief, should not be called "Appellant's Reply Brief but simply called "Reply Brief" simply because it is settled that a respondent cannot under our rules file a reply brief.[22]

It is also now settled that a party cannot maintain on appeal a case diametrically different from one maintained at the trial. An appeal is normally a continuation of the trial[23]

It is pertinent to mention that a brief of argument is meant to assist the court in appreciating the issues in controversy between the parties and thus enhance and facilitate the easy resolution of those issues. It is not meant to befog and becloud those issues or put unnecessary strain on the court in the determination of the issues in controversy. It is advisable that the appellant endeavors as far as possible, to tailor and present the argument

20. N.A.F v. Uyo (1986)3NWLR (pt26) 63.
21. Okpala & ors v. Okpu & ors (2003) 13NSQR p.453 @ 475.
22. S.A Adebiyi v. Rev. E.S Sorinmade & ors (2003) 9FR p. 234 @ 242-243.
23. Fatunbi v. Olanoye (2004) 18NSCQR (pt 11) p.810 @ 832.

in his brief in a manner consistent with sequence of the topics canvassed in the Appellant's Brief. This will obviate the necessity of the court having to see often through the Respondent's Brief in search for the corresponding topics being treated in the Appellant's brief with the attendant risk of inadvertently glossing over relevant arguments.

The traditional role of a respondent in an appeal is to defend the judgment or ruling appealed against. If, however, a respondent wishes to depart from his role, by attacking or challenging the judgment or ruling in any way, he or she is enjoined to file a cross-appeal since the main purpose of a cross-appeal is to correct an error which is standing in the way[24]

It is now settled that whether on the Appellant's Brief, Respondent's Brief or Reply Brief, that repetition of an argument does not improve its efficacy. Mere repetition of an argument does not improve it especially where the earlier argument is arid, weak or completely unacceptable argument[25]

It must also be noted that a point not raised in the brief of argument cannot be raised in oral argument. Nor can an appellant who has filed his grounds of appeal and framed issues thereon properly argue his appeal in the brief on other grounds of appeal not filed[26]

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24. Eliochim (Nig) Ltd v. Mbadiwe (1989) INWLR (pt 14) 46; Lagos City Council v. Ajayi (1970) 1 all NLR 290; Africa Continental Seaways Ltd v. Nigeria Dredging Roads and General Liboks Ltd (1977) 5 S.C 235 @ 247; Buhari & ors v. Chief Obasanjo & ors (2003) 16NSCQR p.1 @ 11-12.
25. Calabar East Co-operative Thrift & Credit Society Ltd & 3 or v. Etim E. Ikot (1999) 12SCNJ 321 @ 339; F.S.B. International Bank Ltd v. Imano Nig. Ltd & anor (2000) 7SCNJ 65 @ 74; Ogbu v. State (2007) 29 NSCQR p. 221 @ 250.
26. Ogundiyan v. State (1991) 3NWLR (pt 181) p.522 @533.

A respondent's brief is filed by the respondent to react to the specific issues for determination raised and argued in the appellant's brief and to advance arguments in defence of the judgment appealed against[27]. The issues argued in the appellant's brief must be based on the grounds of appeal filed. Therefore, the respondent is at liberty to formulate different or alternative issue for determination but such issues must be consistent with the grounds of appeal filed by the appellant[28]

Where the respondent desires the judgement appealed against to be affirmed on ground other than those relied upon in the judgement he must file a respondent's notice or cross-appeal. This procedure is provided for in order 3 rule 15 of the Court of Appeal Rules, 2007[29]

In the absence of a respondent's notice or a cross - appeal, any arguments in the respondent's brief in support of issues not based on any grounds of appeal are irrelevant and will be discountenanced by the court[30]

A reply brief, as the name implies, is a reply to the respondent's brief. A reply brief is filed when an issue of law or arguments raised in the respondent's brief call for a reply. A reply brief should deal with only new points arising from the respondent's brief. In the absence of a new point, a reply brief is otiose and the court is entitled to discountenance it. A reply

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27. Ajomale v. Yaduat (No.2) (1991) 5 NWLR (pt 191) 266 @ 285.
28. Onifade v. Olayiwola (1990) 7NWLR (pt 161) 130 @ 157.
29. Zimit v. Mahmoud (1993), NWLR (pt 267) 71 @ 87; F.G. America Cyanamid Co. v. Vitality Pharmaceuticals Ltd (1999) 2SCNJ 42 @ 52 -54.
30. Okeke v. Oruh (1999) 6NWLR (pt 606) 175 @ 192.

brief is not a repair kit to put right any lacuna or error in the appellant's brief. It is not law of brief writing that a reply brief seeks a different relief outside the main brief[31]

A reply brief should be limited or restricted to answering any new points arising from the respondent's brief and not to repeat points already made or dealt with in the appellant's brief. It is not the function or role of a reply brief to improve on the appellant's brief by repeating the arguments contained therein but rather to reply to new points which are substantial in the respondent's brief[32].

How to Formulate Grounds of Appeal

It is a well settled proposition of law in respect of which there can hardly be a departure, that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the ratio of the decision[33]

The grounds of appeal are not formulated in *nubibus*. They must be in *firma terra*, namely arise from the judgement. However meritorious the grounds of appeal, based either on points of critical constitutional importance or general public interest, it must be connected with a controversy between parties. This is the precondition for the vesting of the judicial powers of the Constitution in the Courts[34] A ground is not a ground of law

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31. Mozie v. Mba Malu (2006) 27NSCQR p. 425 @ 444.
32. Okpala v Ibeme (1989) 2NWLR (pt 102) 208; H.H Uneji v. A.G. of Imo State (1995) 4NWLR (pt 391) 552; Ijade v. Ogunyemi (1966) 9 NWLR (pt 470) 17; Ajileye v. Fakayode (1998) 4NWLR (pt 545) 184.
33. Egbe v. Alhaji (1990) 1 NWLR (pt 128) 546 @ 590.
34. Senator Adesanya v. President of Nigeria (1981) 1 NCLR 359.

simply because the appellant calls it so, it is the content of the ground that will indicate what it really is.[35] It is not how a Ground of Appeal is titled that matters but what it complains about.[36]

Bindingness of Grounds of Appeal

Like pleadings, parties are bound by their grounds of appeal and are not at liberty to argue grounds not related to the judgement appealed against.[37]

Meaning of Grounds of Appeal

It should be noted that grievance and dissatisfaction with a judgement is articulated and conveyed to an appellate Court in ground or grounds of appeal. As a matter of law, grounds of appeal are indexes of an appellant's complaints against a judgement of a Court. Accordingly, where there are no grounds of appeal or there are no properly formulated grounds of appeal, an appellate Court will conclude that there is no appeal before it[38]

Distinction Between Non-Filing of Grounds of Appeal and Filing of Incompetent Ground(s)

Where no ground of appeal is filed on a matter, the Court will come to the conclusion that the appellant is satisfied with the particular matter. However, where there is no competent ground of appeal on a matter the Court will come to the conclusion

35 GTB Plc v. Fadco Industries Ltd (2007) 7 NWLR (pt 1033) 322.
36 ACB Plc v. Obmiami Brick & Stone (1993) 5 NWLR (pt 294) 399; Odock v. State (2007) 7 NWLR (pt 1033) 399.
37 Mozie v. Mba Malu (2006) 27 NSCQR p. 425 @ 438.
38 C.C.B v. Ekperi (2007) 29 NSCQR (pt 1) p. 175 @ 194.

that there is no competent ground on the matter. In the second situation, the appellant may have a complaint but the complaint has not been competently articulated in the ground of appeal. In both situations, appellate Court will not go into the hearing of the appeal[39]

Additional Grounds of Appeal

Parties are at liberty to file additional ground of appeal, which are supposed to complement or boost the ego of the only original ground. The additional grounds can only sail through to the hearing of the appeal if the main grounds they are designed to complement are competent. When an original ground is not competent, it cannot receive additional grounds, though competent. There is an aspect of the law of nature and it is that one can put something on something and the something will remain and stand as that something. One can add nothing to something and the nothing will naturally fossilize into thin air in contact with the something and the something will stand as that something. But one cannot add something on nothing and expect the something to stand. Since the something has nothing to wedge it to stand, the something will not stand, as it will find itself in a situation of a mirage. The above law of nature is clearly against the scientific law of Newton's universal gravitation, though. In view of the fact that the original ground is incompetent, the additional grounds have no place for salvation. They crash.

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[39] C.C.B v. Ekperi (2007) 29 NSCQR p. 175; @ 195.

Once the grounds of appeal are defective and thereby incompetent, then one of the vital pre-conditions that must be met before the Court could entertain the appeal, as required by law, is missing[40]

Grounds of Appeal must be Substantial

It is settled law that a ground of appeal is basically an highlight of the error of law or fact or mixture of law and fact made by the Court in the decision sought to be set aside in the appeal. It is the sum total of the reason(s) why the decision on appeal is considered to be wrong and liable to be set aside.

It follows therefore that for a ground of appeal to be capable of achieving the purpose of setting aside the decision appealed against, it has to be very substantial and must relate to the *ratio* of the decision, not directed at the *obiter dictum* of the Court or in the judgement[41]

How to Determine the Nature of a Grounds of Appeal

In determining the nature of a ground of appeal, the ground and its particulars must be read together. For it is only by reading the ground as a whole that it can be determined what the appellant is complaining about in the judgement. The body of the ground is not to be considered in isolation of its particulars [42]

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40 Madukolu v. Nkedilim (1962) 1 ALL NLR 587.

41 Ohwovoriole SAN v. FRN & ors (2003) 13 NSCQR pg 1 @ 15.

42 Nwankwo v. EDCS (2007) 29 NSCQR pg 73 @ 97 – 98.

On when Grounds of Appeal would be Question, Point, Ground, or Error of Law

Though the difficulty involved in distinguishing a ground of law from a ground of fact has always been present and recognized by the Courts, the position of the legal authorities on the issue is for the Court to examine thoroughly the ground of appeal involved to see whether the ground reveals a misunderstanding by the lower Court of the law or a misapplication of the law to the facts already proved, or admitted in which case, it could be a question of law, or one that would require questioning the evaluation of the facts by the lower Courts before the application of the law , in which case, it would amount to a question of mixed law and fact[43]

The law is settled that where the issue(s) raised in the ground(s) are on legal interpretation of deeds, documents, terms of art, words or phrases, and the inference drawn therefrom, the ground(s) are of law[44]

Also, a ground of appeal is a ground of law if the ground deals exclusively with the interpretation or construction of the law without resort to the facts. In this respect, the Court is involved in the interpretation or construction of either the constitution or a statute with no reference of any factual situation. A ground of appeal which alleges a misapplication of law to the facts of the case, is a ground of law.[45]

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43 Ogbechi v. Onochie (1986) 2 NWLR (pt 23) 484: Orakosin v. Mankiti (2001) 9 NWLR (pt 719) 529 @ 538 Iwueke v. I.M.C. (2005) 24 NSCQR p. 219 @ 238 0 239.

44. Ogbimi v. Niger Construction Ltd (2006) 26 NSCQR p. 407 @ 418; Comex Ltd v. N.A.B. Ltd (1997) 49 LRCN 815 @ 832 - 833.

45 Chief of Air Staff v. Iyen (2005) 21 NSCQR p.645, @ 674.

The Supreme Court **per E. O. Ayoola JSC held in the case of Shanu & ors v. Afribank**[46] that "where the ground of appeal complains that the tribunal has failed to fulfill an obligation cast upon it by law in the process of coming to a decision in the case, such a ground would involve a question of law, namely whether or not there is such an obligation or whether what the tribunal did amounted to an infraction in law of such obligation, provided that all the facts needed are there on the record and are beyond controversy. A ground of appeal involves a question of law alone where in answering the question raised by the ground of appeal the appellate tribunal can determine the issue on the admitted or uncontroversial facts without going beyond a direct application of legal principles. Where it is contended by the other party that the principle of law on which the complaint is based is non existent or mis-conceived, that goes to the merit of the complaint and not to the threshold question as to whether or not the question involved is one of law".

No leave is required to appeal on question of law.[47] In fact in a more converse form **Karibi-Whyte,(rtd)** summarized these general principles as follows: "question of law is capable of three different meanings. First it could mean a question the court is bound to answer in accordance with a rule of law....Concisely stated, a question of law in this sense is one predetermined and authoritatively answered by the laws. The second meaning is as to what the law is. In this sense an appeal

46 (2000) 4 NSCQR p.1 @ 8.
47 Kano Textile v. Gloede & Hoff Ltd (2005) 22 NSCQR p. 346 @ 358.

on question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter.

.....A question of the construction of statutory provision falls within this meaning. The third meaning is in respect of those questions which normally answers questions of law only. Thus, any question which is within the province of the Judge instead of the Jury is called a question of law, even though in actual sense it is a question of fact. The cases which readily come to mind are the interpretation of documents. Often, a question of fact, but is within the province of Judge. Also the determination of reasonable and probable cause for a prosecution in the tort of malicious prosecution which is one of fact, but is matter of law to be decided by the Judge - *Ogbechie v. Onochie (1986) 2 NWLR (Pt. 23) 484, Board of Customs and excise v. Barau (1982) 10SC 48*

When Grounds of Appeal would be a Question, Point, Ground of Fact(s)

It is settled that where the particulars expose only fact and fact of the case alone, the Court is entitled to hold that the ground of appeal deals exclusively with facts. It is very easy to decide[48]. Leave of the Court is needed when appealing.

On what a question of fact is, the learned Justice, ***Karibi-Whyte, JSC*** in the case of ***Ogbechie vs. Onochie (1986) 2***

48. Obiosa v. Nig. Air Force (2004) 20 NSCQR p. 50 @ 73; Medical Practitioner Tribunal v. Okonkwo (2001) 5 NSCQR p. 650 @ 692.

NWLR (pt. 23) 484; Board of Customs and Excise v. Barau (1982) 10SC 48 stated this, "Like of law, question of fact has more than one meaning: The first meaning is that a question of fact is any question which is not determined b a rule of law. Secondly, it is a question except a question as to what the law is. Thirdly, any question to what is to be answered by the Jury, instead of by the Judge is a question of fact.

When Grounds of Appeal would be one of Mixed Law and Fact

A ground of appeal is one of mixed law and fact if the ground creates a hybrid situation in terms of law and facts. In other words, where the ground of appeal is a cocktail, (if I may use that expression guardedly) of law and fact to the extent that it provides a mixed grill, it is then regarded as a ground of mixed law and fact. In this regard, the particulars of error will be of much assistance to the Court. Where the particulars expose a factual situation in the midst of the law, then the Court is entitled to hold that it is a ground of mixed law and fact[49] Where a ground of appeal involves both ground of law and facts, it becomes hybrid and therefore branded as one of mixed law and fact. In such a situation that could be likened to a cocktail, it is the requirement of the law that leave must be sought. This is not to enable the Court to apply a machete to remove the chaff from the grain, but to put the adverse party on notice

49. Obiosa v. Nig. Air Force (2004) 20 NSCQR p. 50 @ 73; Med. Pract. Tribunal v. Okonkwo (2001) 5 NSCQR p. 650 @ 692.

that the ground is one of mixed grill, so to say. And it is good that the Court and the adverse party know this early in the appellate litigation[50]

The Supreme Court is the case of ***CCCTCS Ltd v. Bassey Ekpo (2008) 33NSCQR (pt. 11) p. 1146 @ 1200 - 1202*** resolved the difficulties of determination by counsel of which grounds qualify as a ground of law, facts or both. The court held *"I think the criterion of distinguishing whether a ground of appeal is that of law, fact or both mixed law and facts poses some difficulties and alludes the minds of many counsel. But this court has, time without number, in a litany of cases laid down the general principles in making the distinction between different types of grounds of appeal. For the purposes of elucidation however, I think I should restate some of these principles.*

1. *The first and foremost is for one to examine thoroughly the grounds of appeal in the case concerned to see whether they reveal a misunderstanding by the lower court of the law, or a misapplication of the law to the facts already proved or admitted.*
2. *Where a ground complains of a misunderstanding by the lower court of the law of misapplication of the law to the facts already proved or admitted, it is a ground of law.*
3. *Where a ground of appeal questions the evaluation of facts before the application of the law, it is a ground of mixed law and fact.*

[50] CCB v. Akperi (2007) 29 NSCQR p. 175 @ 195.

4. A ground which raises a question of pure facts is certainly a question/ground of fact.
5. Where the lower court finds that particular events occurred although there is no admissible evidence before the court that the event did in fact occur, the ground is that of law.
6. Where admissible evidence has been led, the assessment of that evidence is entirely for that court. If there is a complaint about the assessment of the admissible evidence, the ground is that of fact.
7. Where the lower court approached the construction of a legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning, the ground is that of law.
8. Where the lower court or tribunal applying the law to the facts in a process which requires the skill of a trained lawyers, this is a question of law.
9. Where the lower court reaches a conclusion which cannot reasonably be drawn from the facts as found, the appeal court will assume there has been a misconception of the law. This is a ground of law.
10. Where the conclusion of the lower court is one of possible resolution but one which the appeal court would not have reached if seized of the issue, that conclusion is not an error in law.
11. Where a trial court fails to apply the facts, which it has found correctly to the circumstance of the case before

it and there is an appeal to a Court of Appeal which alleges a misdirection in the exercise of the application by the trial court, the ground of appeal alleging the misdirection is a ground of law not of fact.

12. *When the Court of Appeal finds such application to be wrong and decides to make its own findings, such findings made by the Court of Appeal are issues of fact and not of law.*

13. *Where the appeal court interferes in such a case and there is a further appeal to a higher Court of Appeal on the application of the facts, the grounds of appeal alleging such misdirection by the lower Court of Appeal is a ground of law not of fact.*

14. *A ground of appeal which complains that the decision of the trial court is against evidence or weight of evidence or contains unresolved contradiction in the evidence of witnesses, it is purely a ground of fact (which requires leave for an appeal to a Court of Appeal or further Court of Appeal)"*

The above principles accord with the previous practice of this court in considering the thorny and intricate issues of law and facts. See the case of ***Board of Customs and Excise v. Barau (1982) 10SC 48. Ogbechie v. Onochie (1986) 2 NWLR (pt. 23) 484.***

Misdirection as a Ground of Appeal

Admittedly, a ground of appeal alleging a misdirection is distinct from the one described as error-in-law. According to Black's Law Dictionary[51], "a misdirection is an error made by a judge in instructing the jury or an erroneous jury instruction that may be grounds for reversing a verdict".

In a legal system as ours in which the Judge also performs the function of the Jury, a misdirection occurs when the Judge misconceives the issues, whether of facts or of law, or summarizes the evidence inadequately or incorrectly. The misdirection may take the form of a positive act or mere non-direction[52]

Finally, a misdirection occurs where the trial judge, sitting alone misconceives the issue(s) or summarizes the evidence inadequately or incorrectly or makes a mistake of law, but described as a misdirection[53]

What is Misdirection?

A misdirection is itself an error as it entails following a "wrong direction". It can also be of law or fact. It is also common ground that you almost always apply the law to a certain sets of facts[54]

51. 8th Edition p.1020.
52. Chidiak v. Laguda (1964) NMLR 123 @ 125; Nwadike v. Ibekwe (1987) 4 NWLR (pt 66) 718 @ 744; Okotie-Eboh v. Ebiowo Manager (2004) 20 NSCQR P. 214, @ 230.
53. Med Practitioner Tribunal v. Okonkwo (2001) 5 NSCQR p. 650 @ 692.
54. Major Umoru & anr v. Alhaji Zibiri & ors (2003) 14 NSCQR (pt 11) p. 781 @ 788.

Composite Grounds of Appeal

Order 3 rule 2 (2) of the Court of Appeal Rules, 2007 provides that "if the grounds of appeal alleges misdirection or error in law the particulars and the nature of the misdirection or error shall be stated".

It is thus clear that under the Rules, an appellant who alleges in his ground of appeal misdirection and/or errors in law is obliged to set out the alleged wrongs committed by the Court against whose judgement he is appealing. It is apt by a long line of cases that composite grounds of appeal which included particulars of errors ond/or misdirection may be filed and would not be struck out as incompetent[55]
In all the cases where their particulars of errors were embedded in the ground of appeal, they are usually so couched that there is no difficulty in identifying the allegation which the appellant is making against the judgement of the Court below. It is clear notwithstanding the relaxation of the rules for the appellant in the framing of his grounds of appeal, that the burden lies on the appellant to frame his grounds of appeal with such clarity as would enable the opposite party and the Court to appreciate his complaint.

What Constitute Particulars in a Ground of Appeal

Order 8 rule 2(2) of the Supreme Court Rules, 1999 (as amended provides: that if the ground of appeal alleges

[55] Okeke Nnamdi v. Okeke Okoli (1977) 7 SC 57 @ 63; Mba Nta v. Anigbo (1972) 5 SC 156 @ 164; Osawaru v. Ezeiruka (1978) 6-7 SC 135; Okorie v. Udom (1960) 5 FSC 146 @ 162; Nsirim v. Nsirim (1990) 2 NSCC 302 @ 310.

misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly stated.

The Supreme Court decided as to what constitutes "particulars" in a ground of appeal, in **Globe Fishing Industries Ltd v. Coker**[56] per Akpata JSC as follows: *"The particulars and nature of the error or misdirection alleged in a ground of appeal which are required to be specific by Order 8 rule 2 (2) are the specific reasoning, finding or observations in the judgement or ruling relating to or projecting the error or misdirection in the judgement or ruling.*

Particulars required are not the arguments or narrative that should be proffered at the hearing of the appeal to establish that the Court erred or misdirected itself. They should not be independent complaint from the ground of appeal itself but ancillary to it"[57]

On the Purpose of Filing Particulars of Grounds of Appeal

Particulars of a ground of appeal are meant to elucidate and advance the reason for the complaint in that ground[58]

Purpose or Essence of Grounds of Appeal in an Appeal

The purport of any ground of appeal is to allow the Court and the respondent the opportunity of knowing what the appellant is averse to in the judgement being appealed against.[59]

56 (1990) 7 NWLR (pt 162) 265 @ 300.

57 Okoye v. Chief Lands Officer (2005) 22 NSCQR p.210, @ 238 - 239; Honika Sawmill (Nig.) Ltd v. Hoff (1994) 2 NWLR (pt 326) 252; Amuda v. Adelodun (1994) 8 NWLR (pt 360) 23 @ 31.

58 Shanu & anr v. Afribank Plc (2002) 11 NSCQR p. 51, @ 68.

59 Garuba v. Kwara Inv. Co. (2005) 21 NSCQR p. 412 @ 429.

It needs to be stressed also that the essence of a ground of appeal is to appraise the opposite party of the nature of the complaint being raised therein and the overriding consideration is whether the ground is clearly stated or vague. This appears to be the outcome of the recent judgement of Supreme Court in the case of **Aderounmu v. Olowu**[60] where his Lordship Ayoola JSC delivering the leading judgement to which the rest of the Justices concurred, had this to say:

"The rules of our appellate procedure relating to formulation of ground of appeal are primarily designed to ensure fairness to the other side. The application of such rules should not be reduced to a matter of mere technicality, whereby the Court will look at the form rather than the substance. The prime purpose of the rules of appellate procedure, both in this Court and in the Court of Appeal, that the appellant shall file a notice of appeal which shall set forth concisely the grounds which he intends to rely upon on the appeal, and, that such grounds should not be vague or general in terms must disclose a reasonable ground of appeal, is to give sufficient notice and information, to the complaint of the appellants and, consequently, of the issues that are likely to arise on the appeal. Any ground of appeal that satisfies that purpose should not be struck out, notwithstanding that it did not conform to a particular form. In my opinion, what is important in a ground of appeal, and the test the Court should apply, is whether or not the impugned

[60] (2000) 4 NWLR (pt 652) 253 @ 266.

ground shows clearly what is complained of as error in law and what is complained of as misdirection or as the case may be, error of fact. The view, with which I am inclined to agree, is expressed in the Court of Appeal case of **Nteogwuija & ors v. Ikuru & ors**[61] that the mere fact that a ground of appeal is framed as an error and a misdirection does not make it incompetent. In my view, only general proposition can be made in a matter in which the question is not as to form. It must be realized, and emphasized that, ultimately, an unobjectionable ground of incompetence of a ground of appeal in the contest of the question raised in this appeal, is to be sought in its lack of preciseness or, set by the rules of appellate procedure. Ultimately, it is for the Court before which the question is raised to decide whether, viewed objectively, the ground satisfies the requirements of preciseness and clarity. A proposition widely stated that a ground alleging an error and misdirection is not incompetent. It is as objectionable as proposition that every such ground is incompetent. What makes a ground incompetent is not whether it is framed as an error and misdirection but whether by so stating it the side is left in doubt, and without adequate information as to what the complaint of the appellant actually is... To hold otherwise will be tantamount to insistence on form rather than substance.

