

## What Is Innovative in the Evidence Act, 2011?

Z. ADANGOR, PhD, B.L, ACI Arb

Senior Lecturer, Department of Public Law, Rivers State University of Science and Technology, Port Harcourt  
Nigeria

### INTRODUCTION

The Nigerian Law of Evidence is essentially statutory and this has been so since the Evidence Act 1943 was passed into law in what was then known as the Colony and Protectorate of Nigeria. The Evidence Act 1943 which came into force on 1<sup>st</sup> June, 1945 became the first legislation governing matters of evidence in judicial proceedings before courts in the country, thus providing the primary source of the law of evidence. The role of the courts has been largely interpretative and through numerous decisions, the courts have defined the intendment, applicability and ambit of specific provisions of the Act. Some of the decisions have also alluded to lacunae in the legislation which had been remedied by resort to the common law rules of evidence which constituted subsidiary source of our law of evidence.<sup>1</sup>

It is interesting to note that the Evidence Act 1943 remained in force for about sixty-six (66) years and did not, at least prior to 2011, undergo any major amendment besides its republication in the different editions of the Laws of the Federation of Nigeria.<sup>2</sup> Given