61. (1998) 10 NWLR (pt 569) 267 @ 310.

Test of Grounds of Appeal

What is important in a ground of appeal and the test the court should apply is whether or not an impugned ground shows clearly what is complained of as error in law and what is complained of as misdirection or as the case may be error of fact[62]

On When a Ground of Appeal is Incompetent

It is settled law that you cannot put something on nothing and expect it to stand.

It follows that where the notice of appeal is incompetent or void for not containing a ground of appeal known to law, it remains dead and buried and cannot be resuscitated or revalidated by the subsequent filing of additional grounds of appeal which may be regarded in certain respects as being valid[63] It is now firmly settled that any ground of fact or mixed law and fact in an interlocutory appeal from the High Court to the Court of Appeal, will be incompetent except with the prior leave of either the trial court or of the Court of Appeal first sought and obtained. That is the essence or intendment of **Sections 241 (1) (b) and 242 (1) of the 1999 Constitution of the Federal Republic of Nigeria**[64]

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62. Nteoguija v. Ikuru (1998) 10NWLR (pt 569) 267; Aderounmu v. Olowu (2000) 4NWLR (pt 652) 253; Trans Atlantic Shipping Agency Ltd v. I.A.S Cargo Airlines (Nig.) Ltd (1991) 7NWLR (pt 202) 156; Olanrewaju v. Bank of the north Ltd (1990) 8NWLR (pt 364) 622.
63. C.C.B. V. Ekperi (2007) 29NSCQR (pt 1) p.175 @ 175 @ 192-193.
64. Anambra State & anor (1992) 8NWLR (pt 261) 512 @ 552 and 554; Chief Nwosu & anor v. Offor (1997) 2|NWLR (pt 487) 274 @ 282; Akinwale v. Bon (2001) 4NWLR (pt 704) 448 @ 455 - 456.

On When the Leave of Court is required to File a Ground of Appeal

It must be expressed that matters under section 242 (1) of the 1999 Constitution which provides that; subject to the provisions of Section 241 of this constitution, an appeal shall lie from decisions of the Federal High Court or a High Court to the Court of Appeal with the leave of the Federal High Court or that of the High Court to the Court of Appeal.

It also expressed that if the ruling or decision of the trial High Court is not a final decision that is, it did not finally dispose of the rights of the parties in the suit. An appeal in an interlocutory decision which is not on a ground of law alone, is not competent when prior leave is not sought and obtained[65] so, where a court process needs to be filed with leave of court, it must be so filed, where it is not filed with the leave of court, the court process is a nullity ***ab inito***[66]

Issues Formulated must be based on the Grounds of Appeal

It is settled law that issues formulated for determination must be based on the grounds of appeal filed by the parties and that where parties and the issues formulated are not related to the grounds of appeal, they become irrelevant in the determination of the appeal and thereby goes to no issue. It is further settled law that any argument in any brief in support of

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65 Ichie Anoghalu & 3 ors V. Nahan Oraclosi & Sole Administrator Ihiala Local Govt. (1999) 10SCNJ 1 @ 10,12; (1999)13NWLR (pt 634) 297.

66 UBN V. Sogunro (2007) 27NSCQR P.182 @ 197 - 198.

an issue or issues not grounded on any ground of appeal filed will be discountenanced by the Court[67]

Notice of Appeal

The right of appeal conferred by the constitution on a party who desires to appeal, is exercised by the filing of a notice of appeal which gives the real constitutional signal of dissatisfaction against the judgement. The notice of appeal is therefore the foundation of the appeal[68]

A notice of appeal is the foundation and substratum of every appeal. Any defect thereto will render the whole appeal incompetent and the appellate court will lack the jurisdiction to entertain the appeal, including any interlocutory application based on the said appeal[69]

Where a notice of appeal is defective in that there is no competent and valid ground of appeal in it, such defective notice of appeal cannot be cured by the filing of amended ground whether within or out of time[70] and the Court of Appeal can strike out the appeal itself under Order 3 rule 2 (7) of the Court of Appeal Rules, 2007[71]

67 Godwin v. Christ Apostolic Church (1998) 14 NWLR 584; Momodu v. Momodu (1991) 1 NWLR (pt 169) 608 @ 620 – 621; Government of Gongola State v. Tukur (No. 2) (1987) 2 NWLR (pt 56) 308; Osinupebi v. Saibu (1982) 7 S.C. 104 @ 110 – 113; Western Steel Works Ltd v. Iron and Steel Worker Union (No. 2) (1987) 1 NWLR (pt 49) 284; A. G. Anambra State v. Onuselogu Enterprises Ltd (1987) 4 NWLR (pt 66) 547; Oniah v. Oniah (1989) 1 NWLR (pt 99) 514 @ 529.

68 Tukur v. Government of Gongola State (1988) 1 NWLR (pt 68) 39.

69 Aviagents Ltd v. Balstraust Invest. Lt+d (1966) 1 All E.R. 450; Awadi v. Okoli (1977) 7 S.C. 37; Olanrewaju v. B. O. N. Ltd (1994) 8 NWLR (pt 364) 622.

70 Atuyeye v. Ashamu (1987) 1 NWLR (pt 49) 267.

71 Nsirim v. Nsirim (1990) 3 NWLR (pt 138) 285.

It is settled law that a Notice of Appeal filed within the time but without any ground or valid ground of appeal is a worthless piece of paper being grossly incompetent and liable to be struck out. The question that follows here is whether an incompetent notice of appeal can be regularized? It is also a settled law that you cannot put something on nothing and expect it to stand. That being the case, it follows that with the Notice of Appeal being incompetent or void for not containing a ground(s) of appeal known to law, it remains dead and buried and cannot be resuscitated or revalidated by the subsequent filing of additional grounds of appeal which may be regarded in certain respects as being valid[72]

Therefore, it should be noted that there cannot be a cognizable appeal without a proper notice of appeal and it is fundamental that a notice of appeal must state the decision against which the appeal has been brought. Thus, the appeal must be properly initiated against a particular judgement or decision in accordance with the provisions of Order 3 Rule 2 of the Court of Appeal Rules. It follows that any complaint that does not relate to the judgement or decision appealed against cannot be relevant in the appeal and will, therefore, be incompetent[73]

Whether a Defective Notice of Appeal can be Amended

An appeal could not be validated by amendment especially when the time within which to bring the appeal has expired by

C.C.B. v. Ekperi (2007) 29 NSCQR p. 175, @ 192-193.
Adegoroye v. Ajayi (2004) 2 FR p. 83 @ 92.

efflusion of time. In other words life could not be breathed into a liveless notice of appeal by amendment[74]

On Whether Parties are bound by the Issues raised for Determination

Parties are bound by the issues formulated in their briefs. In other words, a party cannot advance an argument outside the issue or issues formulated in their brief without leave of Court. This stems from the large ambit of our adjectival law that parties are bound by their briefs[75]

On Whether Court can Formulate Issues for Parties

It should be noted that though it is very necessary and desirable for the counsel to always relate or tie the issues formulated for determination in the appellant's brief to the grounds of appeal from which the said issues are distilled, failure to do so may not necessarily result in the issues being struck out for being incompetent particularly where in the opinion of the Court, the issues can validly be distilled from the grounds of appeal and in such a situation the Court can on its own take a close look at the ground of appeal and the issues as formulated and in order to do substantial justice between the parties which is the preoccupation of the Court, consider the said issues in its judgement in the discharge of its obligation to the parties under the Constitution of this nation. In certain appropriate cases, the court can and in fact do formulate their own issues from

[74] Global T.O.S.A. v. Free Enterprises Nig. Ltd (2001) 2 SC 154; Adekanye v. FRN (2004) 9 FR p. 98 @ 112.

[75] Mozie v. Mba Malu (2006) 27 NSCQR p. 425 @ 438.

the ground of appeal where the issues formulated by counsel are found to be either inadequate or grossly or fundamentally defective. It must be noted that the above position is very different from one where the issues formulated for determination do not arise or not distillable from the grounds of appeal as filed. In that case the law is long settled that such issues are irrelevant to the appeal and would therefore be discountenanced by the Court[76]

The Purpose of raising Issues for Determination in an Appeal

It must be realized and made clear that the true and ultimate purpose for which an appellant ought to raise issues for determination in an appeal should be for him to assist the Court to decide the appeal in his favour. Such issues ought therefore to be on vital aspects of the judgement where errors perceived to lead to a miscarriage of justice have been carefully identified from complaints made in the relevant ground of appeal and exposed in the argument reflecting those issues. In order to do this effectively it is inadvisable to make the issue prolix nor is it of any help to raise them on irrelevant or all manner of errors which may not necessarily lead to a reversal of the judgement. However, the law is that in absence of any issue(s) being so formulated from a ground of appeal, the said ground of appeal is deemed abandoned and liable to be struck out[77]

[76] Dada v. Dosumu (2006) 27 NSCQR p. 485 @ 504 - 505; Osinupebi v. Saibu (1982) 7 S.C. 104 @ 110 - 113.

[77] Aigbobahi v. Aifuwa (2006) 21 W.R.N p. 1 @ 23.

The issue argued in the appellant's brief must be based on the grounds of appeal filed. The respondent is at liberty to formulate different or alternative issues for determination but such issues must be consistent with the ground of appeal filed by the appellant. In the absence of a respondent's notice or a cross - appeal, any arguments in the respondent's brief in support of issues not based on any ground of appeal are irrelevant and will be discountenanced by the Court.[78]

By virtue of Order 3 Rule 15 of the Court of Appeal Rules 2007, where the respondent desires the judgement appealed against to be affirmed on grounds other than those relied upon in the judgement, he must file a respondent's notice.[79]

Nature of Issue for Determination

An issue in an appeal is a substantial question of law or fact or of both, which is based on the grounds of the appeal. An issue in an appeal has been defined by the Supreme Court in **Shittu v. Fashawe**[80] as "an issue for determination is a point so crucial that when decided one way or the other affects the fate of the appeal. It is a point that when decided in favour of a party he is entitled to win the appeal.[81]

78 Okeke v. Oruh (1999) 6 NWLR (Pt 606) 175; Onifade v. Olayiwola (1990) 7 NWLR (Pt 161) 130; D A (Nig) AIEP Ltd v. Oluwadare (2007) 7 NWLR (Pt 1033) 355.

79 Zimit v. Mahmoud (1993) 1 NWLR (Pt 267) 71; American Cyanamid v. Vitality Pharmaceuticals Ltd (1991) 2 NWLR (Pt 171) 15; D. A. (Nig.) AIEP Ltd v. Oluwadare (2007) 7 NWLR (Pt 1033) 355.

80 (2005) 14 NWLR (pt 946) 671 per Musdapher JSC @ 687.

81 See Onifade v. Olayiwola (1990) 7 NWLR (pt 161) 130; Okoye v. Nigerian Construction and Furniture Co. Ltd (1991) 6 NWLR (Pt 199) 501; Sanusi v. Ayoola (1992) 9 NWLR (Pt 265) 275; Igogo v. The State (1999) 14 NWLR (Pt 637) 1; Chief Imonikhe & ors v. A.G. Bendel State & ors (1992) 6 NWLR (pt 248) 396; Ingiari v. Mothercat Ltd (1993) 8 NWLR (pt 311) 370.

An issue must arise from a ground of appeal before the ground can be relevant, similarly, an issue must be based on a ground of appeal before it can be relevant. Thus, where a ground of appeal is not covered by a formulated issue, the ground is deemed abandoned. Similarly, an issue for determination not covered by any ground of appeal is incompetent and is liable to be struck out. [82]

On the Effect of Failure to Provide Particulars of alleged Error in Law or Misdirection in an Appeal

The appellant has the abiding responsibility to provide the respondent(s) and the appellate Court with the particulars of errors or misdirection alleged of in his Court processes. This is stated in Order 3 rule 2(2) of the Court of Appeal Rules, 2007. And the purpose is to inform the Court and the respondent of the particulars of error in law or misdirection alleged to enable the respondent meet the case of the appellant and the Court to properly consider and determine such error or misdirection complained of[83]. Any ground of appeal which alleges error in law or misdirection but fails to provide the particulars of such error or misdirection, contravenes the provisions of Order 3 Rule 2(2) of the Court of Appeal Rules and is to that extent incompetent and liable to be struck out[84]

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82 A. G. Bendel State v. Aideyan (1989) NWLR (Pt 118) 646; Agu v. Ikewibe (1991) 3 NWLR (pt 180) 385; Oje v. Babalola (1991) 4 NWLR (pt 185) 276; Aniekan v. Aniekan (1999) 12 NWLR (Pt 631) 491; Newswatch Communication v. Atta (2000) 2 NWLR (pt 646) 592; Ebukuyo v. Obolo (2007) 7 NWLR (Pt 1033) 217..

83 Atuyeye v. Ashamu (1987) 1 NWLR (pt 49) 267 @ 282.

84 Anadi v. Okoli (1977) 7 SC 57 @ 63; Nta v. Anigbo (1972) 5 SC 156 @ 164; Osawaru v. Ezeiruka (1978) 6-7 SC 135.

When an Issue for Determination could be Struck out

Since it is a law that for a ground of appeal to be competent, it must relate to and constitute an onslaught on the validity of the ratio decidendi of the lower court or tribunal otherwise it would be ruled incompetent and struck out[85]
Also an issue formulated from incompetent grounds of appeal is itself incompetent and liable to striking out. It is not permissible to canvass or tender argument in support of such issue[86]
When an incompetent ground is related to an issue along with a competent ground of appeal and argued together it will not be possible to properly consider such issue. Indeed it is not the business of the Court to perform an incision on the argument nor to sieve argument relating to the competent ground aligned to the issue from those relating to the two bad grounds. It is not for the Court to undertake the extra burden of shifting the chaff from the grains but foisted on the Court by the appellants[87]

Meaning of "Issue"

In **Ugo v. Obiekwe**[88] **Nnaemeka-Agu v. JSC** borrowed gratefully the words of **Buckley, LJ in Howell v. Dering & ors**[89] for the meaning of issue, which reads thus:- "The word

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85 Egbe v. Alhaji (1990) 1 NWLR (pt 128) 546 @ 590; Saude v. Abdullahi (1989) 4 NWLR (pt 116) 387 @ 408; Atoyebi v. Governor of Oyo State (2000) 15 NWLR (pt 344) 290; Abatoyinbo v. Oshatoba (1996) 5 NWLR (pt 450) 531.

86 Madagwa v. State (1988) 5 NWLR (pt 92) 60; African Petroleum Ltd v. Owodunni (1991) 8 NWLR (pt 210) 391 @ 423; Okoye v. Nig. Construction & Furniture Ltd (1991) 6 NWLR (pt 199) 501 @ 533.

87 I. G. Bereyin & ors v. Chief Brown Gbogbo (1989) 1 NWLR (pt 97) 373 @ 380; Nwadike v. Ibekwe (1987) 4 NWLR (pt 67) 718 @ 747; Korede v. Adedokun (2001) 15 NWLR (pt 736) 483, Gwandu v. Gwandu (2005) 4FR p. 52 @ 66.

88 (1989) 1 NWLR (pt 99) 566.

89 (1915) 1 K.B. 54 @ 62.

can be used in more than one sense. It may be said that every disputed question of fact is in issue. It is in a sense, that is to say, it is in dispute. But every question of fact which is "in issue" and which a jury has to decide is not necessarily "an issue" within the reasoning of the rule". Later in the same judgement Buckley L.J. also said:- "An issue is that which if decided in favour of the plaintiff will in itself give a right to relief, or would, but for some other consideration, in itself give a right to relief; and if decided in favour of the defendant will in itself be a defence". His Lordship, Nnaemeka - Agu, JSC then applied this principle in that case when he said this:- "So it is in an appellate brief, mutatis mutandi. It is not every fact in dispute or indeed every ground of appeal that raises an issue for determination. While sometimes one such fact or ground may raise an issue. The acid test is whether the legal consequences of that ground or fact, or a combination of those grounds or facts as framed by the appellant, will result in a verdict in his favour. **Lord Diplock** put it in **Fidelitas Shipping Co. Ltd v. V/O Export**[90] thus: "But while an issue may thus involve a dispute about facts, a mere dispute about facts divorced from their legal consequences is not an issue".

An issue is the question in dispute between the parties necessary for the determination of the Court[91] An issue which is usually raised by way of a question, is usually a proposition of law or fact in dispute between the parties, necessary for the

90 (1966) 1 Q.B. 630 @ 642.

91 Chief Ejowhomu v. Edok-Eter Mandillas Ltd (1986) 1 NWLR (pt 30) 1

determination by the Court; a determination of which will normally affect the result of the appeal[92]

Issues for the determination of an appeal, are short questions raised against one or more grounds of appeal and are meant to be a guide to the arguments and submission to be advanced in support of the ground of appeal. It is a succinct and precise question either of law or of fact for determination by the Court. An issue is a disputed point or question to which parties in an action have narrowed their several allegations and upon which they are desirous of obtaining either decision of the Court on question of law, or of the Court on question of fact[93]

Form and Meaning of Issues for Determination

As a matter of form, a brief must contain the issue or issues for determination on appeal. However the importance of formulation of issues transcends a mere matter of form. The issues for determination are the questions which the parties submit to the Court for its decision. The final determination of an appeal depends on how the material questions in the appeal are answered. The issues themselves must arise from the grounds of appeal. To decide an appeal on questions that neither arise from the grounds of appeal nor from the issues arising therefrom is contrary to our appellate justice system. It makes nonsense of the brief system for parties to argue an appeal as if they are untrammeled by the grounds of appeal and the issues formulated therefrom[94]

92 Adejumo v. Ayantegbe (1989) 3 NWLR (pt 110) 417.
93 Chief Okoiomaka v. Chief Odiri (1995) 7 NWLR (pt 408) 411.
94 Aseimo & ors v. Abraham & ors (2001) 6 NSCQR (pt 11) p. 778 @ 783.

It needs to be stressed that every point in controversy between the parties in an appeal is, in a loose sense, an issue. But for purposes of a brief, an issue is one, which is so crucial that if it is decided in favour of a party, he is entitled to win the appeal. Any question which does not adequately raise a substantial issue which if resolved one way or the other will affect the result of the appeal is not a proper issue for a brief[95]

Proliferation of Issues for Determination

Framing two issues from a single ground of appeal by the appellant amounts to proliferation of issues, the practice which had been frowned at in several cases by our appellate courts such as in the case of **Anaeze v. Anyaso**[96] Therefore, to prevent proliferation of issues, the appellant must ensure that issues formulated must not be more than the number of grounds contained in the notice of appeal.[97]

Consequences of not Formulating Issues for Determination

It is to be noted that failure to formulate issues in a brief is sufficient by itself to render the brief incompetent, and arguments canvassed therein would therefore be of no consequence. The brief becomes irredeemably bad, If arguments are not based on any issue or semblance of them[98].

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95 Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR (pt 199) 501 @ 542, Ezukwu v. Ukachukwu (2004) 19 NSCQR p. 321 @ 338.

96 (1993) 5 NWLR 9PT 291) 1 @ 30; Buraimoh v. Bamgbose (1989) 3 NWLR (pt 109) 352; Utih v. Onyivwe (1991) 1 NWLR (pt 166) 166 @ 214; Oyekan v. Akinrinwa (1996) 7 NWLR (pt 459) 128 @ 136; Yusuf v. AKindipe (2000) 8 NWLR (pt 669) 376 @ 384; Adele Eke v. Ogbonda (2006) 28 NSCQR p. 631 @ 642; Fed. Rep. of Nig v. Anache (2004) 17 NSCQR p.140 @ 176.

97 Gyang v. C.O.P. (2003) 11 FR p. 190, @ 197.

98 Orji v. Zaria Industries Ltd & Anor (1992) 1 NWLR (PT 216) 124; N.A.F v. Shekete (2002) 12 NSCQR p. 74 @ 92.

Chapter Two

Factors Rendering an Appeal Incompetent

The following are the grounds for rendering an appeal incompetent:

(1) When the grounds of appeal do not attack or not distilled from the judgement (i.e. ratio decidendi) appealed against[99]

(2) Where there are no grounds of appeal or there are no properly formulated grounds of appeal[100]

(3) Where the grounds of appeal are defective[101]

(4) Where the leave of the Court is not sought where necessary[102]

(5) When the issues formulated are not related to the grounds of appeal, they would be discountenanced[103]

(6) When the grounds of appeal are argumentative, vague, elaborately and unnecessarily lengthy.[104]

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99 Adelekan v. Ecu-Line NV (2006) All FWLR (pt 321) p. 1213 @ 1223.

100 C.C.B. v. Ekperi (2007) 29 NSCQR (pt 1) p. 175 @ 194 0 195.

101 Madukolu v. Nkedilim (1962) 1 All NLR 587; C.C.B. v. Ekperi (2007) 29 NSCQR (pt 1) p. 175 @ 195

102 C.C.B. v. Ekperi (2007) 29 NSCQR p. 175 @ 195, Co-operative & Commerce bank of Nigeria Plc v. A. G. of Anambra State & anr (1992) 8 NWLR (pt 261) 512 @ 552 - 552; Chief Nwosu & anr v. Offor (1997) 2 NWLR (pt 487) 274 @ 282; Akinwale v. Bon (2001) 4 NWLR (pt 704) 448 @ 455 - 456; Ichie Anoghalu & ors v. Nahan Oraelosi & Sole Admin. Ihiala Local Govt (199) 10 SCNJ 1 @ 10; UBN v. Sogunro (2007) 27 NSCQR p. 182 @ 197 - 198.

103 Godwin v. Christ Apostolic Church (1998) 14 NWLR 584; Oniah v. Oniah (1989) 1 NWLR (pt 99) 514 @ 529; Dada v. Dosumu (2006) 27 NSCQR p. 485 @ 504 - 505; Osinupebi v. Saibu (1982) 7 S.C. 104 @ 110 - 113.

104 Engineer Khalil v. Alhaji Yar' Adua & ors (2004) 1 EPR p. 746 @ 770; CCB v. Okojie (2002) 8 NWLR (pt 768) 48; Bereyin v. Gbado (1989) 1 NWLR (pt 97) 327.

(7) When the notice of appeal is defective[105]

(8) Where the particulars of error or misdirection alleged of are not provided for in the Court processes[106]

(9) Failure to formulate issue for determination in a brief[107]

(10) When the issue in the respondent's brief is not based/ related to the appellant's grounds of appeal in the absence of a respondent's notice or a cross-appeal[108]

(11) Failure to provide record of appeal[109]

(12) Failure to perfect conditions of appeal[110]

(13) Failure of the appellant to file his brief[111]

105 Avi-agents Ltd v. Balstraust Ivest. Ltd (1966) 1 All E.R. 450; Awadi v. Okoli (1977) 7 S.C. 37; Olanrewaju v. B.O.N. Ltd (1994) 8 NWLR (pt 364) 622; Atuyeye v. Ashamu (1987) 1 NWLR (pt 49) 267.

106 Atuyeye v. Ashamu (1987) 1 NWLR (pt 49) 267 @ 282; Anadi v. Okoli (1977) 7 S.C. 57 @ 63; Nta v. Anigbo (1972) 5 S.C. 156 @ 164; Osawaru v. Ezeiruka (1978) 6 - 7 S.C. 135.

107 Orji v. Zaria Industries Ltd & anr (1992) 1 NWLR (pt 216) 124; N.A.F. v. Shekete (2002) 12 NSCQR p. 74 @ 92.

108 Okeke v. Oruh (1999) 6 NWLR (pt 606) 175 @ 192; Osumah & ors v. Zenebu (1988) 4 NWLR 474 CA.

109 Lawrence Uwechia v. Augustine Obi & ors (1973) NMLR 308; Ebenezer Ezewusim v. James Okoro & ors (1993) 5 NWLR 478 @ 494; Jonathan Omoni & ors v. William Big Tora & ors (1991) 6 NWLR 93 @ 108.

110 Ezeigbo-Kenyi Obiamalu & ors v. Enwelunam Nwosu & ors (1973) NMLR 307; Chief S. B. Bakare v. Ado Ibrahim & ors (1971) 1 NMLR 50.

111 Akanle Olowu & ors v. Amudatu Abolore & anor (1993) 5 NWLR 252 S.C.

Chapter Three

Omnibus Ground of Appeal

An omnibus ground of appeal is a general ground of fact complaining against the totality of the evidence adduced at the trial. It is not against a specific finding of fact or any document. It cannot be used to raise any issue of law or error in law.[112] The models of drafting grounds of appeal on general and omnibus ground in civil and criminal appeals are distinct. The general law is that in a civil appeal the omnibus ground is that the judgement is against the weight of evidence, and in a criminal appeal the general ground is that the verdict is unreasonable or cannot be supported having regard to the evidence is required in a criminal case to sustain a verdict and, in a civil case, after all the evidence has been taken, it is the duty of the trial court to consider the evidence of both the plaintiff and defendant and ascribe relative weight to each of them. Thus, an omnibus ground of appeal in civil appeal even though has the characteristics of a ground of appeal in criminal appeal is a proper ground of appeal in civil appeals.[113]

It therefore follows that for a complaint on a finding of fact on a specific issue, substantive ground of appeal must be raised challenging that finding. It cannot be covered by an

[112] Ajibana v. Kolawole (1996) 10 NWLR (Pt 476) 22)

[113] Gidado v. Lowgan (2004) 10 NWLR (Pt 881) p. 385 - 387; Atuyeye v. Ashanu (1987) 1NWLR (Pt 49) 267; Adeyeri v. Akobi (1997) 6 NWLR (Pt 510) 534; Okezie v. Queen (1963) All NLR 1; Akibu v. Opaleye (1974) 11SC 189; Aladesuru v. Queen (1956) SC NLR 49.

omnibus ground. Where however, no issue is raised in respect of a ground of appeal, the ground of appeal is deemed abandoned and it should be struck out[114]

When an appellant complains that a judgement is against the weight of evidence all he means is that when the evidence adduced by him is balanced against that adduced by the respondent the judgement given in favour of the respondent is against the weight which should have been given to the totality of the evidence before the Court. And the implication or effect of an omnibus ground of appeal has been laid to rest by the Supreme Court in the case of **Anyaoke v. Adi**[115] where the Court held that: "...in an omnibus ground of appeal implies that the judgement of the trial Court cannot be supported by the successful party which the trial court either wrongly accepted or that the inference drawn or conclusion reached by the trial judge based on the accepted evidence cannot be justified".

The question is: "what determines the weight of evidence by the trial court?" The fact that the relative weight put on the evidence of each side was not expressly categorised or otherwise expressed does not imply that the evidence of the parties not weighed as what determines the weight of evidence is the value, credibility, quality as well as the probative value of the evidence as expounded in **Onwuka v. Edika**[116] within the range of the

114 Ndiwe v. Okocha (1992) 7 NWLR (Pt 252) 129; Iyayi v. Eyigebe (1987) 3 NWLR (Pt 61) 523; Ajibade v. Pedro (1992) 5 NWLR 257; Are v. Ipaye (1986) 3 NWLR (Pt 29) 416.

115 (1986) 3 NWLR (Pt 31) 731

116 (1989) INWLR (Pt 96) 182, 208 - 209

five factors posited in **Mogaji v. Odofin**[117] namely, admissibility, relevancy, credibility, conclusiveness and probability of the evidence by which the weight of evidence of both parties is determined.

I agree with this statement of law that where there was no evidence to support a finding made by the trial court, that finding can be challenged under the omnibus ground of appeal that the decision is against the weight of evidence[118]

It is judicially recognised that an omnibus ground of appeal in a criminal case is differently drafted from such a ground of appeal in a civil case. In a criminal case, the essence of such a ground is that there is no evidence to support the verdict and therefore the omnibus ground in a criminal case is framed thus - "The verdict or judgement is unreasonable and cannot be supported having regard to the evidence" [119]

In civil cases which are decided on the basis of preponderance or balance of evidence, the omnibus ground of appeal is simply that - "the judgement is against the weight of evidence" [120]. However, it has been held that it is objectionable if such a complaint is couched in civil cases as - "the judgement is unreasonable, unwarranted and cannot be supported having regard to the weight of evidence" [121] But this is appropriately

117 (1978) 4 S.C. 91, 94 - 95
118 Sparkling Breweries v. Union Bank (2001) 7 NSCQR pg 209, at 228.
119 Aladesuru v. The Queen (1956) AC 49; B.O. (West Africa) Ltd v. Akinola Allen (1962) 2 SCNLR 388.
120 Akibu v. Opaleye & anr (1974) 11 S.C. 189.
121 Atuyeye v. Ashamu (1987) 1 NWLR (Pt 49) 267; Adeyeri v. Okobi (1997) 6 NWLR (Pt 519) 534: Stephen Oteki v. Attorney General, Bendel State (1986) 2 NWLR (Pt 24) 648 @ 659

couched in a criminal than in a civil case, therefore it is incompetent as it contravenes Order 8 Rule 2(4) of the Supreme Court Rules. The appropriate order the Court should make is to strike out such ground of appeal/issue for determination.

In the case of **Lasisi Idowu v. A. A. Ajiboye**,[122] both counsel agreed (on appeal) that the Magistrate Court's record of proceedings did not reflect accurately the purport of evidence and the legal submissions made in Court. The Court held that failure of the Magistrate to make an accurate note of the oral evidence and legal submissions of the counsel would result in coming to an unjust decision. The judgement of the trial Court was set aside and the Court ordered that the suit was to be heard de novo before a different Magistrate.

There are several decisions of the Supreme Court warning parties particularly those who desire to exercise their right of appeal that such parties cannot hide behind an omnibus ground of appeal to raise specific questions on issues including damages, in the absence of specific ground of appeal raising the questions[123]

Also, the Court has no power to allow an appeal on the ground that the decision is "against the weight of the evidence" except that the appellant can show that the decision was "unreasonable" in the sense that no reasonable tribunal would have come to the same decision or that there was no evidence to support the judgment of such Court[124].

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122 (1975) 5 U.I.L.R. (Pt 111) p. 314

123 Ndiwe v. Okocha (1992) 7 NWLR (Pt 252) 129 at 139 - 140; Bhojson v. Kalio (2006) 25 NSCQR p.483, at 498.

124 Garba v. Inspector General of Police (1956) N.R.N.L.R. 32

The *locus classicus* on the concept of omnibus ground of appeal is the case of **Madam Rabiatu Odofin v. A. R. Mogaji & ors.**[125] The action originated from the Ikeja High Court where the plaintiffs' claims against the defendants were for a declaration of title to land, injunction and possession of holdings on the said land. After pleadings had been ordered and duly delivered, the learned trial judge took evidence from both sides. However, before the defendants' title was examined, the learned trial judge considered, accepted and found for the plaintiffs. The defendants appealed on the ground that the judgment was against the weight of evidence. The Appellate Court held that "in deciding whether a certain set of facts given in evidence by one party in a civil case before a Court in which both parties appear is preferable to another set of facts given by the other party, the trial judge, after a summary of all the facts must put the two sets of facts on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it in preference to the other and then apply the appropriate law to it; if that law supports it bearing in mind the cause of action, he (the trial judge) will then find for that party. That in deciding which evidence has more weight than the other, a trial judge sometimes seeks the aid of admissions made by one party to add more to the weight of the evidence adduced by the other party. That a judge decides for a party on balance of probabilities, not by the number of witnesses called but by the quality or the probative value of the testimony of the witnesses."

[125] (1978) 7 U.I.L.R p. 384

So, if the trial Court failed to be guided by the principle stated in the case of **Mogagi v. Odofin**[126] above, the appellate Court would be absolutely right in setting aside the judgement and making an order of a retrial before another judge of the same jurisdiction[127].

When Evidence lacks Probative Value

The duty of appraising evidence given at a trial is pre-eminently, that of the trial Court who saw and heard witnesses. It is the right of that Court to ascribe value[128]. Evidence is said to be probative when it is tending to prove or disprove a fact in issue.

In short, before a Judge whom evidence is adduced by the parties in a civil case comes to a decision as to which evidence he accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale: he will put the evidence adduced by the plaintiff on one side of the scale and that by the defendant on the other side of the scale and weigh them together. He will then see which is heavier, not by the numbers of witnesses called by each party, but the quality or probative value of the testimony of those witnesses. This is what is meant when it is said that a civil case is decided on the balance of probabilities[129].

(supra)

Solomon v. Mogaji (1982) 11 S.C. 1 @ 24

Ogundulu & ors v. Chief Phillips & ors (1973) 2 S.C. 71; @ 80; Fashanu v. Adekoya (1974) 1 ANLR (Pt 1) 35 @ 41.

Bodi v. Agyo (2003) 4FR p. 44 @ 58; Arowolo v. Akapo (2003) 4 FR; Mogaji v. Odofin (1978) 4 S.C. 91.

The law does not permit evidence which has no probative value to be relied upon by a party, nor to be acted upon by the Court; to support a claim. It is an important aspect of civil procedure that for evidence to be considered useful and which a Court can act upon, there are certain basic qualities it must possess. The first consideration is usually the double requirement of relevancy and admissibility. But in essence, they can be separated. The evidence must be relevant to a fact in issue, or to any fact which, though not in issue, is so connected with the fact in issue; or relevant to a fact which is inconsistent to any fact in issue; or to a fact which by itself or in connection with any other fact makes the existence or non-existence of any fact in issue probable or improbable[130]. It must be admissible having regard to the facts pleaded and if no law or rule precludes its admission[131]. It must have credibility or cogency thereby enabling the judge to ascribe some probative value to it having regard to its nature and what it is intended to establish[132].

Where a Court of trial, unquestionably evaluates the evidence and makes definite findings of fact, which are fully supported by such evidence and are not perverse, it is not the

130 Section 7 & 12 Evidence Act.

131 MISR (Nig.) Ltd v. Ibrahim (1975) 5 S.C. 55 at 62; Akhionbare v. Omoregie (1976) 12 S.C. 11 at 27; Awara & ors v. Alalibo & ors (2002) 12 NSCQR pg 413; at 476 - 477; Abisi v. Ekwealor (1993) 6 NWLR (Pt 302) 643; Obodo v. Ogba (1987) 2 NWLR (Pt 54) 1; Woluchem v. Gudi (1985) 5 S.C. 291; Atolagbe v. Shorun (1985) 1NWLR (Pt 2) p. 77 - 78.

132 Misr (Nig.) Ltd v. Ibrahim (1975) 5 S.C. 55 at 62; Akhionbare v. Omoregie (1976) 12 S.C. 11 at 27; Awara & ors v. Alalibo & ors (2002) 12 NSCQR pg 413; at 476 - 477; Abisi v. Ekwealor (1993) 6 NWLR (pt 302) 643; Obodo v. Ogba (1987) 2 NWLR (pt 54) 1; Woluchem v. Gudi (1985) 5 S.C. 291; Atolagbe v. Shorun (1985) 1NWLR (pt 2) p. 77 - 78.

business of the court of appeal to substitute its own views for those of the trial Court. What the court of appeal ought to do is to find out whether there is evidence on which the trial Court arrived at its findings: once there is such evidence on record, the appellate court cannot interfere.[133]

Since it is the testimon(ies) of the witness(es) that the Court would ascribe probative value to, it is worth remarking that belief or disbelief is a mental reaction to facts proved in evidence, their probability or, improbability within the context of the surrounding circumstances of the case. In our system, issues of fact, evaluation of evidence, credibility of witnesses and ascription of probative value to such evidence by no means dependent on the number of witnesses - are matters within the exclusive competence of the trial Court, the Court that sees, hears, watches and believes. In any given case therefore, much will depend on which side the learned trial Judge believed[134].

The law is settled that in ascribing probative value to the testimony of a witness, the Court takes into consideration whether the testimony is cogent, consistent and in accord with reason and in relation to other evidence before it. In the determination of the credibility of witnesses, the demeanour, personality and reaction to question under examination are all factors to be taken into consideration. The determination of the credibility of a witness is within the province of the trial

133 Sanusi v. Adebiyi (1997) 11 NWLR (Pt 530) 565 at 583; Okino v. Obanebira (1999) 13 NWLR (Pt 36) 535 at 558; Samuel Agbonifo v. Madam Irobere A. & anor (1988) 2 S.C. 64 at 80

134 A. O. Mbubu v. Obori & anr (2004) 5 FR p.66, @ 79.

Judge where the veracity of a witness is in doubt, his evidence should carry no weight.

Thus, where the issue turns on the credibility of witnesses, an appellate Court which has not seen the witnesses must refer to the opinion of the trial Court. In such cases, the opinions of the trial Court should be preferred[135].

On the issue of ascribing probative value to the document(s) tendered to prove any issue of fact, it is not the law that every document admitted by a Court of law must be assigned probative value. A document could be admitted on the ground of relevancy but the Court may not attach any weight to it. In other words, admissibility which is based on relevancy is distinct from weight to be attached to the document.

Admissibility which is one of the cornerstones of our Law of Evidence, is based on relevancy. A fact in issue is admissible if it is relevant to the matter before the Court. In that respect, it is correct to say that relevancy is a precursor to admissibility in our law of Evidence. Flowing from the above, the negative statement that what is not relevant is not admissible is correct.

A trial judge has the competence to either completely reject admitted evidence or disregard such evidence admitted at that stage of writing judgment if he comes to the conclusion that the evidence, documentary or oral, was wrongly admitted. This is because at the stage of writing judgment, the trial judge

[135] Fashanu v. Adekoya (1974) 6 SC 83: Sagay v. Sajere (2000) 6 NWLR (pt 661) 360; Gbadamosi v. Governor, Oyo State (2006) 26 NSCQR (pt2) p. 1332, 1441; Ajiboye v. Ishola (2006) 26 NSCQR (pt 2) p. 1399 @ 1427.

is fully exposed to the totality of the evidence before him and therefore he is in the best position to determine the probative strength of the evidence. Accordingly, where a document earlier admitted does not carry any probative value by virtue of the Evidence Act in the light of the live issues before the Court, the Judge can expunge the document or disregard it in the course of evaluating the totality of the evidence before him to enable him arrive at a proper decision.

Therefore, where an appellant heavily and totally relies on a document as basis for faulting the judgment of the lower Court and the appellate Court comes to the conclusion that the document has no probative value and was therefore rightly disregarded by the lower Court, the appeal crumbles and must be dismissed[136].

In law, there is a clear distinction between a piece of evidence which is admissible and the probative value or weight to be attached to the said piece of evidence. The fact that evidence, oral or documentary is admissible does not necessarily mean that it has weight. It may not have any probative value or any weight at all although it is admissible[137].

In the case of **Remm Oil Ltd v. Endwell Co. Ltd.**[138] the Court of Appeal held that the evidence by the P.W.1 lacked any probative value and consequently could not be relied upon as establishing the alleged breach by the appellant.

136 Nwabuoku v. Onwordi (2006) 26 NSCQR (pt 2) p. 1161 @ 1180 - 1181.
137 B.P.E. (Nig.) Ltd v. Roli Hotels Ltd (2006) ALL FWLR (pt 314) p.238 @ 271.
138. (2003) 1 FR p.205, @ 217

Conclusively, the belief or disbelief of evidence of parties does not depend upon the number of witnesses who gave evidence in the Court. Belief or disbelief of evidence depends on the probative value of the evidence as evaluated by the trial Court in terms of veracity or authenticity of witnesses. For example, a village or community of witnesses may give evidence which the trial Court may not believe and the evidence of single witness on acts of ownership or possession may be believed. Belief or disbelief is not a matter of numbers but a probative matter in our Law of Evidence. It is not a matter of population census[139].

Unchallenged/Uncontroverted Evidence

However, it does appear to me that a distinction has not always been drawn in the manner in which evidence is challenged or controverted. "Unchallenged" and "Uncontroverted" have mostly been used as meaning the same thing. In a strict sense, "unchallenged" and incontroverted" may not mean the same thing. To challenge is to object or react to something or put it in dispute or render doubtful. To controvert is to dispute or deny, oppose or contest[140]

Challenging a witness is more appropriate in cross-examination while controverting his evidence is more appropriate in leading contrary evidence. Notwithstanding the distinction in most cases, the consequence would be the same whether evidence is unchallenged or whether it is uncontroverted. Whether

139 Okochi & ors v. Animkwoi & ors (2003) 13 NSCQR p. 517 @ 534

140 Black's Law Dictionary 8th Edition.

evidence is challenged and rendered doubtful or without weight by cross-examination, the fact that it is not controverted by contrary evidence will not render it cogent or weighty. On the other hand, the fact that contrary evidence has not been adduced to controvert the evidence of a witness on a particular matter weakens any suggestion that evidence is not true[141]. It is now settled law that where evidence is given by a party and is not contradicted by the other party who has the opportunity to do so, and such evidence proffered is not inherently incredible and does not offend any rational conclusion or state of physical things the Court would accord credibility to such evidence[142]

Moreover, it is elementary principle of our law which requires no citing of authority that, in civil proceedings, what is admitted requires no further proof[143]. In the case of **Owosho v. Dada**,[144] **Aniagolu JSC** stated that: "but a plaintiff need not proceed to prove an admitted fact. And a fact is deemed to be admitted if it is neither specifically denied nor denied by implication, having regard to the other facts averred in the pleadings".

This rule of evidence under discourse applies to civil and criminal actions. If a piece of evidence of an accused was not challenged or contradicted, the law, is that such evidence will be accepted as proof of a fact it seeks to establish[145] If

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141 Egwunike v. ACB Ltd (1995) 2 NWLR (Pt 375) 34 S.C.

142 Omoregbe v. Daniel Lawani (1980) 3-4SC 108 at 117; Okoebor v. Police Counsel (2003) 12 NWLR (pt 834) p. 444; Asafa Foods Factory v. Alarine (Nig.) Ltd (2002) 12 NWLR (Pt 781) p 253: Adeyemi v. Bamidele (1968) 1 NLR p. 31; Nwabuoku v. Ottih (1961) 2 SC NLR p. 232.

143 Section 75 of the Evidence Act Laws of Federation of Nigeria 2004.

144 (1984) 7S.C. 149, 163 - 164

145 Nwede v. The State (1985) 3 NWLR 444.

therefore, the story of an accused stands uncontradicted then it is to the facts as put forward by him that the trial Judge would relate the applicable law[146]

Also in a trial court in civil proceedings, the Court is obliged to place the evidence of both parties on each side of the imaginary scale so as to determine which side outweighs the other.

For example, if the defendant(s) adduce no evidence whatsoever, their own side of the imaginary scale remains weightless and unable to tilt the proverbial scale which clearly is heavily laden in one direction, to wit, on the side of the plaintiff. The onus of proof in such a case by a plaintiff is discharged quite easily on minimal proof[147]

Essentially, when the defendant rested their defence with the case of the plaintiff and did not call any evidence on their behalf, in such circumstance where evidence given by a party to a proceedings was not challenged by the other side who has the opportunity to do so, it is always open to the Court seized of the matter to act on such unchallenged evidence before it[148]

The position of law does not change in the case of affidavit evidence or any other class of evidence. An

146 The State v. Oka (1975) 9 – 11 SC 17.

147 Broadline Enterprises Ltd v. Monterey Maritime Corporation & anor (1995) NWLR (pt 417) 1 @ 27; Nwabuoku v. Ottih (1961) 2 SCLR 232; Balogun v. U.B.A. Ltd (1992) 6 NWLR (pt 247) 336 @ 354.

148 Omoregbe v. Daniel Lawani (1980) 3 – 4 SC 108 @ 117; Odulaja v. Haddad (1973) 11 S.C. 35; Nigerian Maritime Service Ltd v. Alhaji Bello Afolabi (1978) 2 SC 79 @ 81; Olohunde v. Adeyoju (2000) 2 SCNLR (pt 11) p. 1472 @ 1498; Provost v. Dr. Edun (2004) 17 NSCQR p. 370 @ 388; Cappa v. Akintilo (2003) 14 NSCQR (pt 1) p. 469, @ 487.

uncontradicted and uncontroverted affidavit evidence is deemed admitted. The Court is to act on such unchallenged or uncontroverted averment[149]

But it should be noted that before a Court would act on an unchallenged and uncontradicted evidence in a claim for special damages, such unchallenged and uncontradicted evidence must satisfy the minimum requirements necessary to prove special damages[150]

Since it is now settled law that where evidence given by a party to any proceedings is not challenged and where the defendant offered no evidence, the plaintiff's evidence before the Court under such circumstance goes one way with no other evidence to be placed on the other side of the proverbial imaginary balance against such evidence given by or on behalf of the plaintiff. The onus of proof in such a case is discharged on minimal of proof[151].

In **Artra Industries Nigeria Limited v. NBCI**[152] the Supreme Court held as follows:- *"Although in proper cases, unchallenged oral evidence of a party establishing his claim has been held to be sufficient proof, where however, the evidence is self-defeating and unacceptable, the Court is not obliged to act on it."*

149 A.M.F. Agbaje v. Ibru Sea Food Ltd (1972) 5 SC 50; Globe Fishing Industries Ltd & others v. Chief Folaring Coker (1990) 11 SCNJ 56 @ 78; Amana Comm. Bank and anr v. Olu (2003) 3 FR pg 220, @ 244; Niger Progress Ltd v. North East Line Corporation (1989) 3 NWLR (pt 107) 68 @ 83; Yesufu v. Kupper International N.V. (1996) 5 NWLR (pt 446) 17, @ 24 - 29; Wallarstener v. Moir (1974) 1 WLR 991; Amayo v. Erinmwingbovo (2006) 26 NSCQR (pt 11) p. 1455, @ 1472.

150 B.P.E (Nig.) Ltd v. Roli Hotels Ltd (2006) All FWLR (pt 314) p. 238 @ 270.

151 Broadline Ent. Ltd v. Monterey Maritime Corp. (1995) 9 NWLR (Pt 417) p-1 at 11 - 12.

152 (1998) 4 NWLR (Pt 546) p. 357 at 364

When the facts leading to the evidence is not pleaded

Pleadings are the documents of claims/defence cum reply presented to the Court by the parties in a dispute. And the purpose of pleadings is to bring the parties to issues that arise so that either party may know the real point or points to be discussed and decided when the case comes on for trial i.e. the issues to be resolved are defined before hand[153].

Generally speaking, the main function of pleadings is to ascertain with precision the various matters that are actually in dispute and the points on which they agree and thus to arrive at certain and clear issues on which both parties desire a judicial decision. Each party must give his opponent a sufficient outline of his case.

Also, parties are bound by their pleadings and cannot raise on appeal a fresh issue that was not canvassed in the Court below and upon which the Court or tribunal had not the opportunity to make a pronouncement upon without leave of Court[154].

A Court cannot consider issues not joined by the parties in their pleadings and to do so might result in denial of justice to one or the other of the contesting parties[155].

Pleadings generally, should not contain evidence but facts. Parties must only plead in such a way as to prevent surprise when leading evidence in support of their case[156].

153 Eke v. Okwaranyia (2001) 20 WRN 132; (2001) 12 NWLR (Pt 726) 181; Okagbue v. Romaine (1982) 5 S.C. 133, Katto v. Central Bank of Nigeria (1991) 9 NWLR (Pt 214) 126; African Continental Bank v. Gwagwada (1994) 5 NWLR (Pt 342) 25.

154 Adegoke Motors Ltd v. Adesanya (1989) 3 NWLR (Pt 109) 250

155 Temile v. Awani (2001) 30 WRN 1.

156 Ngige v. Obi (2006) 18 W.R.N. p. 33 @ 205.

Though where the contents of a document are material, it shall be sufficient in any pleadings to aver the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof, are material such as in cases of libel[157].

Documentary evidence needs not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such a document is covered are expressly pleaded. The legal position is that documents in support of facts pleaded need not be pleaded and they can be tendered in support of facts pleaded[158].

When a document is pleaded in order that it may be used to support facts relied upon by the pleader, the existence of such document is thereby pleaded as a fact. The contents thereof are facts and are pleaded as such. The document will then at the appropriate time in the proceedings be tendered as the evidence in proof of those facts. It is not part of our procedure as it is in England to attach documents pleaded to the statement of claim so as to make them possible to be read at once along with the pleading as was certainly the case in **Day v. Williams Hill (Park Lane) Ltd**[159].

On the other side, the basic law is that parties are bound to plead all facts they intend to rely upon at the trial and facts not pleaded will go to no issue. One rationale behind this principle

157 Ipinlaiye II v. Chief Olutokun (1996) 6 NWLR (pt 451) 148:
158 Monier Construction Co. v. Onyuike (1990) 3 NWLR (pt 136) 74; Okonkwo v. Coop. & Commerce Bank (2003) 13 NSCQR p. 688, @ 741.
159 (1949) 1 All ER 219; 1 K.B. 632.

is that litigation must follow some restrictive order and not open ended in order to save the time of both the Courts and the litigants. If the procedure of pleadings was not introduced in litigation, parties' search for evidence could not have ended and that the Court would have protracted litigation beyond expectation[160].

So, it is trite law that parties are bound by their pleadings. The essence of pleading is to compel the parties to define accurately and precisely the issue upon which the case between them is to be fought to avoid element of surprise by either party. It also guides the parties not to give evidence outside the facts pleaded as evidence on a fact not pleaded goes to no issue[161].

Substantial Contradiction or Inconsistencies in the Evidence of the Witness(es)

Literarily, the word "Contradiction" connotes saying the opposite of something, challenge, counter, be at variance with, while the word inconsistency means incompatible; out of place, contrary; at variance; in opposition; in conflict etc.

From the above definitions, we can infer that those words can be used interchangeably. So concentration would be placed on the word contradiction in this discourse.

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160 Okolo v. UBN (2004) 17 NSCQR p. 105 @ 128.

161 Onwuka v. Omogui (1992) 3 NWLR (pt 230) 393; APN v. First (2000) 1 SCNQR p. 65; Inspector Kayode v. Odutola (2001) 6 NSCQR (pt II) pg 723, @ 735; Ogunsina & ors v. Matanmi & ors (2001) 6 NSCQR (pt 1) p.1, @ 9.

The word contradiction comes from two Latin words *contra,* which means opposite and *dicere,* which means to say. Therefore, contradiction means to speak or affirm the contrary. Hence in the law of evidence, a piece of evidence is contradictory to another when it asserts or affirms the opposite of what the other asserts and not necessarily when there are some minor discrepancies. In other words, contradiction between two pieces of evidence goes rather to the essentiality of something being or not being at the same time. Whereas minor discrepancies depend rather on the person's astuteness and capacity for observing meticulous details.

Therefore, it is the law firmly settled in a number of decided authorities[162] that it is the duty of a Court, to deal, consider and pronounce on all material issues properly before it[163] The material issue or evidence in questions could be placed before the Court by the Counsel or witnesses in such case(s). Where there are contradictions in the evidence of a witness or witnesses, the trial judge must make a finding relating to the contradictions. Though, an accused person telling lies is of no effect[164]but where the testimony of the prosecution witnesses are inconsistent, this goes down to the credibility of such witnesses. The character of witness for habitual veracity is an essential ingredient in his credibility. For it is said, that for a

162 See The State v. Ajie (2000) 11NWLR (Pt 679) 434; Bamaiyi v. State (2001) 8NWLR (Pt 715) p.270 at 285

163 Chief Okotie-Eboh v. Chief Manager & 2 ors (2004) 12 SCNJ 139 at 161; (2004) 20 NSCQR 214.

164 See Okeper v. The State (1971) 1 All NLR 105

man who is capable of uttering a deliberate falsehood, is in most cases, capable of doing so under the solemn sanction of an oath. If, therefore, it appears that he has formally said or written the contrary of that which he has now sworn, his evidence should not have much weight in a Court and if he has formerly sworn the contrary, the fact is almost conclusive against his credibility.

So, where there are contradictions in the evidence of a witness(es) and where the trial judge failed to make a finding in relation to the contradictions, it may vitiate a conviction[165] – **per Nasir, JSC (as he then was).** There is no doubt and this is also settled, that where there are material discrepancies in the testimony of the prosecution witnesses, it is not possible to hold that the evidence for the prosecution, is overwhelming[166]

It is now settled, that where such variance, contradiction, or inconsistency appears or exists, the witness shall be treated as unreliable[167]

It must be known, that, for contradictions, to be fatal, the prosecution's case must go to the substance of the case and not to be a minor nature. It is settled, that if every contradiction however trivial to the overwhelming evidence before the Court, will vitiate a trial, nearly all prosecutions will fail and that human faculty, may miss some vital details due to lapse of time and error in narration in order of sequence.

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165 Atiji v. The State (1976) 2 S.C. 79 at 83-94

166 Opayemi v. The State (1985) 2 NWLR (Pt 5) p. 101.

167 Asuguo William v. The State (1975) 9-11 S.C. 139; Adere v. The State (1975) 9-11 S.C. 115; Stephen v. The State (1986) 5 NWLR (Pt -) 975 at 1000 Oladejo v. The State (1987) 3 NWLR (Pt..) 419; at 427-428.

In the case of **Sele v. The State**[168] The Supreme Court **per Belgore JSC (as he then was),** held that if the contradictions do not touch on a material point or substance of the case, it will not vitiate once the evidence is clear and it is believed or preferred by the trial Court. It is also settled that it is not in all cases where there are discrepancies or contradictions in the prosecution's case, that an accused person, will be entitled to an acquittal. That is only when the discrepancies or contradictions are on material point(s) in the prosecution's case, which creates some doubt, that the accused person is entitled to benefit therefrom.[169] Such contradictions also on evidence of witnesses for the prosecution to affect conviction, they must be sufficient to raise doubt as to the guilt of the accused[170]

In a criminal appeal, for the ground of appeal complaining of contradiction in the evidence of witnesses to be successful, the appellant must show not only the existence of those contradictions but must also show further that the trial judge did not advert to and consider the effects of those contradictions. The contradictions must also be shown to amount to substantial disparagement of the witness or witnesses concerned, making it dangerous or likely to result in a miscarriage of justice to rely on the evidence of the witness or witnesses.

168 (1993) 1 SCNJ p.15 at 22-23

169 See Wankey v. The State (1993) 6 SCNJ 152 at 161.

170 Ogoala v. State (1991) 2 NWLR (Pt 175) 509 at 525; Iko v. State (2005) 1 NCC p. 499 at 509; Nwosis v. State (1976) 6 S.C. 109; Ejigbodero v. State (1978) 9 - 10 S.C. 81; Atano v. A.G. Bendel State (1988) 2 NWLR (pt 75) 201; Ayo Gabriel v. State (1989) 5 NWLR (Pt 122) 457 at 468 - 469.

In addition to the above, the appellant must equally assert that the inconsistency is material and that the trial judge failed to advert to the inconsistency in his judgment[171]

Thus, for any conflict or contradiction in the evidence of the prosecution witnesses to be fatal to the case, it must be fundamental to the main issues before the Court[172]

There is no doubt and this is also settled, that where two or more witnesses, testify in a Criminal prosecution, and the testimony of such witnesses, is contradictory and irreconcilable, it would be illogical to accept and believe the evidence of such witnesses[173]

Furthermore, where a witness has made a statement before trial which is inconsistent with the evidence he gives in Court, provided that no cogent reasons are given for such inconsistency, a trial judge should regard such evidence as unreliable[174] Where no explanation has been furnished for any inconsistencies in the evidence of witnesses called by the prosecution, it is not for the Court to pick and choose which witness to believe and which to disbelieve among such witnesses. It cannot accredit one witness and discredit the other in such circumstances[175]

171 Ejoba v. State (1989) 1 CLRN p. 194 at 203; Queen v. Abdullahi Isa (1961) 1 ALL NLR (pt 4) 668; Enahoro v. The Queen (1965) 1 ANLR 121 @ 149 - 150; Akinsule v. The State (1972) 5 S.C. at 72; Eugene Ibe v. The State (1992) 6 SCNJ (pt 11) 172 at 177.

172 Effia v. The State (1999) 6 SCNJ 92 at 98.

173 Onugbogu v. The State (1974) 9. S.C. 1 at 20; (1974) 4 ECSLR 403; Nasumu v. The State (1979) 6 S.C. 153; at 159; Nwosu . The State (1986) 2 NWLR (Pt 35) pg 6 at 8; Orepekan & 7 ors; In Re: Amadi & 2ors v. The State (1993) 11 SCNJ 68 @ 78.

174 Williams v. State (1975) 5 ECSLR 576; Onubogu v. State (1974) 9 S.C. 1 at 18.

175 Muka v. State (1976) 9-10 S.C. 305 at 325.

Even where inconsistencies in the testimony of two prosecution witnesses can be explained it is not the function of a trial Judge to provide the explanation[176]

The Court will in such circumstances hold that the evidence of the prosecution fell short of the required standard of proof for a criminal case and the prosecution has thereby failed to establish his case against the accused person(s) beyond reasonable doubt. Where one witness called by the prosecution in a criminal case contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation, such as showing that the witness is hostile, before it can ask the Court to reject his testimony and accept that of the other witness or witnesses[177]

Admission of an Inadmissible Evidence

An admission is a statement, oral or written (expressed or implied) which is made by a party or his agent to a civil proceedings and which statement is adverse to his case. It is admissible as evidence against the maker as the truth of the fact asserted in the statement[178].

In civil cases, admissions by a party are evidence of the facts asserted against, but not in favour of such party. Unless explanations are given which satisfy the Court that admissions should not be so regarded, due weight should be given to them as such[179].

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176 Onubogu v. State (1974) 9 S.C. 1.
177 Onubogu v. State (1974) 9 S.C.1.
178 Ogunaike v. Ojayemi (1987) 1 NWLR (pt 53) 760; Mohammed v. Local Govt Police (1970) NNLR 98; (1970) 2 All NLR 202; Seismograph Service (Nig.) Ltd v. Eyuafe (1976) 9 - 10 S.C. 135.
179 Tagoe v. Matse of Akumajay (1946) 12 WACA 31; Okai v. Ayikai (1946) 12 WACA 31.

In order to found admissions on oral testimony, the evidence must be clear and unambiguous. The value of an admission depends on the circumstance in which it is made. It is however, for the trial Court to decide the issue and to give due weight to the alleged admission and the explanatory facts or circumstances[180].

While admission is a matter of law, the circumstance that leads to the admission is a matter of fact.

The law is elementary that a party is bound by his admission and to the extent of the admission[181] and a fact admitted needs not be proved[182].

An admission, in order to be useful to the adverse party, must relate or affect the live issues in the matter[183].

Section 19 of the Nigerian Evidence Act defines an admission as *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.*

However, the questions that arise are: can inadmissible evidence be admitted? And where it has been wrongly admitted, what should the Court do? And what effect does it have on the case?

In the first place, it is settled that where inadmissible evidence has been admitted, it is the duty of the Court not to

180 Iga v. Amakiri (1976) 11 S.C. 1.
181 Ogunnaike v. Ojayemi (Supra); Seismograph Services (Nigeria) Ltd v. Eyuafe (Supra).
182 Akpan v. Umoh (1999) 11 NWLR (pt 627) 349; Atanze v. Attah (1999) 3 NWLR (pt 596) 647; UNIC v. UCIC Ltd (1999) 3 NWLR (pt 593) 17.
183 Archibong v. Ita (2004) 17 NSCQR p. 295 @323.

act upon it. It is immaterial that its admission was as a result of the consent of the opposite party or that party's default in failing to make objection at any proper time. The Court of Appeal has the power to reject such evidence and decide the case on legal evidence[184].

Also where inadmissible evidence is tendered, it is the duty of the opposite party or his counsel, to object immediately. If he fails to do so, that the trial Court in civil cases, may and in criminal cases, must reject such evidence *ex proprio motu* i.e. of one's own accord.

Secondly, that where evidence is by law, inadmissible in any event, that it ought never to be acted upon in Court (whether of first instance or of appeal) it is immaterial that its admission in evidence, was as a result of consent of the opposite party or that party's default in failing to make objection at the proper time.

There are different categories of evidence which were dealt with recently in the case of **Alhaji Shittu & 3 ors v. Otunba Fashawe**[185] The Supreme Court – **per Musdapher JSC** for instance identified:

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[184] Owonyin v. Omotosho (1961) 1 ANLR (Pt 11) 304 at 305; (1961) 2 SCNLR 57 at 61; Idowu Alashe & ors v. Olori Ilu & ors (1965) NMLR 60 at 67; Johanini v. Saibu (1977) 2. S.C. 89 at 112 - 113; Olukade v. Alade (1976) 1 All NLR (Pt 1) 67 @ 73 - 74.

[185] (2005) 7 S.C. (Pt 11) 107; (2005) Vol. 12 MJSC 68 & 86 - 90

(a) Category of evidence legally inadmissible which cannot under any circumstance, constitute evidence in the case at the trial or on appeal even where admitted by consent[186].

(b) Category of evidence which is admissible if admitted without objection by the other party and where the admission, did not affect the result of the case[187].

Therefore, neither a trial Court nor the parties have the power to admit without objection, a document that is in no way or circumstance, inadmissible in law[188].

It is firmly established, that if a document is wrongly received in evidence before the trial Court, an appellate Court, has the inherent jurisdiction to exclude it although counsel at the lower Court, did not object to its admission[189].

Indeed, in the case of **Osho & anor v. Michael Akpe**[190] **Onu, JSC**, stated as follows: *"I am not oblivious of the facts that it is not the law that once a document is received in evidence without objection by a party then such a party is forever automatically estopped, even in the appellate Court from raising*

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186 Owonyin v. Omotosho (supra); Alashe v. Ilu, (Supra); Yassin v. Barclays Bank D.C.O. (supra); Ikenye v. Ofunne (1985) 2 NWLR (pt 5) 1; Osho & Anor v. Ape (1998) 6 SCNJ 139 at 15 - 153; Nwanyi v. Coastal Services (Nig.) Ltd (2004) 6 SCNJ 146 at 160 - 161: (2004) 11 NWLR (Pt 885) 552; (2004) 6 - 7 S.C. 38.

187 Ajayi v. Fisher (1956) 1 FSC 90 92; R v. Thomas (1958) 3 FSC 8; Akadile v. The State (1971) 1 ANLR 18; Idundun v. Okumagba (1976) 9 - 10 SC 27 245.

188 Oba Oseni & 14 ors v. Dawodu & ors (1994) 4 NWLR (Pt 339) 390 at 405 - 406; Chief Alao v. Akano & ors (2005) 4 SC 25 at 32; (2005) 4 SCNJ 65 at 74; (2005) Vol. 10 MJSC (Monthly Judgements of the Supreme Court of Nigeria) 137 at 109.

189 Mallam Yaya v. Mogoga 1 WACA 132 at 133; Alashe v. Ilu (Supra) Anyanwale & ors v. Atanda & anor (1988) 1 S.C. 1. at 3; (1988) 1 SCNJ 1 at 20.

190 (1998) 6 SCNJ 139 at 152 - 153.

the issue of its admissibility. Thus, if a document is unlawfully received in evidence, an appellate Court has inherent jurisdiction to exclude and discountenance the document even though counsel at the trial court did not object to its going into evidence".

The learned Jurist, continues thus: "*Accordingly, although a document was unlawfully received in evidence without objection by or on behalf of an appellant, it would still be opened to him in the appellate court, particularly where such an appellant has suffered injustice as a result, or a miscarriage of justice is thereby occasioned, to object to it since it is the duty of the appellate Court to exclude inadmissible evidence which was erroneously received in evidence during the trial*"

His Lordship referred to several decided cases including those already cited in this discourse.

In **Nwangi v. Coastal Services (Nig.) Ltd**[191] the effect of the admission of inadmissible document/evidence by a trial Court was examined, the Court stated that such evidence or document must be discountenanced as it goes to no issue[192].

In other words, the consequence of where inadmissible evidence is admitted, is that it must be expunged, it is immaterial whether such evidence/document was objected to or not[193].

191 (2004) 6 SCNJ 146 at 160-161; (2004) 11 NWLR (Pt 885) 552; (2004) 6 - 7 S.C. 38.

192 Union Bank of (Nig) Ltd v. Prof. Ozigi (1994) 3 NWLR (Pt 33) 385 at 402; Udeze & 2 ors v. Chidebe & 4 ors (1990) 1 NWLR (pt 125) 141; Idundun v. Okumagba (1976) 9 - 10 S.C. 27; Oba Ipinlaiye II v. Chief Olutokun (1996) 6 NWLR (pt 453) 148 @ 167; Okonji & ors v. Njokanma & ors (1991) 7 NWLR (pt 202) 131 @ 46.

193 Saraki (Mrs.) v. Kotoye (1992) 9 NWLR (pt 254) 156 @ 202; (1992) 12 SCNJ 26; Egbaram & ors v. Akpotor & 3 ors (1997) 7 SCNJ 39 402.

It is contended that where admission of inadmissible evidence did not occasion any miscarriage of justice or affect the decision of the Court in any way, the appellate Court will not tamper with the judgement of the trial Court[194].

Unsatisfactory Evidence/Insufficient Evidence

Unsatisfactory Evidence is evidence that is not sufficient to satisfy an unprejudiced mind seeking the truth. Insufficient evidence on the other hand is the evidence that is inadequate to prove or support a finding of something.

There is no doubt, and it is now well settled that where anybody asserts anything in law, he has the onus to prove his assertion by adducing enough and satisfactory evidence[195].

For example, in the claim(s) of a declaration of title to a piece of land, the plaintiff must produce satisfactory evidence in proof of that title. In discharging that burden of proof, the plaintiff can only rely on the strength of his own case and not on the weakness of the defence. But where the evidence of the defence favours the plaintiff, it has also been held that the plaintiff can also rely on it to prove his claim[196].

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194 Section 227 (1) of the Evidence Act LFN 2004; Ezeoke v. Nwagbo (1998) 1 NWLR (pt 72) 616; Nwaeze v. The State (1996) 2 NWLR (pt 428) 1 @ 14 - 15; MCC Ltd v. Azubuike (1990) 3 NWLR (pt 136) 74; Ajayi v. Fisher (1956) SCNLR 279; Orosunlemi v. State (1967) NMLR 278; Ogunsina & ors v. Matanmi & ors (2001) 6 NSCQR (pt 1) p. 1 13. Order 4 Rule 9 (2) Court of Appeal Rules 2007.

195 Sections 135 - 138 of the Evidence Act.

196 Kodinlinye v. Odu 2 WACA 336; Edosomwan v. Ogbeyfun (1996) 4 NWLR 266 @ 280; Seismograph Service (Nig.) Ltd v. Ejuafe (1976) 9-10 SC 135 @ 146; Akinola v. Oluwo (1962) 1 SCNLR 352.

As it relates to the claim of title to land so also it is in respect of any claim in law. Therefore, it seems to me to be pure common sense, if not logic that where evidence on both sides is unsatisfactory to prove a fact, that one of the two sets of unsatisfactory evidence is "slightly better" will not make it satisfactory. The "slightly better" or even for that matter "much better" but unsatisfactory, evidence will still remain unsatisfactory, to prove the fact[197].

The Court in the case of **Kofi v. R**[198] held that where the verdict cannot be supported having regard to the evidence because it was unsafe to convict upon the evidence then it is the duty of the Court of Appeal to quash the conviction.

It is submitted that unsatisfactory/insufficient evidence applies both to civil and criminal cases where it occurs.

Conclusively, where a trial Court, clearly finds that there is no satisfactory evidence supporting a claim before the Court clearly, the Court should dismiss the claim/the order[199].

Failure to discharge the Burden & Standard of Proof

What is burden of proof? Grammatically speaking, burden of proof is a party's duty to prove a disputed assertion or charge[200].

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197 Okhuarobo v. Aigbe (2002) 9 NSCQR pg 623 @ 659; Woluchem v. Gudi (2001) 6 NSCQR (pt 11) p. 1132 @ 1138 - 1139.

198 (1955) 14 WACA 648.

199 Minister of Internal Affairs & ors v. Okoro & ors (2003) 10 FR p. 115, @ 126.

200 Black's Law Dictionary, Deluxe Eight Edition by Bryan A. Garner, Editor in Chief.

In the same vein, standard of proof can be defined as the degree or level of proof demanded in a specific case, such as "proof beyond a reasonable doubt" or "proof by balance of probabilities or preponderance of evidence".

It is the general position of the law that he who asserts must prove the assertion.[201] The mode of such proof can be oral, documentary, written, circumstantial evidence or any other means of proving an assertion known to Nigerian Law of Evidence.

Precisely, the standard of proof required in civil cases and criminal cases differ from each other. The standard of proof in civil matter as it is generally known is the proof on the balance of probability and that of criminal law is that of proof beyond reasonable doubt.

Firstly, we shall discuss the burden and standard of proof in civil matters and then the standard and burden of proof in criminal matters will be discussed.

The standard and burden of proof in civil matters is governed by **Sections 135 - 137 of the Nigerian Law of Evidence**[202] which provide:

> 135(1) Whosoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

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201 Wema Bank v. Alh. Anisere (2003) 8 FR p. 91 @ 99; Pam v. Gadi (2003) 8 FR p. 101 @ 106 - 107.

202 LFN 2004.

(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.

136 The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

137(1) In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgement 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 to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgement 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.

Let us first deal with the burden of proof as stated in **Section 135 of the Evidence Act. Section 135(2)** completes **Section 135(1)** by providing that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person[203].

203 Elias v. Disu (1962) 1 ANLR 214; Abiodun v. Adehin (1962) 1 ANLR 550; University Press Ltd v. I.K. martins (Nig.) Ltd (2000) 4 NWLR (pt 654) 584; Odukwe v. Ogunbiyi (1998) 6 SC 72.

In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgement 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. This is the language of **Section 137(1) of the Evidence Act**[204]

Although, the burden of proof under Section 137(1) generally remains on the plaintiff, it is not invariably so. As provided in the subsection, the burden of proof will be determined by the pleadings. It will therefore not be wrong to say that the burden of proof under the subsection fluctuates with the state of the pleadings and the level of fluctuation may at times go to the defendant, if he has asserted the positive fact therein[205].

In most cases, the burden of proof lies with or rests on the plaintiff because he is the person who is making the claim[206].

As a matter of law, the plaintiff has the onus of proving his case and where he fails to get the appropriate findings relevant to the reliefs he had sought, he must fail[207]. A plaintiff who asserts the truth or existence of a fact must prove it. A

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204 Are v. Adisa (1967) NMLR 304; Elemo v. Omolade (1968) NMLR 359; NMSL v. Afolabi (1978) 2 SC 79; Kate Enterprises Limited v. Daewoo Nigeria Limited (1985) 2 NWLR (pt 5) 116; Duru v. Nwosu (1989) 7 SC (pt 1) 1; Olaiya v. Olaiya (2002) FWLR (pt 109) 1588; Udih v. Idemudia (1998) 3 SC 56.

205 Akinfosile v. Ajose (1960) 6 FSC 192; Noibi v. Fikolati (1987) 1 NWLR (pt 52) 619.

306 Osawani v. Ezeiruka (1978) 6 - 7 SC 135; A-G. Anambra State v. Onuselogu (1987) 4 NWLR (pt 66) 547; Agu v. Nnadi (2002) 12 NSCQR 128; Oredoyin v. Arowolo (1989) 7 SC (pt 11) 1.

207 Fashanu v. Adekoya (1974) 6 SC 83.

mere speculative observation cannot be a substitute to proof of the fact asserted[208].

Therefore, it should be noted that it is the duty of the plaintiff to prove his case and not the duty of the defendant to disprove the plaintiff's case. That is the essence of **Section 137 of the Evidence Act.**[209] Where a plaintiff fails to prove his case, it will be dismissed[210].

Generally on the principles on burden of proof, **Section 137 of the Evidence Act** is not static. It undulates between the parties. Subsection 1 of Section 137 places the first burden on the party against whom the Court will give judgement if no evidence is adduced on either side. In other words, the *onus probandi* (i.e. burden of proof) is on the party who would fail if no evidence is given in the case. Thereafter, the second burden, if it may be so numbered, it goes to the adverse party in line with subsection 2 and so the burden changes places almost like a Chameleon or weather clock in climatology until all the issues in the pleadings have been dealt with.

So, the standard of proof in civil cases is on the preponderance of evidence or balance of probabilities[211].

In determining either preponderance of evidence or balance of probabilities in evidence, the Court is involved in some

208 George v. UBA (1972) 8 - 9 SC 264.
209 LFN 2004.
210 Agbana v. Owa (2004) 18 NSCQR (pt 11) p. 601 @ 615.
211 Amukomowo v. Audu (1985) 1 NWLR (pt 3) 530; Odulaja v. Haddad (1973) 11 SC 357; Okuarume v. Obabokor (1965) All NLR 360; Faluri v. Oderinde (1987) 4 NWLR (pt 64) 155; Onwuka v. Omogui (1992) 3 NWLR (pt 230) 393.

weighing by resorting to the imaginary scale of justice in evaluation exercise. Accordingly, proof by preponderance of evidence simply means that the evidence adduced by the plaintiff should be put on one side of the imaginary scale as in **Mogaji v. Odofin**[212] and the evidence adduced by the defendant put on the other side of that scale and weighed together to see which side preponderates[213].

In **Mogaji v. Odofin**[214] the Supreme Court, per Fatayi - Williams, JSC (as he then was) said at page 93; *"Therefore, in deciding whether a certain set of facts given in evidence by one party in a civil case before a Court in which both parties appear is preferable to another set of facts given in evidence by the other party, the trial judge after a summary of all the facts, must put the two sets on an imaginary scale, weigh one against the other, then decide upon the preponderance of credible evidence which weighs more, accept it, and then apply the appropriate law to it, if that law supports it bearing in mind the cause of action, he will then find for the plaintiff. If not, the plaintiff's claim will be dismissed."*

The balance of probabilities, like the preponderance of evidence, is not based on rhetoric but on credible evidence adduced by the parties in Court. By this principle, the Court weighs the evidence in the usual imaginary scale and sees which evidence sounds more probable than the other. In other words,

212 (1978) 3 SC 91.
213 Nwankpu v. Ewulu (1995) 7 NWLR (pt 407) 269.
214 (Supra).

in order to give judgement to the plaintiff, the Court must be satisfied that the evidence given by and or for the plaintiff is more likely to be true and correct than that of the defendant. By this, the Court comes to the conclusion that the story presented by the plaintiff is more likely to happen than that presented by the defendant.

In arriving at the preponderance of evidence or the balance of probabilities, the judge does not need to search for an exact mathematical figure in the "weighing machine" because there is in fact and in law no such machine and therefore no figures. On the contrary, the Judge relies on his judicial and judicious mind to arrive at when the imaginary scale preponderates, and that is the standard; though oscillatory and at times, nervous.

At this juncture, the distinction between "burden of proof" and "evidential burden" becomes imperative to be drawn.

In law a distinction is drawn between "burden of proof" of a case which as an inflexible rule rests on the plaintiff in civil matters and "evidential burden" which places the onus of proof on one making a specific assertion over a particular point essential to his stand on the matter regardless of whether the person making the assertion is the defendant. As a doctrine of the Law of Evidence, evidential burden imports that where a given allegation, whether affirmative or negative, forms an essential part of a party's case the onus of proof of such allegation rests on him[215]. Evidential burden is complimentary

215 Alade v. Aborishade (1960) 5 FSC 167 @ 171.

to the general principle of burden of proof that has its origin in **Sections 135 – 137**[216] and whenever its application is warranted it is said that the burden of proof to establish a particular assertion has shifted.[217]

The rationale for a combination of the principles has been well summed up by the Supreme Court in **Osawaru v. Ezeiruka**[218] that the general rule which is enshrined in the maxim *ei qui affirmat non ei qui negate incumbit probation*, i.e. the burden of proof lies on one who alleges, and not on him who denies, has been provided for in Sections 135 – 137 of the Evidence Act.[219]

In criminal matters, Sections 138; 141-144 of the Evidence Act apply. Section 138 Evidence Act provides as follows:

> 138 (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 a wrongful act is, subject to the provisions of Section 141 of this Act, on the person who asserts it whether the commission of such act is or is not directly in issue in the action.

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216 Evidence Act
217 Elemo v. Omolade (1968) NMLR 359 @ 361.
218 (1978) 6 – 7 SC 135, @ 145.
219 Umeojiako v. Ezeanumo (1990) 1 SCNJ 181 @ 189; Ugbo v. Aburime (1994) 9 SCNJ 23.

(3) If the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on the accused.

It is a common ground that in all criminal prosecution, it is the duty of the prosecution to prove his case beyond reasonable doubt. It is not essential to prove the case with absolute certainty but the ingredients of the offence charged must be proved as required by law and to the satisfaction of the Court. To prove beyond reasonable doubt is a prescription of the law.[220]

What constitutes "proof beyond reasonable doubt"? Proof beyond reasonable doubt connotes that there is no doubt as to the accused's guilt[221] It also connotes such proof as precludes every reasonable hypothesis except that which it tends to support. Certainly, it is not a proof beyond shadow of doubt[222]

The term or phrase "proof beyond reasonable doubt" stems out of a compelling presumption of innocence inherent in our adversary system of criminal justice.[223] To displace this presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure including the administration of justice[224]

220 Sections 138 - 142 of the Evidence Act.
221 ILGPC Ltd Okunade (2005) 1 WRN p. 131 @ 143.
222 Dimlong v. Dimlong & ors (1998) 2 NWLR (pt 538) 381; Oladele v. The Nigeria Army (2004) 36 WRN p.68 @ 77.
223 Section 36(5) of the 1999 Constitution..
224 Bakare v. The State (1987) 3 S.C. 1 @ 32.

To prove a charge beyond reasonable doubt does not depend on the number of witnesses called by the prosecution at the trial but on the quality of evidence so produced. Consequently if the evidence is strong against an accused person as to leave only a remote possibility in his favour which can be dismissed with the sentence: "of course it is possible but not in the least probable," the case is proved beyond reasonable doubt. Therefore, certainty is an essential element of proof in criminal liability[225]

Proof beyond reasonable doubt is the policy of our law. The policy derives from the fact that human justice has its limitations. It is not given to human justice to see and know, as the great Eternal knows, the thoughts and actions of all men. Human justice has to depend on evidence and inferences.

For example, it is settled law that for the prosecution to discharge the burden of proof placed on it by law in a charge of causing death by dangerous driving under the provisions of Sections 4 and 5 (1) of the Federal Highway Decree No. 4 1971, it must establish by evidence, the following ingredients of the offence:

(a) That the accused person's manner of driving was reckless or dangerous.

(b) That the dangerous driving was the substantial cause of death of the deceased; and

(c) That the accident occurred on a Federal Highway.

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225 Uyo v. A.G. Bendel State (1986) 1 NWLR (pt 17) p. 418.

All these ingredients in the above offence have to be proved beyond reasonable doubt and if this burden/onus is not discharged, it is fatal to the prosecution's case.

What are the methods of proving guilt? Three methods to prove the guilt of an accused person are:-

(a) by confession;

(b) Circumstantial evidence;

(c) The evidence of eye-witnesses[226]

Therefore, suspicion or speculation, however, strong does not constitute proof of a criminal offence[227]

So, since the onus in a criminal offence is always on the prosecution to prove beyond reasonable doubt the guilt of the accused and failure so to do, will automatically lead to the discharge of the accused person[228]

It would also automatically entitle the accused to an acquittal of the charge against him[229]

Also, on whom lies the onus of proof where the accused raises a particular defence? For example, where the accused raises the defence of insanity, and what is the standard of proof required from such accused person?

In respect of the example given above, an accused person who decides to contend that he is insane or that he suffers

226 Emeka v. The State (2001) 7 NSCQR p. 582 @ 592 - 593; Igabele v. State (2006) 25 NSCQR p. 321; R.8.

227 Nsofor v. State (2004) 20 NSCQR p. 74 @ 96-97.

228 Onubogu v. State (1974) 9 S.C. 1; Stephen v. State (1986) 5 NWLR. (pt 46) 978.

229 Kobari v. State (1989) 1 CLRN p.174 @ 179; Giremabe v. Bornu N. A. (1961) 1 All NLR 469; Omonuju v. The State (1976) 5 S.C. 1; Onyenankeya v. The State (1964) NMLR 34; Lori v. The State (1980) 8-11 S.C. 81

from insane delusions has the legal burden to rebut or to dislodge this presumption of law which declares him sane until the contrary is established. In other words, the onus of proof rests on him to establish insanity or insane delusions and not on the prosecution to prove the sanity of the accused person at all times material to the commission of the offence with which such accused person is charged.

However, this burden of proof on the accused person in a criminal trial is merely and simply as in civil cases, that is to say, on the balance of probability or the preponderance of evidence and not on the basis of proof beyond reasonable doubt as normally obtains in a criminal trial[230]

Lack of Corroborative Evidence where Necessary

Corroboration simply means "confirming or giving support to" either a person, statement or faith". The nature of evidence that would constitute corroborative evidence must be independent testimony which affects the accused by connecting or contending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute.

230 R v. William Echem 14 WACA 158; R v. Mathew Onakpoya (1959) 4 FSC 150; Emeryl v. The State (1973) 6 SC 215 @ 226; R v. Philip Dim 14 WACA 154; Nkanu v. The State (1980) NSCC 114; 3 - 4 SC 1.

It therefore follows, to ask: what is the purpose of corroborative evidence? In **D.P.P. v. Hester**[231] Lord Morris said, "the purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible, and corroborative evidence will only fill its role if it itself is completely credible evidence".

The above statements put together would appear to mean that while corroborative evidence must be independent and capable of implicating the accused in relation to the offence charged, it must be credible and must go to confirm and support that evidence which is sufficient, satisfactory and credible whether the case is one in which is required by statute or by rule of practice.

However, let us consider the class of Criminal cases in which corroboration is required to prove the guilt of the accused. It is common ground that in all cases where the law provides that corroboration is necessary, a conviction of an accused can only be valid when there is such corroborative evidence. That is the case where statutory corroboration is required. But there are other cases in which though there is no statutory requirement for corroboration, yet as a matter of practice, corroboration though not essential, is almost always required before conviction. The latter is mostly in cases of complainants in sexual offences, accomplices or where children give evidence on oath.

231 (1972) 57 Cr. A. R. 212 @ 229

Any witness in any of these categories would conveniently be regarded as "suspect" witness and that is why the law requires that if any conviction is to be based on their evidence, the judge must warn himself of the danger of convicting on the uncorroborated evidence of such witness[232].

The danger sought to be obviated by the common law rule in each of these categories of witnesses is that the story told by the witness may be in-accurate for reasons not applicable to other competent witnesses; whether the risk be of deliberate inaccuracy, as in the case of accomplices, or unintentional inaccuracy as in the case of children and some complainants in cases of sexual offences. What is looked for under the common law rule is confirmation from other source that the "suspect witness" is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged.

Corroborative evidence is such evidence that goes to support or strengthen the assertions of the complainant. There is no statutory provision in this country that makes such corroboration mandatory. It has, however been considered expedient that, as a matter of practice, the Courts should be very slow to convict on the uncorroborated evidence of the complainant[233]

232 Lord Diplock in D.P.P v. Hester (supra)
233 Ibeakanma v. Queeen (1963) 2 SCNLR 191 at 194 - 195.

On the issue of the warning, it is settled that no particular form of words need be used by the Court but the judge must use simple and plain language that will, without doubt, convey that there is a danger in convicting on the complainant's evidence alone. The Court, bearing that warning well in mind must look at the particular facts of the case and if, having given full weight to the warning that it is dangerous to convict, should come to the conclusion that in the particular case the complainant is, without any doubt, speaking the truth, then the fact that there is no corroboration is discarded and the Court is entitled to convict the accused accordingly. Even where there is such a warning but matters are suggested by the trial Court as being corroborative of the relevant evidence which are not in fact so, the conviction in a proper case, may be quashed on appeal.[234] It is long settled that a statement of a co-accused cannot be used as evidence against the fellow accused without any corroboration[235]

Want of Evidence

Section 19 of the Criminal Procedure Act provides: "when any person has been taken into custody without a warrant, for an offence other than an offence punishable with death, the officer in charge of the Police Station or other place for the reception of arrested persons to which such person is brought

234 R v. Philips 18 Cr. App. Rep. 115; R v. Whitehead (1927) 1 K.B. 99; 21 Cr. App Rep 23; R v. Henry Ross 18 Cr. App. Rep. 141; R v. Keeling 28 Cr. App. Rep. 121; Iko v. State (2005) 1 NCC p.499 @ 527.

235 State v. Onyeukwu (2004) 19 NSCQR pg 231, @ 268.

shall, if after the inquiry is completed he is satisfied that there is no sufficient reason to believe that the person has committed any offence, forthwith release such person".

It has become the law that once there is no credible evidence linking the accused person with the offence charged against him and no prima facie case has been established justifying the proceedings of the criminal trial against him such accused person should be discharged.[236] In **Ikomi v. State**[237] the Court clearly said that no citizen should be put to the rigours of trial, in a criminal proceedings, unless the available evidence points, *prima facie*, to his complicity in the commission of a crime. This is borne out of the fact that suspicion however well placed does not amount to *prima facie* evidence, Courts of law deal with evidence and not guesses[238] That is, there must be a *prima facie* case established from the proof of evidence warranting the arraignment of the accused person for the offence charged in the first place.

In respect of civil matters, a party is not bound to lead evidence in proof of all averments in its pleadings provided he has led enough evidence to sustain his claim or defence. Civil cases are decided on balance of probabilities and if one party adduces credible evidence which outweighs the evidence of the other party, the former is entitled to judgement.[239]

236 Ohwovoriole SAN v. FRN & ors (2003) 13 NSCQR pg 1 @ 15.
237 (1986) 3 NWLR (pt 28) 340 @ 358
238 Abacha v. The State (2002) 7 SCNJ 1 @ 35.
239 Mogaji v. Odofin (1979) 4 S.C. 91; Ezukwu v. Ukachukwu (2004) 19 NSCQR p. 322 @ 345.

Therefore, where any of the party to the lawsuit prays the Court for any relief(s), such relief(s) has to be supported by evidence and proof by it also.[240] So, it is trite law that where a plaintiff fails to prove his relief by evidence the action stands dismissed and it is dismissed.[241].

Failure to call Vital and Material Witnesses

When a party does not call a witness who is available and is acquainted with the facts of the case, the presumption is that if the witness was called the evidence he would have given would be unfavourable to the party at whose instance he came to court to give evidence. It is therefore legitimate to draw an adverse inference if the witness draws an adverse inference if the witness abstains from coming to Court to give evidence.[242]

It is the law in criminal case that the prosecution is bound to call all material witnesses before the Court, even though they give inconsistent accounts/ testimonies in order that the whole of the facts may be before the Court. This principle of law has not altered the general rule of law whereby witnesses who support the case for prosecution are called by the prosecution, and witnesses who support the case for the defence are called by the defence. Therefore it is the duty of the prosecutor/ State to call all relevant witnesses[243] in discharging onus of proof (i.e. proof beyond reasonable doubt).

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240 Total Plc v. Ajayi (2003) 12FR p. 174 @ 199 - 200, 201.

241 Fagunwa v. Adibi (2004) 19 NSCQR p. 415 @ 438; Minister of Internal Affairs & ors v. Okoro & ors (2003) 10 FR p. 115 @ 126.

242 Iwuchukwu v. Anyawu (1993) 8 NWLR (Pt 311) 307; In re: Adewunmi (1988) 3 NWLR (Pt 83) 483; Bamgbose v. Jiaza (1991) 3 NWLR (pt 177) 64. Oduche v. Oduche (2006)5 NWLR (pt 972) p. 120.

243 R. v. T.U. Essien (1938) 4 WACA 112

The prosecutor should usually place all witnesses whose name appeared on the back of the information in the witness box even if it does not propose to examine them and offer them as witnesses to the accused person[244]

It is not the prosecutors duty to resolve conflict of evidence from apparently credible witnesses: that is, the function of the Court at the trial. It is now settled that counsel for the prosecution has a discretion and need not call a host of witnesses - all he need do is to call sufficient number of witnesses to establish his case[245] He (the prosecuting counsel) need not call even an eye- witness if he has a reasonable belief that such a witness would not speak the truth[246]

Therefore a conviction is liable to be quashed if a witness whose evidence must have been conclusive, vital and material one way or the other is not called[247]

In the case of **R v. Enema**[248] the Court held that failure by the crown to produce at the trial a material witness named by the accused person in the commitment proceedings as a witness whom he wished to call was held fatal to the conviction.

Where the name of a person is not on the back of the information of the prosecution witness, the crown needs not call him as a witness. Even if the prosecutor accedes to the

244 R v. Chigeri (1937) 3 WACA201; R v. Kelfalla (1958) 5WACA 157 The Queen v. Suberu Balogun (1958) W.R.N.L.R.65.
245 Samuel Adaje v. State (1979) 6-9 S.C.18 @ 28.
246 R v. Yeboah (1954) 14 WACA 484; R v. Twumasi - Ankra (1955) 14 WACA 673.
247 R v. Kuree (1941) 7 WACA 175.
248 (1941) 7 WACA 134

request of the defence to do so it is not illegal for the Judge to treat such evidence as evidence for the defence.

Conclusively, where the vital and material witness(es) are not called, the Court nevertheless has a duty to consider how the evidence of the witness not called would have affected the case for the prosecution. If indeed the witness was not in a position to give evidence at all, e.g. if he was unconscious, then the Court would still have to consider the evidence in favour of the accused[249]

Generally, the order of production and examination of witnesses where necessary is for the Court to make. But parties who also want to prove their claim(s) can call any witness(es) in pursuance of their case(s).

So, both in civil and criminal matters, vital and material witness(es) must be before the Court to enable the Court to do substantial justice to their case(s).

When the Evidence is Hearsay

Hearsay evidence or hearsay rule has been succinctly formulated by **Professor Cross** thus: "Express or implied assertions of persons other than the witness who is testifying and assertions in documents produced to the Court when no witness is testifying are inadmissible as evidence of that which is asserted".[250]

249 The State v. Jerome (1980) 1 NCR. 228.
250 Cross on Evidence, 4th Edition p. 387.

Hearsay is generally regarded as one of the most complex subjects in the entire law of evidence. It was simply defined and reformulated by **Rupert Cross** as follows: "assertions of person other than the witness who is testifying (including statement relied on as equivalent to assertions, although not primarily intended as such by their maker and conduct relied on as conduct equivalent to the actor's assertion of any fact other than his contemporaneous state of mind or physical sensation, although not so intended by him) are inadmissible as evidence of the truth of that which are asserted"[251]

The above formulation of the hearsay rule, encompasses the provisions of Section 77 paragraphs (a) (b) (c) (d) of the Evidence Act which apart from the provisos thereto, read thus:

Section 77: Oral evidence must, in all cases whatever, be directed -

(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.

251 Cross, "The Scope of the Rule against Hearsay."

(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."

When can evidence be said to be hearsay? In the often cited case of the common law tradition of **Subramanian v. Public Prosecutor**[252] the Judicial Committee of the Privy Council held that evidence of a statement made to a person by a person who is himself not 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.

Where a third party relates a story to another as proof of contents of a statement, such story is hearsay. Hearsay evidence is an evidence, which does not derive its value solely from the credit given to the witness himself, but which rests, also, in part, on the veracity and the competence of some other person.[253] A piece of evidence is hearsay if it is evidence of the contents of a statement made by a witness who himself is not called to testify[254].

The word "hearsay" is used in various senses. Sometimes, it means whatever a person is heard to say. Sometimes, it means whatever a person declares on information given by someone else.

252 (1956) 1 WLR 965 @ 969.
253 Judicial Service Commission v. Omo (1990) 6 NWLR (pt 157) 407.
254 Etteh v. The State (1992) 2 NWLR (pt 223) 257.

The Evidence Act, LFN 2004 does not specifically use the expression "hearsay evidence" but the totality of Section 77 of the Act, by interpretation of the Courts, provides for hearsay evidence.

In most cases, hearsay evidence is to the following or like effect: "I was told by XYZ that; or XYZ told me that; or I heard that XYZ told ABC that; or I made inquiries and I was told that".[255].

To crown it all, hearsay rule is a rule which is grounded upon commonsense as the focus of it is to prevent a person from being accused or found guilty of an offence (in criminal cases) which he did not commit. It is a self evident fact, malevolent people could manufacture such evidence as they would, to falsely accuse persons of offences which they did not commit. By reason of this rule, Courts are enjoined and indeed under a duty not to accept and/or convict an accused person upon testimony of witnesses who did not see, hear or had perceived by any other sense or in any other manner, the facts given in their testimony at a criminal trial of an accused person, or even in a civil case. This rule, except for such exception as the *res gestae* rule and certain recognized statutory exceptions, are mandatory for all Courts. Should a trial Court convict an accused person upon evidence adjudged to be "hearsay" evidence, an appellate Court may quash such conviction, if there are no other evidence upon

255 Armels Transport Ltd v. Madam Martins (1970) 1 ALL NLR 27; Adeka v. Vaatia (1987) 1 NWLR (pt 48) 134; Management Enterprises Ltd v. Otusanya (1987) 2 NWLR (pt 55) 179; Jolayemi v. Olaoye (2004) 12 NWLR (pt 887) 322; Olalekan v. The State (2001) 8 NSCQR p.207 @ 230; The State v. Dandeson Ogbolu & ors (1972) ECSLR 438; Akingboye v. Salisu (1999) 7 NWLR (pt 611) 434

which the conviction of the accused could be properly and safely convicted.[256]

Improperly Received Evidence

It should be noted that a plaintiff is entitled to lead evidence through his own witnesses or by cross-examination of the defendant's witnesses to controvert a fact pleaded by the defence.[257]

Also, the defendant is equally permitted to lead evidence through his own witnesses or cross-examination of the plaintiff's witnesses to controvert a fact pleaded in the statement of claim and reply where necessary.

Any evidence tendered before the Court has to be properly received by the same Court because the law is well settled that where a document has been improperly or wrongly received in evidence in the Court below, even where no objection has been raised, it is the duty of the Court of Appeal to reject the document and to decide the case on legal evidence.[258]

One of the ways through which an evidence could be properly received is for such evidence to be produced from a proper custody. Then, when can it be said that a document/ evidence has been produced from proper custody? A document

256. Ijioffor v. The State (2001) 6 NSCQR (pt 1) p. 209 @ 221.

257. Bamgboye v. Olanrewaju (1991) 4 NWLR (pt 184) 145 @ 155; Gaji & ors v. Paye (2003) 14 NSCQR (pt 1) p. 613 @ 628.

258. Omidokun Owoyin v. Omotosho (1961) All NLR 304 @ 308; Idowu Alashe & ors v. Sanya Olori - Ilu (1964) All NMLR 390 @ 397' IBWA Ltd v. Imano (Nig.) Ltd & ors (2001) 3 SCNJ 160 @ 177; Mallam Yaya v. Mogoga (1947) 12 WACA 132 @ 133; Ajayi v. Fisher (1956) SCNLR 279; Agbaje v. Adegun (1993) 1 NWLR (pt 269) 261 Chigbu v. Tanimas (Nig) Ltd (1999) 3 NWLR (pt 593) 115; Shanu v. Afribank (Nig) Plc (2002) 17 NWLR 185; (2003) FWLR (pt 136) 823.

is said to be in "proper custody" within the meaning of Sections 116 – 123 of the Evidence Act, if it is in the place in which and under the care of the person with whom, it would naturally be. "Proper custody" means no more than "its deposit with a person and in a place where, if authentic, it might naturally and reasonably be expected to be found and proof of production from proper custody is required not as a ground for reading the document but to afford the judge reasonable assurance of its being what it purports to be" [259]

No custody is, however, 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. [260]

Thus the proper custody of an expired lease is with the lessor or lessee.[261] The importance of showing that a document is produced from proper custody is that it is a condition under which the Court can make any presumption contained in any of the aforementioned sections unless the contrary is proved. If the document is produced from proper custody, it is presumed to be genuine if evidence of execution and identity is not available. [262] According to Fidelis Nwadialo SAN[263] said *"where a document is admissible the question of coming from "proper custody" is irrelevant to the issue of admissibility. Admissibility is based on relevance and not on proper custody. Its production*

259 Per Idigbe in Ogbunyinya v. Okudo (1979) 3 LRN 318 @ 322.
260 Section 124 Evidence Act.
261 Hall v. Ball (1841) 3 Man and G. 242.
262 Dr. Torti Ufere Torti v. Chris Ukpabi & ors (1984) 1 S.C. 370 @ 392.
263 In his book Modern Nigerian Law of Evidence 2nd Edition at p. 355.

from proper custody goes to the weight to be attached to the piece of evidence i.e. on whether or not it is genuine or on the question of whether it was made or signed by the purported maker."

For example, if a newspaper is tendered as an evidence in a case for it to be admissible when produced, it must be produced from a proper custody and in this case it must be the publishers of the newspapers or registrar of the newspaper's company.[264] This is especially the case with newspapers not printed by a government printer. The basis for this is stated in **Section 116 of the Evidence Act** which provides that "the Court shall presume the genuineness of every document purporting to be the official Gazette of Nigeria or of a state or the Gazette of any part of the Commonwealth or to be a newspaper or journals, or to be a copy of the resolutions of the National Assembly printed by the Government Printer 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"

My understanding of the above section is that, it can be split into two i.e., into documents which do not have to be produced from proper custody before they can be presumed genuine and documents which must be produced from proper custody before their genuineness can be presumed.

264 Oneh v. Obi (1999) 7 NWLR (pt 611) 487 @ 499.

A Court will therefore presume the following documents genuine.

(a) Official Gazette of Nigeria,

(b) Official Gazette of a State in Nigeria.

(c.) The Gazette of any part of the Commonwealth.

(d) A newspaper or journal or a copy of the National Assembly resolutions printed by the Government Printer.

Therefore, all the other documents purported to be documents directed by any law to be kept by any person must be produced from proper custody before they could be presumed genuine by the Court. It should however be noted that the documents that shall be presumed genuine must be printed by the government printer. It therefore follows that a newspaper or a journal must be printed by the Government Printer before they could be presumed genuine otherwise they must be produced from proper custody. It must be noted that the issue before the Supreme Court in **Ogbunyinya v. Okudo**[265] was whether an official Gazette must be produced from a proper custody, as was held by the Court of Appeal. The Supreme Court held that the Court of Appeal was wrong to so hold and went on to say at page 112 that: "Had the Court of Appeal addressed his mind adequately to the issue of "proper custody" of documents it would certainly have come to the conclusion that the prerequisite of production from proper custody cannot properly apply to a Government Printer's copy of the Official Gazette and that it

[265] (1975) All NLR 105.

could not be a sine qua non to the application of the rebuttable presumption of genuineness to the government notice in the Official Gazette aforesaid.

Failure to Cross-examine a Witness where necessary

The examination of a witness by a party other than the party who calls him shall be called cross - examination.[266]

Cross-examination, in practice is always at the discretion of the party other than the party who calls the witness. And it is done after the examination-in-chief has been conducted/ carried out. Cross-examination is also described as the questioning of a witness at a trial or a hearing by the party opposed to the party who called the witness to testify. The purpose of cross examination is to discredit a witness before the fact finder/Court in any of several ways, as by bringing out contradictions and improbabilities in earlier testimony, by suggesting doubts to the witness and by trapping the witness into admissions that weaken the testimony. The cross-examiner is typically allowed to ask leading questions but is traditionally limited to matters covered on direct examination and to credible issue.[267]

It has been said that the effect of failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness.[268]

266 Section 188(2) Evidence Act.
267 Black's Law Dictionary, Eighth Edition.
268 Gaji & ors v. Paye (2003) 14 NSCQR (pt 1) p. 613 @ 629; Agbanifo v. Aiwereoh (1988) 2 SCNJ 146.

It should be noted that it is not proper for a defendant not to cross-examine a plaintiff's witness on a material point and to call evidence on that matter after the plaintiff has closed his case.

In the case of **Oforlete v. The State**[269] the Supreme Court affirmed the above dictum as follows:

"In Blackstone's Criminal Practice, 1991, the effect of failure to cross-examine a witness upon a particular matter is stated to be a tacit acceptance of the truth of the witness's evidence. The law was thus, citing **Hart (1932) 23 CR. App. P. 202** as authority:

"A party who fails to cross examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses tacitly accepts the truth of the witness's evidence-in-chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while he is in the witness-box, or at any rate, to make it plain to him at that stage that his evidence is not accepted".

A similar attitude to the effect of failure to cross-examine a witness is contained in the opinion of Iguh, JSC, in **Broadline Enterprises Ltd v. Monterey Maritime Corporation & anr**[270] when he said:

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269 (2000) 3 NSCQR p. 243, @ 260.
270 (1995) 9 NWLR (pt 417) 1 @ 27.

"I think the first point must be made for a better appreciation of their resolution that where evidence given by a party to any proceedings is not cross-examined upon or challenged by the opposite party who had the opportunity to do so, it is always open to the Court seized of the matter to act on such unchallenged evidence before it is established".[271]

Moreso, where a witness who after testifying in chief refused to make himself available for cross-examination, no reasonable tribunal of justice would accord the evidence given by such witness as gospel truth. Indeed, the inference could be, were he to make himself available, that he might not be telling the truth hence, he made himself unavailable. However, such evidence already adduced by that party would be considered by the Court taking into consideration the nature of the testimony and the various prevailing factors that impact on it, i.e., the weight that would be given to it would depend largely on the credibility to be attached to the quality of the testimony and the disposition to tell the truth on the part of the witness. The weight to be attached to it would be made by considering the nature of the evidence of the other party on the same subject, and this to my mind is for the trial Court to assess, not for the appellate Court.

271 Isaac Omoregbe v. Daniel Lawani (1980) 3-4 SC 108; @ 177; Odulaja v. Haddad (1973) 11 SC 357; Nigerian Maritime Service Ltd v. Alhaji Bello Afolabi (1978) 2 SC 79 @ 81; Adel Boshali v. Allied Commercial Exporters Ltd (1961) 2 SCNLR 322; (1961) All NLR 917.

Improper Evaluation of Evidence

It is a known fact, that it is for the parties to a matter who want their claims to be granted that must adduce evidence to support their prayers/claims. It is trite law also that a trial judge is bound to consider the totality of the evidence adduced before it during a trial.[272]

Therefore, evaluation of evidence invokes reviewing and criticizing the evidence given and estimating it. Any decision arrived at without a proper or adequate evaluation of the evidence cannot stand. Evaluating evidence does not stop with assessing the credibility of the witnesses although that in appropriate cases is part of the exercise. It extends to a consideration of the totality of the evidence on any issue of fact in the circumstance of each case in order to determine whether the totality of the evidence supports a finding of fact which the party adducing the evidence seeks that the trial Court should make. After giving due concession to the advantageous position in which the trial Court is in regard to credibility of witnesses – the responsibility of the appellate Court to consider the findings of the fact and ensure that it is arrived at after an adequate consideration of the totality of the evidence or which a reasonable tribunal properly adverting to the evidence, would make such finding remain where the findings of fact are challenged. When the trial Court did not properly advert to the evidence or give necessary consequence to the evidence given,

[272] Karibo v. Grend (1992) 3 NWLR (pt 230) p. 420; Ogunleye v. Oni (1990) 2 NWLR (pt 135) p. 745; Nadi v. Oseni & anr (2003) 10 FR p.131 @ 148.

the appellate Court will itself perform that exercise by virtue of **Section 16 of the Court of Appeal Act, LFN 2004**[273]

Furthermore, in deciding whether or not a trial court properly evaluated the evidence, the essential focus should be on whether the learned trial court judge made proper findings and reached the correct judgement upon the facts before him. It is not the method or approach that necessarily determines these ends. Thus, so long as a trial court does not arrive at its judgement merely by considering the case of one party before considering the case of the other, its judgement, if right, will not be set aside simply on the method of assessment of the evidence or approach to the entire case it may have adopted.[274]

It is well settled that the proper manner to evaluate evidence led by the parties to a case is to place the evidence called by either side on an imaginary scale and weigh them together to see which outweighs the other in terms of probative value[275]

So, where a trial Court has properly evaluated the evidence before it, and come to a right conclusion, it is not the business of the appeal court to interfere. The appeal court can only interfere in such if the evaluation of the evidence led is improper and such has led to miscarriage of justice.[276]

273 Basil v. Fajebe (2001) 11 NWLR (pt 725) p.592.
274 Woluchem v. Gudi (1981) 5 SC (pt 291) p.294.
275 Mogaji & ors v. Odofin & ors (1978) 3 SC. 91.
276 Akilu v. Opaleye (1974) SC 189.

Where an appellate Court is satisfied that the Court of trial has been guilty of improper use of its powers in the performance of its adjudicative functions, it must go further and ask itself whether the error was such that it could be corrected from the evidence in cold print without injustice to either side. If it is, then the appellate Court can correct the error, but if it is not, it must order a retrial[277]

On Whether a Document Previously rejected can be Re-admitted

Document, according to Section 2 of the Evidence Act 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.

Therefore, it has been decided by the Court that once a document was tendered in Court and it was rejected and marked rejected, it cannot subsequently be tendered and admitted in evidence as exhibit in the case. It cannot be made use of as it has no value[278]

It is trite law, that a trial Court has no competence to subsequently admit in evidence a document it had preciously rejected without hearing the parties on the point. The emphasis

277 Sanusi v. Ameyogun (1992) NWLR (pt 237) p.527 @ 549.

278 Oyetunji v. Akanni (1986) 5 NWLR (pt 42) 461 @ 470; Agbaje v. Adigun (1993) 1 NWLR (pt 269) 261 @ 272; Ita v. Ekpenyong (2001) 11 NWLR (pt 695) 619; Ngige v. Obi (2006) 18 WRN p. 33 @ 244.

here is on "without hearing the parties" on the point. To do so would amount to a trial Court sitting on appeal over its own decision, which it has no competence to do.

In the case of **Salawu Jagun Olukade v. Abolade Agboola Alade**[279] the Supreme Court laid down the following principle that legal evidence, and, this might be documentary evidence which cannot be received in evidence because certain conditions are not complied with is not necessarily lost to the party tendering it. If necessary steps can be taken during the trial to fulfill the conditions after its admission has been refused by the Court, it can be received in evidence.

Also in the case of **Arubi v. Offshore (Nig.) Ltd**[280] it was clearly stated that a distinction should be drawn between documents which were by their nature inadmissible and those in respect of which a pre-requisite to admissibility had not been fulfilled. In the later case, if the pre-requisite to admissibility is fulfilled, it can be admitted despite the fact that a Court had earlier refused its admission.

For example, the Evidence Act provides for the tendering under certain conditions certified true copies of public documents[281]

It is trite law, that there is a difference between matters of admissibility of evidence be it oral or documentary as an issue; matter of estoppel also as an issue.

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279 (1976) 2 SC 183,.
280 (1978) 1 LRN, 342.
281 Chief Philip O. Anatogu & ors v. HRH Igwe Iweka II & ors (1995) 9 SCNJ 156.

As a general rule, a court is not permitted to sit on appeal over its decision or to reverse itself after taking a decision on an issue in the same proceedings. However, such a general rule admits of exceptions one of which is that a Court which rules that a piece of oral evidence or a document is admissible but later finds that either in law or procedure it is not, can later in its judgement or in the course of the proceedings reject the inadmissible evidence[282]

It is my considered view that by the same token where a Court holds that a document is inadmissible because of failure to fulfill certain preconditions, such as certification of document, that Court is not estopped from revisiting the issue after the preconditions which militated against admissibility have been duly satisfied[283].

Failure of the Plaintiff to adduce Acceptable Evidence

It is the law that plaintiff/or any litigant who asserts or prays the Court for any claim must prove it with evidence. Essentially, such onus of proof is always on the plaintiff or the prosecutor/ the State. The evidence to be adduced in respect of the claims/relief sought must be an acceptable evidence within the provisions of the Evidence Act. The question is: what constitute an acceptable evidence? For evidence to be

[282] Ajayi v. Fisher (1956) SCNLR 279; Owonyin v. Omotosho (1961) 2 SCNLR 57; N.I.P.C. Ltd v. Thompson Organisation Ltd (1969) 1 All NLR 138; Olukade v. Alade (1976) 1 All NLR (pt 1) 67; Ayanwale v. Atanda (1988) 1 All NNLR (pt 68) 22; Sadhwani v. Sadhwani (Nig.) Ltd (1989) 2 NWLR (pt 101) 72; Agbaje v. Adigun (1993) 1 NWLR (pt 269) 261; Shanu v. Afribank Nig. Ltd (2002) 17 NWLR (pt 795) 185.

[283] University of Ilorin v. Adeniran (2004) 1 FR p.27, @ 41.

acceptable, in any case, it must be consistent with any other rational conclusion the Court may draw from the other evidence(s) adduced under the law. It is also necessary in criminal matters before drawing the inference of accused's guilt to be sure that there was no other co-existing circumstances, which would weaken such inference[284]

But the question is, is the defendant bound to prove anything where the plaintiff has not adduced acceptable evidence in a bid to prove his case? A defendant need not prove anything if the plaintiff has not succeeded in establishing his case, at least prima facie, in order that the necessity of the defendant to confront the case so made may arise.[285] Because, it is a rule that a plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case. Though, this rule does not apply where the defendant's case itself supports that of the plaintiff and contains evidence on which the plaintiff is entitled to rely[286]

If a plaintiff fails to establish his claim the defence is not duty bound to call evidence[287]

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284 Obalum Anekwe v. The State (1976) 10 SC 255 @ 264; Tepper v. The Queen (1952) AC 480 @ 489; PC Stephen Ukorah v. The State (1977) 4 SC 167 @ 174, 176-177; Valentine Adie v. The State (1980) 1-2 SC, 116, @ 122; Loki v. State (1980) 8 - 11 SC 81; Aigbadion v. The State (2000) 2 SCNQR (pt 1) p.1 @ 21.

285 Aromire v. Awoyemi (1972) 2 S.C. 1 @ 10-11; Adeleke v. Iyanda (2001) 13 NWLR (pt 729) p. 1 @ 21-22; Jolayemi v. Olaoye (2004) 18 NSCQR (pt 11) p. 682 @ 703; Umeojiaku v. Ezeenamuo (1990) 1 SCNJ 181.

286 Chukwueke & anr v. Ikoronkwo & ors (1999) 1 SC 71.

287 Okonkwo v. Okonkwo (1998) 8 ALR 1 @ 11; Olagunju v. Yahaya (2004) 1 FR p. 92, @ 110.

Wrongful admission or Exclusion of Evidence

It is an elementary principle of law that an appellate Court will not ordinarily interfere with the findings of fact made by the trial Court which are supported by evidence except in circumstances such as where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial or where it has drawn wrong conclusions from accepted credible evidence or has taken an erroneous view of the evidence or the findings of fact are perverse in the sense that they do not flow from the evidence accepted by it[288]

It is a well settled principle of administration of justice in our Courts that only evidence properly authenticated, either by the oral testimony of a party or the written statement tendered and admitted during proceedings can be evidence in a trial. Extra judicial statements which remain in that category however credible they may appear, cannot be used as evidence in a trial[289]

Section 227 of the Evidence Act provides:

227(1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in a 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.

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288 Woluchem v. Gudi (1981) 5 SC 291 @ 295 and 326; Okpiri v. Jonah (1961) All NLR 102 @ 104.

289 The State v. Ogbubunjo & anr (2001) 5 NSCQR p. 27 @ 54-55.

227(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".

By the provisions of Section 227(1) and (2) of the Evidence Act (supra), the wrongful admission or exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case. The appeal Court must refrain from interfering with the decision of a trial Court where it appears that such evidence cannot reasonably be held to have affected the decision and the decision would have been the same had the evidence been admitted or excluded[290]

The law is that an appellate Court will not quash a conviction or reverse a judgement where it is clear that expunging the admitted inadmissible evidence will not alter the decision of the Court appealed against[291]

However, where it is uncertain or impossible to say with some degree of certainty that the Court whose judgement is appealed against would have reached the same decision if the inadmissible evidence had not been admitted, an appellate court would have no alternative but to quash the conviction and sentence of the Court if there had been a conviction and

290 - A. G. Kwara State & 2 ors v. Raimi Olawale (1993) 1 NWLR (pt 272) p. 645 @ 661 - 662; Oneli Okobia v. Mamodu Ajanda & anr (1998) 6 NWLR (pt 554) p. 348 @ 360: Alli v. Alesinloye (2000) 2 SCNQR (pt 1) p. 285 @ 323; Ezeoke v. Nwagbo (1988) 1 NWLR (pt 72) 616; @ 630; Umeojiako v. Ezenamuo (1990) 1 NWLR (pt 126) 253 @ 270; Monier Construction Co. Ltd v. Azubuike (1990) 3 NWLR (pt 136) 74 @ 88.

291 Queen v. Haske (1961) 2 SCNLR 90.

sentence, or in any case set aside the judgement entered by virtue of the inadmissible evidence[292]

In **Queen v. Olubunmi Thomas**[293] the Federal Supreme Court laid down that the test applicable in determining the effect of wrongful admission of evidence on the judgement appealed against is as follows: *"The question which must be posed therefore is, would the learned trial judge have reached the same decision if the inadmissible evidence had not been admitted? It is impossible for us to say what effect that evidence may have had on the mind of the learned trial judge and although we think that there was sufficient evidence without the inadmissible evidence to convict the appellant, we cannot say with certainty that the learned trial judge must inevitably have come to the same conclusion. That being so we have no alternative but to allow this appeal, quash the conviction and sentence, and order a verdict of acquittal to be entered".*

Now it is settled that an appellate court will set aside the judgement of the trial court where the wrongful admission of evidence by the trial court occasioned miscarriage of justice.[294]

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292 Queen v. Thomas (1958) SCNLR 98; Ajayi v. Fisher (1956) SCNLR 279: The State V. Ogbubunjo (2001) 5 NSCQR p. 27 @ 55.
293 (1958) SCNLR 98.
294 Ossai v. Wakwah (2006) 4 NWLR (Pt 969) p. 208 @ 230.

Failure of the Court to consider the totality of the Evidence and Issues Formulated

Judicial power[295] is vested in the Courts for the purpose of determining cases and controversies before them; the cases or controversies, however, must be justiciable. Having passed through this stage, the Court then has the duty to consider and scrutinize the totality of the evidence adduced before it by the litigants. This is the primary obligation of the trial Court[296].

Therefore, where a valid criticism of the judgement of the trial judge is that he has made an improper use of the opportunities he had of seeing and observing the witnesses *viva voce* or that his appreciation of such witnesses has been imperfect, it is not the function of the appellate Court, such as Court of Appeal to substitute its own views and seek to consider the totality of the evidence or ascribe credibility to the testimony of witnesses it had no opportunity to see and observe. This is essentially because although our appellate procedure is based on the rehearing of the case as a whole, it is a rehearing on the cold printed record.

In the absence of these essential factors, an appellate Court is only left to guesses and surmises based on intuition that the trial judge would have done in the appropriate situation.

It is well settled that where the trial judge was evasive in his consideration and findings and therefore did not take proper advantage of having seen or heard the witnesses before

295 Section 6 of the 1999 Constitution.
296 Fashanu v. Adekoya (1974) 6 S.C. 83.

him, an order for a re-trial is appropriate,[297] decision had been set aside on the ground of improper appraisal of the totality of evidence by trial Court[298]

Though before the appellate Court can order a re-trial in a case, it is always of paramount importance to have all the records in an appeal before the appellate court. The proceedings including the exhibits and judgement are the materials necessary for the appellate Court to decide whether the trial Court's judgement was right or wrong. No Court can do justice in any case, when all the relevant facts available are not placed before it.

And where it seems that the appeal for example in the Court of Appeal could not be prosecuted on its merit because all necessary documents could not be available before it, it is in the interest of justice for the Court of Appeal to make all necessary orders so that the case can be resurrected. If the manuscript is missing, the appeal Court will be unable to fairly hear the appeal, the best it can do is to order hearing *de novo*.

In **Okoduwa v. State**[299] the Supreme Court accepted one of the tests postulated in **Abodundun v. The Queen**[300] which is that a Court of Appeal ought to order a retrial where there has been such an error in law or an irregularity in procedure

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297 Okpiri v. Jonah (1961) 1 All NLR 102. In George v. George (1964) 1 All NLR 136 @ 149

298 Shell BP v. Cole (1978) 3 SC. 183; Okeowo v. Migliore (1979) 11 S.C. 138; Nader v. Customs & Excise (1965) 1 All NLR 33; Total v. Nwako (1978) 5 SC 1; Ayoola v. Adebanjo (1969) 1 All NLR 159.

299. (1988) 2 NWLR (pt 76) p. 333 @ 335.

300 (1959) 4 FSC 70.

which neither renders the trial a nullity nor makes it possible for the appeal court to say there has been no miscarriage of justice[301]

The Court of Appeal has been enjoined in several cases by the Supreme Court to always consider all issues placed before it so that the Supreme Court can have benefit of the opinion of the Court of Appeal on all the issues[302]

Where all the issues were not decided upon by the Court of Appeal and all materials for resolving the issues not touched upon, are before the Supreme Court, more so that they are mostly questions of law, it is right and just that the Supreme Court should rehear the appeal on those issues pursuant to Section 22 of the Supreme Court Act.

The rationale behind the duty to make a pronouncement on issues raised is similar to that where in cases in which damages are to be assessed, the trial Court should always do so even if this decision in the action was against the party claiming damages. This will save the need to send the case back for assessment of damages in the event of the action succeeding on appeal[303]

The obvious exceptions are when an order for a retrial is necessary or the judgement is considered a nullity, in which case, there may be no need to pronounce on all the issues which could arise at the retrial or in a fresh action, as the case may be[304]

301 Duru v. Nwosu (1989) 4 NWLR (pt 113) 24 @ 43.
302 Odunayo v. The State (1972) 8 - 9 SC 290 @ 296.
303 Yakassai v. Messrs Incar Motors Ltd (1975) 5 S.C. 107.
304 Sanusi v. Ameyogun (1992) 4 NWLR (pt 527) 550.

Failure to prove issues joined between Parties by Evidence

It is a fundamental procedural requirement that when issues are joined on the pleadings, evidence is needed to prove them. It is the person upon whom the burden of establishing that issue lies that must adduce satisfactory evidence. When there is no such evidence, the issue must be resolved against him and the consequences of that are as decisive of the case presented as the materiality of the issue. The nature of the evidence that will suffice, as to whether it is documentary or oral, may well depend on the issue and the requirement of the law[305]

A party is not bound to lead evidence in proof of all the averments in its pleadings provided he has led enough evidence to sustain his claim or defence. Civil cases are decided on balance of probabilities and if one party adduces credible evidence which outweighs the evidence of the other part, the former is entitled to judgement[306]

It is the law that the Court cannot determine any matter based only on the pleadings. Evidence must be given to prove the averments made in the said pleadings, in the absence of any evidence to the contrary of that presented by the opposing party. In the absence of any rule of law which prevents the court from accepting such evidence presented for example by the plaintiff, the trial Court would be right to have accepted the evidence of the plaintiff[307]

305 African Cont. Bank & anr v. Emos Trade Ltd (2003) 14 NSCQR (pt 1) p.22 @ 31 - 31.
306 Mogaji v. Odofin (1979) 4 S.C. 91.
307 Nwabuoku v. Ottih (1961) All NLR 487; Fasheun v. Pharco (Nig.) Ltd (1965) 2 All NLR 216.

Whether a Judge may write a Judgement on the Evidence recorded by another Judge

Generally speaking, a trial is a judicial examination of evidence according to the law of the land, given before the Court after hearing parties and their witnesses. A trial must be conducted by the Judge himself and at the end of the hearing his Lordship will write a judgement which is the authentic decision based on the evidence he received and recorded. It is a mistrial for one judge to receive evidence and another to write judgement on it.

What the Court should do where one judge has completed hearing of all evidence and adjourned for judgement when that Judge was transferred or retired is to direct the case to be started de novo. Because it will palpably be wrong for one judge to write a judgement on the evidence recorded by another judge[308]

When the Evidence led is at Variance with the Pleadings

Black's Law Dictionary defines "Pleading" as a formal document in which a party to a legal proceeding sets forth or responds to allegations, claims, denials or defences.

Our Courts especially the apex Court, have repeatedly, time without number emphasized that the primary aim of pleadings is to set out clearly facts which parties in a suit rely on for their case[309]

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308 Eghobamien v. Fed. Mortgage Bank (2002) 11 NSCQR p. 183, @ 191; Ubwa v. Yaweh (2004) 18 NSCQR p. 468, @ 473.

309 Alhaji Buba Usman v. Mohammed Barke (1999) 1 NWLR (pt 587) 466; Akande v. Adisa (2004) 2 F.R. p. 71, @ 78.

In the same vein, it is a cardinal practice of our adversary system that a party who avers a fact must prove the fact by evidence[310]

The evidence tendered by the party who avers is placed on an imaginary scale and if the other party to the case also testifies, the testimony is placed also on the other side of the imaginary scale. The success in the proof of the fact in issue of the person who avers depends on a balance of the probabilities of the facts proved[311]

Therefore, it must be remembered that once pleadings are ordered, filed and exchanged, the parties and the Courts are bound by the pleadings so filed. It therefore follows that evidence must be led in accordance with the pleadings. Evidence led not in conformity with pleadings, and/or upon facts not pleaded went to no issue[312]

If the evidence is at variance with the pleadings, such evidence will have no value. It will be discountenanced because it is contrary to the issues joined and therefore goes to no issue worthy of consideration[313]

310 Section 138 Evidence Act LFN 2004.

311 Mogaji v. Odofin (1978) 4 SC 91; Towoeni v. Towoeni (2002) 1 SMC p. 173 @ 183.

312 Kanu v. Omen (1977) 5 SC 1; Ekpoke v. Usilo (1978) 6 - 7 SC 187; Ataye v. Ofili (1986) 1 NWLR (pt 15) 134; Egbue v. Araka (1988) 3 NWLR (pt 84) 598; Overseas Construction Ltd v. Creek Enterprises Ltd (1985) 3 NWLR (pt 13) 407.

313 Ogboda v. Adulugba (1971) 1 All NLR 68 @ 72 - 73; Emegokwue v. Okadigbo (1973) 4 SC 113 @ 117; Ige v. Akoju (1994) 3 NWLR (pt 340) 535 @ 546; Umukoro v. Nigerian Ports Authority (1997) 4 NWLR (pt 502) 656 @ 555; Allied Bank (Nig.) Ltd v. Akubueze (1997) 6 NWLR (pt 509) 374 @ 396; Makinde v. Akinwale (2000) 2 NWLR (pt 645) 435 @ 450, Ukwu Eze v. Atasie (2000) 2 SCNQR (pt 11) p. 1136 @ 1145.

The rationale for the rules that parties are bound by their pleadings and that any evidence which is at variance with the averments in the pleadings goes to no issue and should be disregarded by the Court is that the Court should concern itself only with evidence on those matters which have been included in the pleadings[314]

If the averment in the pleadings of any party to an action is contrary to the oral evidence given and the trial Court did not advert its mind to it, the appellate Court has the responsibility to reverse the decision of the trial Court on such evidence. In the case of **Abimbola v. Abatan**[315] the Supreme Court held: *"Now, in the instant case, the evidence led by the appellant having been adjudged to be contrary to the pleadings of the appellant, should have been rejected by the trial Court. But, that notwithstanding, this Court cannot look or accept such evidence in the consideration of the merits of this appeal. In the absence of any other evidence which can justifiably support this appeal it is manifest that the appeal must be dismissed".*

When the Evidence is Weak or Wobble

Evidence is said to be weak or wobble when such is unreliable, shaky or stagger. When there are specific claims it is the duty of the plaintiff to prove all the essential facts

314 Emegokwe v. Okadigbo (1973) 4 SC 113 @ 117; George & ors v. Dominion Flour Mills Ltd (1963) 1 ANLR 71 @ 77; African Continental Seaways Ltd v. Nigerian Dredging Roads and General Works Ltd (1977) 5 S.C. 235; @ 248; National Investment Co. Ltd v. Thompson Organisation (1969) NMLR 104; Woluchem v. Gudi (2001) 6 NSCQR (pt 11) p. 1132, @ 1147.

315 (2001) 6 NSCQR (pt 1) p. 25 @ 40.

succinctly and with clarity to leave no one in doubt. In order to meet the standard required in proof of specific or special items, the facts and the evidence in support of such claims must not be wobbly or bent or susceptible to varying degrees of construction[316]

When the evidence of a witness is hazy or deficient or utterly hollow, skimpy or shallow, then it would prove nothing and in the case of specific claims such weak evidence would be so wanting in its substantiality that it may be regarded as a mere effusion of an incompetent witness. The evidence of facts and circumstances on which a party relies and the inferences deducible therefrom must so preponderate in the favour of the basic proposition he is seeking to establish by proof as to exclude any equally well supported belief, and that in the administration of justice the Court must be satisfied with proof which leads to a conclusion with probable certainty where absolute certainty is either impossible or not necessary or essential.

Therefore, when the evidence is weak in content as not to assist the Court or it is manifestly unreasonable or is devoid of any substance as not to help to resolve the matter in issue it will be safe to ignore it as it does not attain the standard of credibility.

Although it is the general rule that uncontradicted evidence from which reasonable people can draw but one conclusion may not ordinarily be rejected by the Court but must

316 J. O. Imana v. Robinson (1979) 1 ANLR 1 @ 16.

be accepted as true, it is also true to say that the Court is not in all the circumstances bound to accept as true testimony an evidence that is uncontradicted where it is willfully or corruptly false, incredible, improbable or sharply falls below the standard expected in a particular case[317]

Therefore, it should be remarked that neither the pleadings nor the most forensic eloquence of any brilliant lawyer can be a substitute for evidence that was not given, weak or wobble. Evidence, whether oral or documentary consists of facts, and facts are fountain head of law.

When the Document tendered in Evidence is Speculative in Content

It is trite law that a party who prays the Court for any relief must prove it. In civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgement 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. This is the language of Section 137(1) of the Evidence Act.[318]

Although the burden of proof under Section 137(1) generally remains with the plaintiff, it is not invariably so. As provided in the subsection, the burden of proof will be determined by the pleadings. It will therefore not be wrong to say that the burden of proof under the subsection fluctuates

317 NEKA Ltd v. ACB (2004) 17 NSCQR p. 240 @ 261-261.
318 Are v. Adisa (1967) NMLR 304.

with the state of the pleadings and the level of fluctuation may at times go to the defendant if he has asserted the positive fact therein[319]

So, where the appropriate party who has the onus of proof fails to get the appropriate findings relevant to the relief he had sought, he must fail.[320] A plaintiff who asserts the truth or existence of a fact must prove it. A mere speculative observation cannot be a substitute to proof of the fact asserted[321]

A Court of law cannot speculate or conjecture.[322]

Where a document is speculative in content, the Court is entitled not to rely on it to make an award or order[323]

In short, the proposition of being buttressed here is that, a Court of law is not permitted in any way and by any means to speculate whether in civil or criminal proceedings.[324]

Where the Court misapprehends a Party's Case

It is the duty of a Court of law (whether trial or appellate Court) to take the case of the parties dispassionately and evenly. It must examine and analyse the case of both parties as in the record. Where a Court of law, trial or appellate, misconceives

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319 Akinfosile v. Ajose (1960) 6 FSC 192; Noibi v. Fikolati (1987) 1 NWLR (pt 52) 619.

320 Fashanu v. Adekoya (1974) 6 SC 83.

321 George v. UBA (1972) 8 - 9 SC 264.

322 Ogunye v. The State (1999) 68 LRCN 699; Okonji v. Njokanma (1999) 73 LRCN 3632.

323 Olalomi Industries Ltd v. NDIC (2002) FWLR (pt 131) 1984; Archibong v. Ita (2004) 17 NSCQR p. 273, @ 320; NDIC & anr v. Savannah Bank (2003) 1 FR p. 10 @ 41; Offoboche v. Ogoja L. G. (2001) 7 NSCQR p. 82, @ 102; Koku v. Koku (2002) 1 SMC p. 82 @ 96.

324 Oladele v. The State (1993) 1 NWLR (pt 269) 294; Oguonzee v. The State (1998) 5 NWLR (pt 551); Ahmed v. The State (1999) 7 NWLR (pt 612) 641; Ivienagbor v. Bazuaye (1999) 9 NWLR (pt 620) 552.

the case as contained in the record and reaches a conclusion in that misconception, the appellate Court especially, the Supreme Court will certainly set aside the judgement which is a product of the misconception. This is clearly was the case in **Oyewale v. Oyesoro**[325]

Essentially if the facts misrepresented or misconceived by the Court are crucial and material that the decision of the Court would have been different had the facts been correctly appraised and understood. Then the Court would act if, the misunderstanding of the case submitted by the parties is, according to law, a fundamental vice liable to render that decision indefensible and unsustainable.[326]

Moreover, if it is obvious that the learned trial judge in a case completely went wrong, in his approach to the resolution of the dispute placed before him by the parties and if this happened because his Lordship seemed to have misconceived the issues joined, the result would be that he did not consider and make relevant findings on the evidence throughout the judgement and this has led to a miscarriage of justice.

A judgement of the Court must demonstrate that the Court understood the case before it and elicit an open and full consideration of the issues properly raised by the parties in their pleadings as supported by evidence. The conclusion reached must also reflect and justify such an exercise.

325 (1998) 2 NWLR (pt 539) 663.

326 Oladipo v. Oluwasemi & anr (1974) 4 UILR (pt 2) 160; Jimoh A. Oyewale v. Agboola Oyesoro (1998) 2 NWLR (pt 539) 679.

Once a Court has misapprehended the nature of the case in respect of which it is required to give a dispassionate and rational decision, the chances are that the decision otherwise reached will be perverse. This is because when an adjudicator fails to discern the real question which he is to consider and decide or answer, his reasoning will inevitably be addressed to a collateral matter which is irrelevant or to an aspect which is beside the point in issue. Such an adjudicator is said to suffer from *ignoratio elenchi* (i.e. this is a fallacy of logic often involved when a judge is trying to prove something that is immaterial to the point to be decided). A perverse decision of a Court can arise in several ways. It could be because the Court ignored the facts or evidence; or that it misconceived the thrust of the case presented; or took irrelevant matters into account which substantially formed the basis of its decision; or went outside the issues canvassed by the parties to the extent of jeopardizing the merit of the case; or committed various errors that faulted the case beyond redemption. The hallmark is invariably, in all this, a miscarriage of justice and the decision must be set aside on appeal[327]

And in this type of case, an appellate Court may order a retrial in a civil case when, among other conditions,

(1) there has been such an error in substantive law or irregularity in procedure by the trial Court which neither renders the trial a nullity nor makes it possible for the

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327 Atolagbe v. Shorun (1985) 1 NWLR (pt 2) 360; Adimora v. Ajufo (1988) 3 NWLR (pt 80) 1; Agbomeji v. Bakare (1998) 9 NWLR (pt 564) 1; Odiba v. Azege (1998) 9 NWLR (pt 566) 370.

Court of Appeal to say there has been no miscarriage of justice[328]

(2) the trial Court made no finding of fact on conflicting material evidence adduced on an issue by both parties to the action, the resolution of which is essential to the just determination of the case and the Appeal Court in the exercise of its appellate jurisdiction cannot resolve that conflict on issue of credibility in order to bring the litigation to an end[329]

(3) there has been a substantial misdirection by the Court or some other substantial error like wrong placing of burden of proof by the Court such that cannot be corrected by the Appeal Court[330] and the justice of the case, looked in all its special circumstances, justifies an order of retrial[331]

For instance, in the case of **Ndengwu v. Uzuegbu & ors**[332] the Supreme Court per Kalgo JSC held: *"There is no doubt that the trial Court and the Court of Appeal misconceived the issues in the case as disclosed by the pleadings and evidence of the parties. The question whether the land in dispute was a family land and was sold without the relevant consent was not raised*

328 Ezeoke v. Nwagbo (1988) 1 NWLR (pt 72) 616 @ 629.
329 Atanda v. Ajani (1989) 3 NWLR (pt 111) 511 @ 536; Sanusi v. Amoyegun (1992) 4 NWLR (pt 237) 527 @ 556.
330 - Onobruchere v. Esegine (1986) 1 NWLR (pt 19) 799; Onifade v. Olayiwola (1990) 7 NWLR (pt 161) 130 @ 161 @ 167.
331 Abusomwan v. Aiwerioba (1990) 4 NWLR (pt 441) 130 @ 141; Eke v. Okwaranyia (2001) 12 NWLR (pt 726) 181 @ 210.
332 (2003) 15 NSCQR p. 262 @ 276 - 277.

by the parties. Therefore any decision reached on it is defective and adverse to the parties' interest and will constitute a miscarriage of justice. The 1st - 4th respondents not being members of the appellants' vendor's family are not entitled to raise the issue of sale of family land in this case. Only a member of Okpalansofor's family can properly do so. Therefore the decisions of both the trial Court and the Court of Appeal based on sale of family land without consent are clearly not on merit and are perverse. They cannot stand. There is however the need to retry the case and determine it on merits".

In the above case, Edozie JSC @ p.278 said *"... since the trial Court had misapprehended the case presented by the parties to adjudicate on an issue not placed before it and the Court of Appeal had fallen into the same error by affirming the decision of the trial Court, the inevitable order to make is one of retrial".*

On when the Decision of Court is based on Ground in respect of which parties have not adduced Evidence

To be factual, the duty of adducing evidence is meant for the party who will lose the case if the evidence is not given. That is why pleadings have to be filed in Court's registry. A party is bound by his pleadings and cannot give evidence outside what was pleaded. If he does, it goes to no issue and is irrelevant. If a party's pleadings are relevant to his claim in Court and he produces evidence in support of the pleadings the court is bound

to consider and decide his claim on the evidence.[333] Pleadings are the body and soul of any case in a skeleton form and are built up and solidified by the evidence in support thereof. They are never regarded as evidence by itself and if not followed by any supportive evidence, they are deemed abandoned[334]

Therefore, where a witness does not give evidence in respect of a fact in the pleadings the fact remains abandoned and of no evidential value[335]

It is indeed the law that where the claim of the plaintiff as disclosed in the writ of summons and statement of claim is not supported by the evidence at the trial, the action is bound to fail[336]

So, it is common ground that the decision of a Court should not be founded on any ground in respect of which it has neither received evidence in support nor received argument on behalf of the parties nor raised by or for the parties. It is the law that grant of consequential or incidental relief or orders is an exception to the principle that decisions of the Court must be based on grounds in respect of which it has received argument.

333 Overseas Construction Ltd v. Creek Enterprises Ltd (1985) 3 NWLR (pt 13) 407 @ 414; African Continental Seaways Ltd v. Nigeria Dredging Roads & General Works (1977) 5 S.C. 235 @ 250; H.L.O. Adeniji v. T. A. Adeniji (1972) 4 S. C. 10 @ 17; Aguocha v. Aguocha (1986) 4 NWLR (pt 77) 413; Adekeye v. Akin - Olugbade (1987) 3 NWLR (pt 60) 214.

334 Ajao v. Alao (1986) 5 NWLR (pt 45) 802; Ebueku v. Arinola (1988) 2 NWLR (pt 75) 128; Jolayemi v. Olaoye (2004) 18 NSCQR (pt 11) p. 682 @ 695.

335 Ebueku v. Amola (1988) 2 NWLR (pt 74) 128; Bala v. Bankole (1986) 3 NWLR (pt 27) 141; Ajao v. Alao (1986) 5 NWLR (pt 45) 802.

336 Olowosago v. Adebayo (1988) 4 NWLR (pt 88) 275; Ogiamen v. Ogiamen (1967) NMLR 245; Balogun v. Oshunkoya (1992) 3 NWLR (pt 232) 827 @ 835; Amana Comm. Bank & anr v. Olu (2003) 3 FR p. 220 @ 242.

It is equally settled that a Court is at liberty to apply or invoke provisions of any law it finds relevant to a determination whether or not cited by parties without putting them on notice since he is entitled to take judicial notice of any law, be it statutory or decided cases, by virtue of Section 73 of the Evidence Act[337]

It is equally trite that the Court not being a Father Christmas has no power to donate a relief that is not claimed except they are within orders that can be properly construed as consequential order which is one that normally or naturally flows out of the judgment. It is, therefore clear that a Court can only grant the relief sought by a party and any orders made outside such prayer must be refused except it is consequential[338] as where Supreme Court said,

"It should always be borne in mind that a Court of law is not a Charitable institution; its duty, in civil cases, is to render unto everyone according to his proven claim".[339]

337 Lt Col. Mrs. R. A. Finnih v. J. O. Imade (1992) 1 SCNJ 87, (1992) 1 NWLR (pt 219) 511.

338 Obajinmi v. A. G. Western Nigeria & ors (1968) NMLR 96, @ 98; Akinbobola v. Plisson Fissko Nig. Ltd (1991) 1 NWLR (pt 167) 20 @ 27; Dipcharima v. Alli (1974) 12 SC 45; Awosile v. Sotunbo (1986) 3 NWLR (pt 29) 471 @ 482; Jonah Kalio & ors v. Chief M. Kalio (1972) 2 SC 15 @ 20; Ekpeyong & ors v. Nyong & ors (1975) 2 SC 71 @ 80.

339 Okubola v. Oyegbola (1990) 4 NWLR (pt 147) 723; Bola Ige v. Olunloyo (1984) 1 SC 258; Ransome - Kuti v. A. G. of Federation (1985) 2 NWLR (pt 6) 211; Abu v. Molokwu (2003) 11 FR p. 223, R. 10. 11; Ezennah v. Atta (2004) 17 NSCQR p. 615, R. 14 - 15; Olanrewaju v. Afribank (2001) 7 NSCQR p. 22, R. 2; PAN v. First (2000) 1 SCNQR p. 65, R.9; Ezemba v. Ibaneme (2004) 19 NSCQR p. 352, R.20; Jolayemi v. Olaoye (2004) 18 NSCQR (pt 11) p. 682 R 1 - 2; Amina C.B. & anr v. Olu (2003) 3 FR p.220, R.5; Gabari v. Ilorin & ors (2003) 11 FR p.44, R.5; Tinubu v. I.M.B.S. (2001) 8 NSCQR p. 1, R. 2; Total Plc v. Ajayi (2003) 12 FR p.174 R. 7-8; A. G. Fed. V. A.I.C. Ltd (2000) 2 SCNQR (pt 11) p. 1112, R. 1-3; A.G. Ekiti v. Daramola (2003) 14 NSCQR (pt 1) 549, R.8; Fagunwa v. Adibi (2004) 19 NSCQR p. 415, R.12.

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EVIDENCE ACT

An Act to provide for the law of evidence to be applied in all judicial proceedings in or before courts in Nigeria.

Commencement: [1st June, 1945]

PART I. — PRELIMINARY

Short title and Interpretation

L.N. 47 of 1955

1. Short title and application.

(1) This Act may be cited as the Evidence Act.

(2) This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but it shall not apply -

(a) to proceedings before an arbitrator; or

(b) to a field general court martial; or 1991 No. 61

(c) to judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless the President, or the Governor of a State, by order published in the Gazette, confers upon any or all Sharia Courts of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory, Abuja or a State, as the case may be, power to enforce any or all the provisions of this Act.

(3) In judicial proceedings in any criminal cause or matter in or before an Area Court, the Court shall be guided by the provisions of this Act and in accordance with the provisions of the Criminal Procedure Code Law.

(4) Notwithstanding anything in this section, an Area Court shall, in judicial proceedings in any criminal cause or matter, be bound by the provisions of sections 138, 139, 140, 141, 142 and 143 of this Act.

2. Interpretation.

In this Act, except as the context otherwise requires - Cap 143 "bank" and "banker" means any person, persons, partnership or company carrying on the business of bankers and also include any savings bank established

under the Federal Savings Bank Act, and also any banking company incorporated under any charter 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; "custom" is a rule which, in a particular district, has, from long usage, obtained the force of 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; Cap 18 "proceedings" includes arbitrations under the Arbitration and Conciliation Act, and "court" shall be construed accordingly; "statement" includes any representation of fact, whether made in words or otherwise; "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.

3. **Relation of relevant facts.**
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.

4. **Presumptions.**

(1) 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.

(2) 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.

(3) 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.

5. **Savings as to certain evidence.**
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 been passed.

PART II. — RELEVANCY
Relevance of Facts

6. Evidence may be given of facts in issue and relevant facts.
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.

7. Relevancy of facts forming part of same transaction

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.

8. Facts which are the occasion, cause or effect of facts in issue.

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.

9. Motive, preparation and previous or subsequent conduct

(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.

(3) The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; 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.

10. Facts necessary to explain or introduce relevant facts.

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 the purpose.

11. Things said or done by conspirator in reference to common intention.

(1) Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or 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, for the purpose of proving the existence of the conspiracy as well 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 facie grounds for believing in the existence of the conspiracy to which they relate.

12. **When facts not otherwise relevant become relevant. 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 nonexistence of any fact in issue or relevant fact probable or improbable.

13. **Certain facts relevant in proceedings for damages.** 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.

14. **What customs admissible**

(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.

(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.

(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.

15. Relevant facts as to how matter alleged to be custom understood 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.

16. *Facts showing existence of state of mind, or of body, or* bodily feeling.

(1) Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill 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.

17. Facts bearing on question whether act was accidental or intentional 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

Admissions

19. "admission" defined.
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.

20. Admissions by party to proceeding or his agent;

(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 proceedings, 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.

21. Admissions by persons whose position must be proved as against party to suit, 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.

22. Admissions by persons expressly referred to by party to suit.

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.

22. Admissions by persons expressly referred to by party to suit.
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.

23. Proof of admissions against persons making them, and by or on their behalf.
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 of this Act;

(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.

24. When oral admissions as to contents of documents are relevant.

Part V.

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 of this Act, or unless the genuineness of a document produced is in question.

25. Admissions in civil cases when relevant.
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 170 of this Act.

26. Admissions not conclusive proof, but may estop.
Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions of Part VIII of this Act.

Confessions

27. Definition of "confession"
(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.

28. Confession caused by inducement, threat or promise when irrelevant in criminal proceedings.
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.

29. Facts discovered in consequence of information given by accused. 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.

30. Confession made after removal of duress, relevant.
If such a confession as is referred to in section 28 of this Act 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.

31. Confession otherwise relevant not to become irrelevant because of promise of secrecy. 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

32. Evidence in other proceedings amounting to a confession is admissible.
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

33. Cases in which statement of relevant fact by person who is dead is relevant: dying declaration;

(1) Statements, written or verbal, or 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 acknowledgement 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 controversy 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.

(2) The conditions above referred to are as follows –

(a) 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;

(b) 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 –

(i) Cap 103
LFN 1958 Edition

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

(ii) 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 (b) of this subsection, is deemed relevant to the question of the identity of the parents of the petitioner;

(c) 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.

(3)(a) the declarations of a deceased testator as to his testamentary intentions, and as to the contents of his will, are deemed to be relevant –

(i) when his will has been lost, and when there is a question as to what were its contents, or

(ii) when the question is whether an existing will is genuine or was improperly obtained, or

(b) it is immaterial whether the declarations were made before or after the making or loss of the will.

34. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

(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 of the Federation or of a State 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 Federal 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.

35. When statement may be used in evidence.

Cap 81

A statement in accordance with the provisions of sections 290 and 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.

36. Admission of written statements of investigating police officers in certain cases.
Notwithstanding the provisions of this Act or of any other law but subject as herein provided, where in the course of any criminal trial, the court is satisfied that for any sufficient reason, the attendance of the investigating police officer cannot be procured, the written and signed statement of such officer may be admitted in evidence by the court if -

(a) the defence does not object to the statement being admitted; and

(b) the court consents to the admission of the statement.

37. Statement of accused at preliminary investigation.
Any statements 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

38. Entries in books of account, when relevant.
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.

39. Relevancy of entry in public records made in performance of duty.

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.

40. Relevancy of statements in maps, charts and plans.
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.

41. Relevancy of statement as to fact of public nature contained in certain Acts or notifications.
Order 47 of 1951. L.N. 112 of 1964
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 the National Assembly or any legislation of the United Kingdom still applicable to Nigeria or in any proclamation or speech, or in any statement made in a Government or public notice appearing in the Federal Gazette or in a State notice or a State public notice appearing in a State 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

42. Certificates of specified Government officers to be sufficient evidence in all criminal cases.
52 of 1958. L.N. 41 of 1934.
(1) (a) 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 or any other chemist so specified by the Government Chemist of the Federation or of the State, any pathologist or entomologist specified by the Director of Medical Laboratories of the Federation or of the State, or any Accountant specified by the

Accountant-General of the Federation or of the state (whether any such officer is by that or any other title in the service of a State or of the Federal Government), 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.

Certificates of Central Bank officers as evidence in criminal cases.

(b) Where a certificate purports to be signed by an officer of the Central Bank of Nigeria who himself adds after his signature the words "duly authorised by the Governor of the Central Bank of Nigeria for the purposes of section 42 of the Evidence Act" it shall be accepted by all courts and persons as sufficient evidence of the facts stated in the certificate, and no certificate shall be questioned on the ground only of the authorisation; but subject thereto, the proviso to paragraph (a) of subsection (1) of this section shall have effect with regard to any such certificate.

(2) Notwithstanding the provisions of subsection (1) of this section, any certificate issued and produced by any officer in charge of any laboratory established by the appropriate authority may be taken as sufficient evidence of 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 interest of justice so requires.

(3) In this section, unless the context otherwise requires - "appropriate authority" means the Inspector-General of Police, the Comptroller-General of Customs or the

Minister of Health; "officer" means any officer-in-charge of any laboratory established pursuant to this Act; "specified" means specified by notice as may be published in the Federal Gazette.

1955 No.21
1958 No. 52

(4) The President 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 science laboratory in a rank not below that of Medical Laboratory Technologist, shall for the purposes of subsection (1) of this section 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) of this section 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.

43. Service of certificates on other party before h hearing.
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 terms as may seem proper.

44. Genuineness of certificate to be presumed.
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

45. Family or communal tradition in land cases.
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.

46. Acts of possession and enjoyment of land.

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.

47. Evidence of scienter upon charge of receiving stolen property.

(1) 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 was convicted of any offence involving fraud or dishonesty.

(2) This last mentioned fact may not be proved unless –

(a) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given; and

(b) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession*2

How much of a Statement is to be Proved

48. What evidence is to be given when statement forms part of a conversation, document, book or series of letters or papers.

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

49. Previous judgments relevant to bar a second suit or trial. The existence of any judgment, order or decree which by law prevents any court from taking cognisance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognisance of such suit or to hold such trial.

50. Relevancy of certain judgments in certain jurisdiction.

(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 persons 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.

51. Relevancy and effect of judgments other than those mentioned in section 50. Judgments, orders or decrees other than those mentioned in section 50 of this Act 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.

52. Judgment, etc. other than those mentioned in sections 49 to 51 when relevant.
Judgments, orders or decrees, other than those mentioned in section 49, 50 and 51 of this Act, 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.

53. Fraud or collusion in obtaining judgment, or nonjurisdiction of court, may be proved.
Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 49, 50 or 51 of this Act and which has been proved by the adverse party, was delivered by a court without jurisdiction, or was obtained by fraud or collusion.

54. Judgment conclusive of facts forming ground of judgment.
Every judgement 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.

55. Effect of judgment not pleaded as estoppel.

(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 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.

56. Judgment conclusive in favour of Judge.
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 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

57. Opinions of experts.

(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.

(2) Such persons are called "experts".

58. Opinions as to foreign law.

(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*.

59. Opinions as to native law and custom.

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.

60. Facts bearing upon opinions of experts.

Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

61. Opinion as to handwriting, when relevant.

(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 ha*3ve been habitually submitted to him.

62. Opinion as to existence of "general custom or right" when relevant.

(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.

63. Opinions as to usages, tenets, when relevant 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.

64. Opinion on relationship, when relevant.

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.

65. Grounds of opinion, when relevant.
Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

66. Opinions generally irrelevant
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 57 to 65 of this Act.

Character, when Relevant

67. In civil cases, character to prove conduct imputed irrelevant.
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.

68. In criminal cases, previous good character relevant.
In criminal proceedings the fact that the person accused is of a good character is relevant.

69. Evidence of character of the accused in criminal proceedings.

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

(2) The fact than 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 160 of this Act.

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

70. Character as affecting damages.
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.

71. In libel and slander notice must be given of evidence of character.

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.

72. Meaning of word "character".
In sections 67 to 71 of this Act the word "character" means reputations 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

73. Fact judicially noticeable need not be proved.
No fact of which the *5court must take judicial notice need be proved.

74. Facts of which court must take judicial notice.
(1) The court shall take judicial notice of the following facts -
(a) Order 47 of 1951 L.N. 112 of 1964 L.N. 47 of 1955
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 Act passed or hereafter to be passed by the National Assembly and all subsidiary legislation made thereunder, and all local and personal Acts directed by the National Assembly to be judicially noticed;
(c) the course of proceeding of the National Assembly and of the Houses of Assembly of the States 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 the National Assembly 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, the public festivals, fasts and holidays notified in the Federal Gazette or fixed by Act;

(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 of Nigeria 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, the Supreme Court of Nigeria or the Court of Appeal or by the High Court of the State or of the Federal Capital Territory, Abuja or by the Federal High Court 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 a State and of the Federal Capital Territory, Abuja and in the Federal High Court.

(2) In all cases in subsection (1) of this section 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.

75. Facts admitted need not be proved.

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

76. Proof of fact by oral evidence.
All facts, except the contents of documents, may be proved by oral evidence.

77. Oral evidence must be direct.
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 of 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 and 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

78. Court may order proof by affidavit.
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.

79. Affidavits to be filed.
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.

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80. Before whom sworn.
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.

81. Sworn in foreign parts.
Any affidavit sworn in any foreign parts out of Nigeria or out of any part of the Commonwealth 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.

82. Proof of seal and signature.
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.

83. Affidavit not to be sworn before certain persons.
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.

84. Defective in form.
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.

85. Amendment and re-swearing.
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.

86. Contents of affidavits.
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.

87. No extraneous matter.
An affidavit shall not contain extraneous matter, by way of objection, or prayer, or legal argument or conclusion.

88. Grounds of belief to be stated.
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.

89. Informant to be named.
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.

90. Provisions in taking affidavits;
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 inthe 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 and the person taking the declaration shall record in the attestation the reason of such declaration being taken without oath.

Admissibility of Documentary Evidence

91. Admissibility of documentary evidence as to fact in issue. 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 (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 those matters; and

(b) if the maker of the statement is called as 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) of this section 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.

92. Weight to be attached to evidence.

(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

93. Proof of contents of documents.

The contents of documents may be proved either by primary or by secondary evidence.

94. Primary evidence.

(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.

95. **Secondary evidence**

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.

96. Proof of documents by primary evidence.

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

97. Cases in which secondary evidence relating to documents may be given.

(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 98 of this Act, 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 109 of this Act;

(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) of this section 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 the that 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.

98. Rules as to notice to produce.

Secondary evidence of the contents of the documents referred to in paragraph (a) of subsection (1) of section 97 of this Act, 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.

99. Proof that bank is incorporated under law.

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The fact of any bank having duly made a return to the Board of Inland Revenue in Nigeria 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 Board of Inland Revenue; the fact that any savings bank is established under the Federal Savings Bank Act, may be proved by a certificate purporting to be under the hand of the Managing Director 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

100. Proof of signature and handwriting of person alleged to have signed or written document produced.

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.

101. Identification of person signing a document.

(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.

102. Evidence of sealing and delivery of a document.

(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.

103. Proof of instrument to validity of which attestation is necessary.

(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.

104. Admission of execution by party to attested document.
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.

105. Cases in which proof of execution or of handwriting unnecessary.

(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 97 and 123 of this Act.

106. Proof when attesting witness denies the execution.
If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

107. Proof of document not required by law to be attested.
An attested document not required by law to be attested may be proved as if it was unattested.

108. Comparison of signature, writing, seal or finger impressions with others admitted or proved.

(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

109. Public documents.
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.

110. Private documents.
All documents other than public documents are private documents.

111. Certified copies of public documents.

(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.

112. Proof of documents by production of certified copies. 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.

113. Proof of other official documents.

Order 47 of 1951 L.N. 112 of 1964. L.N 131 of 1954. 120 of 1957 L.N. 112 of 1964 (7Edw. 7, c. 16.) The following public documents may be proved as follows –

(a) Acts of the National Assembly or Laws of a State legislature, proclamations, treaties or other acts of State, orders, notifications, nominations, appointments and other official communications of the Government of Nigeria or of any State thereof or of any Local Government –

(i) which appear in the Federal Gazette or the Gazette of a State, 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 State 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 Senate or of the House of Representatives - 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 State House of Assembly - 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 thereof 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 printed by the Queen's Printer;

(f) L.N. 112 of 1964 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 foreign country;

(i) L.N. 112 of 1964 any judgement, 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 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

114. Presumption as to genuineness of certified copies.

(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.

115. Presumption as to documents produced as record of evidence. 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 –

(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.

Order 47 of 1951. L.N. 112 of 1964.

116. Presumption as to gazettes, newspapers, private Acts of the National Assembly and other documents.

The court shall presume the genuineness of every document purporting to be the official Gazette of Nigeria or of a State or the Gazette of any part of the Commonwealth or to be a newspaper or journal, or to be a copy of the resolutions of the National Assembly printed by the Government Printer, 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.

L.N. 112 of 1964.

117. Presumption as to document admissible in United Kingdom without proof of seal or signature.

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 United Kingdom.

118. Presumption as to powers of attorney.
L.N. 112 of 1964.
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 the President, was so executed and authenticated.

119. Presumption as to public maps and charts.

(1) All maps or charts made under the authority of any Government, or of any public municipal 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 authority which made the originals shall be admissible in evidence without further proof.

120. Presumption as to books.
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.

121. Presumption as to telegraphic messages.
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.

122. Presumption as to due execution of documents not produced.

The court shall presume that every document, called for and not produced after notice to produce given under section 98 of this Act, was attested, stamped and executed in the manner required by law.

123. Presumption as to documents twenty years old.
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.

124. Meaning of expression "proper custody".
Documents are said to be in proper custody within the meaning of sections 116 to 123 of this Act 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.

125. Presumption as to date of document.
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 or er 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.

126. Presumption as to stamp of a document.
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.

127. Presumption as to sealing and delivery.

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.

128. Presumption as to alterations.

(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.

129. Presumption as to age of parties to a document.

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.

130. Presumption as to statements in documents twenty years old.
Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of the National Assembly, 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.

131. Presumptions as to deeds of corporations.
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

132. Evidence of terms of judgments, contracts, grants and other disposition of property reduced to a documentary form.

(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 document, or of any part of it, or which would entitle any person to any judgement, 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.

133. Evidence as to the interpretation of documents.

(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 identifies 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 documents 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 and 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 part 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.

134. Application of this Part.

(1) Sections 132 and 133 of this Act 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

135. Burden of proof.

(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.

136. On whom burden of proof lies.
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.

137. Burden of proof in civil cases.

(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.

138. **Burden of proof beyond reasonable doubt.**

(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 had been guilty of a crime or wrongful act is, subject to the provisions of section 141 of this Act, 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

139. Burden of proof as to particular fact.
The burden of proof as to any particular fact lies on the 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.

140. Burden of proving fact to be proved to make evidence admissible.

(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.

141. **Burden of proof in criminal cases.**
L.N. 46 of 1945.

(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 of this Act 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 138, 142 of this Act 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 acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused in charged; or

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (2) of this section do not exist; or

(c) affect the burden placed on an accused person to prove a defence of intoxication or insanity.

142. Proof of facts especially within knowledge When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

143. Exceptions need not be proved by prosecution.
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.

144. Presumption of death from seven years' absence and other facts.

(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.

145. Burden of proof as to relationship in the cases of partners, landlord and tenant, principal and agent.
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.

146. Burden of proof as to ownership.
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.

147. Proof of good faith in transaction where one party is in relation of active confidence.

Where there is 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.

148. Presumption of legitimacy.

Cap. 217

Without prejudice to section 84 of the Matrimonial Causes Act, where a person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after dissolution, the mother remaining unmarried, the court, shall presume that the person in question is the legitimate son of that man.

149. Court may presume existence of certain facts.

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.

150. Presumptions of regularity and of deeds to complete title.

(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 entitled 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.

Cap. 60

(4) When a minute is produced purporting to be signed by the chairman of a company incorporated under the Companies and Allied Matters 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

151. Estoppel.

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.

152. Estoppel of tenant; and of licensee of person in possession.

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.

153. Estoppel of bailee, agent and licensee.

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.

154. Estoppel of person signing bill of lading.

Every bill of lading in the hands of a consignee or endorse 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

155. Who may testify.

(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.

156. Dumb witnesses.

(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.

157. Case in which banker not compellable to produce books.
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 the manner provided in section 97 of this Act 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.

158. Parties to civil suit, and their wives or husband.
Subject to the proviso contained in section 148 of this Act, in all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.

159. Competency in criminal cases.
Subject to the provisions of this Part of this Act, 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.

160. Competency of person charged to give evidence.
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 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 he 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.

161. Evidence by husband or wife: when compellable;
(1) When a person is charged -
(a) Cap. 78 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.

162. Communications during Islamic marriage privileged.
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 Islamic 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

163. Evidence by spouse as to adultery.

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 or adultery, unless he or she has already given evidence in the same proceeding in disproof of the alleged adultery.

Communications during Marriage

164. Communications during marriage.

No husband or wife shall be compelled to disclose any communication 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 person's 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 161 of this Act.

Official and Privileged Communications

165. Judges and magistrates.

L.N. 47 of 1955

No judge and, except upon the special order of the High Court of the State, or of the Federal Capital Territory, Abuja or the Federal High Court, 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.

166. Information as to commission of offences.

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.

167. Evidence as to affairs of State.
L.N. 131 of 1954.
Subject to any directions of the President in any particular case, or of the Governor where the records are in the custody of a State, no one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived 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.

168. Official communications.
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.

169. Communications between jurors.
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.

170. Professional communication
(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 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.

171. Sections 170 to apply to interpreters and clerks.
The provisions of section 170 of this Act shall apply to interpreters, and the clerks and agents of legal practitioners.

172. Privilege not waived by volunteering evidence.
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 170 of this Act, 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, h would not be at liberty to disclose.

173. Confidential communication with legal advisers.
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.

174. Production of title-deeds of witness not a party.
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 of which might tend to incriminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

175. Production of documents which another person could refuse to produce. 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.

L.N. 46 of 1945.

176. Witness not to be compelled to incriminate himself.

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 160 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 person;

(c) Cap 81 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 State, under Part 49 of the Criminal Procedure Act, from answering any question required to be answered under the provisions of section 458 of that Act.

Corroboration

177. In actions for breach of promise.

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; and the fact that the defendant did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration.

178. Accomplice

(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.

179. Number of witnesses.

(1) Except as provided in this section, no particular number of witnesses shall in any case be required for the proof of any fact.

Treason and treasonable offences.

Cap 78

(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 President, or a direct attempt to endanger the life or injure the person of the President.

Evidence on charge of perjury.

(3) A person shall not be convicted of committing perjury or of counseling 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 corroborated such witness.

Exceeding speed limit

(4) A person charged under the Road Traffic Law of a State 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.
Cap 78

(4) A person shall not be convicted of the offence 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

180. Oral evidence to be on oath or affirmation.
Cap 377 ..
Save as otherwise provided in sections 182 and 183 of this Act all oral evidence given in any proceedings must be given upon oath or affirmation administered in accordance with the provisions of the Oaths Act.

181. Absence of religious belief does not invalidate oath.
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.

182. Cases in which evidence not given upon oath may be received.

(1) Any court may on any occasion, if it thinks it just and expedient, 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.

183. Unsworn evidence of child.

(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) of this section, 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.

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(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.

184. Evidence of first and second class chiefs.

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 so 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.

The Examination of Witnesses

185. Order of production and examination of witnesses.
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.

186. Judge to decide as to admissibility of evidence.

(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.

187. Ordering witnesses out of court.

(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.

188. Examination-in-chief.

(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.

189. Order of examination.

(1) Witnesses shall be first examined-in-chief, then, if any other party so desires, crossexamined, then, if the party calling him so desires, re-examined.

(2) The examination and cross-examination must relate to relevant facts, but the crossexamination 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 crossexamination; and, if new matter is, by permission of the court, introduced in reexamination, the adverse party may further cross-examine upon that matter.

190. Cross-examination by co-accused of prosecution witness.
In criminal proceedings where more than one accused are 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.

191. Cross-examination by co-accused of witness called by an accused.
Where more than one accused are 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.

192. Production of documents without giving evidence.
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 causes such document to be produced in court the court may dispense with his personal attendance.

193. Cross-examination of person called to produce a document.
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.

194. Witnesses to character.
Witnesses to character may be cross-examined and re-examined.

195. Leading questions.
Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

196. When they must not be asked.

(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.

197. When they may be asked.
Leading questions may be asked in cross-examination.

198. Evidence as to matters in writing.

(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.

199. Cross-examination as to previous statements in writing.
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, called to those parts of it which are to be used for the purpose of contradicting him.

200. Questions lawful in cross-examination.
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 a criminal offence and being a witness may be crossexamined to the effect, and under the circumstances, described in paragraph (d) of the proviso to section 160 of this Act.

201. Court to decide whether question shall be asked and when witness compelled to answer.

(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 courts 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.

202. Question not to be asked without reasonable grounds.
No such question as is referred to in section 201 of this Act ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

L.N. 131 of 1964

203. Procedure of court in case of question being asked without reasonable grounds.
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.

204. Indecent and scandalous questions.
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.

205. Questions intended to insult or annoy.
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.

206. Exclusion of evidence to contradict answers to questions testing veracity.

Cap 78

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.

207. How far a party may discredit his own witness.
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.

208. Proof of contradictory statement of hostile witness.
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.

209. Cross-examination as to previous statements in writing.
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.

210. Impeaching credit of witness.

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.

211. Cross-examination of prosecutrix in certain cases.

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 and 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.

212. Evidence of witness impeaching credit.

Cap 78

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.

213. Questions tending to corroborate evidence of relevant fact, admissible.

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.

214. Former statements of witness may be proved to corroborate later testimony as to same fact.
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.

215. What matters may be proved in connection with proved statement relevant under section 33 or 34.
Whenever any statement relevant under section 33 or 34 of this Act 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.

216. Refreshing memory.

(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 the 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.

(3) An expert may refresh his memory by reference to professional treatises.

217. Testimony to fact stated in document mentioned in section 216.
A witness may also testify to facts mentioned in any such document as is mentioned in section 216, although he has no specific recollection of the facts themselves, if he is

sure that the facts were correctly recorded in the document.

218. Right of adverse party as to writing used to refresh memory.

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.

219. Production of documents.

(1) A witness, subject to the provisions of section 220 of this Act, 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 and 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.

Cap. 78

(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.

220. Exclusion of evidence on grounds of public interest.

L.N. 131 of 1954. L.N. 20 of 1957.

(1) The Minister, or in respect of matters to which the executive authority of a State extends, the Governor or any person nominated by him, may in any proceedings object to the production of documents or request the exclusion of oral evidence, when, after consideration, he is satisfied that the production of such document or the giving of such oral evidence is against public interest; and 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.

L.N. 131 of 1954
L.N. 120 of 1957

(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 or be informed as to the nature of such oral evidence but shall give effect to such affidavit or certificate.

221. Giving as evidence of document called for and produced on notice.
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.

222. Using, as evidence, of document production of which was refused on notice.
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.

223. Judge's power to put questions or order production.
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 162 to 176 of this Act, 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 201 or 202 of this Act, nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

224. Power of jury or assessors to put questions.
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

225. Proof of previous conviction.
(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 customary 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 Comptroller - General 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.
L.N. 46 of 1945 (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 subsection 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.

L.N. 6 of 1955

226. Additional mode of proof in criminal proceedings of previous conviction.

Cap. 44

(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) 1959 No. 30 purporting to be signed by or on ehalf 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 ave 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.

L.N. 6 of 1955

(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.

L.N. 6 of 1955

(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

227. Wrongful admission or exclusion of evidence.

(1) The wrongful admission of evidence shall not of it self 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.

(3) In this section the term "decision" includes a judgment, order, finding or verdict.

PART XIII. — SERVICE AND EXECUTION THROUGHOUT NIGERIA OF PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES BEFORE COURTS OF THE STATES AND THE FEDERAL CAPITAL TERRITORY, ABUJA AND THE FEDERAL HIGH COURT

228. Interpretation

In this Part - "court" means a High Court or a magistrate's court.

L.N.47 of 1955

229. Subpoena or witness summons may be served in another State.

(1) When a subpoena or summons has been issued by any court in any State or in the Federal Capital Territory, Abuja or by the Federal High Court 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 State or Federal Capital Territory, Abuja.

L.N. 47 of 1955

(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 summon had been served in the State or Federal Capital Territory, Abuja in which it was issued.

Cap. 81

(3) Such warrant may be executed in such other State or the Federal Capital Territory, Abuja in the manner provided in Chapter 12 of the Criminal Procedure Act in the case of warrants issued for the apprehension of persons charged with an offence.

230. Orders for production of prisoners.

L.N. 47 of 1955

(1) Where it appears to any court of a State or Federal Capital Territory, Abuja that the attendance before the court of a person who is undergoing sentence in any State or Federal Capital Territory, Abuja 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 State or the Federal Capital Territory, Abuja, 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.

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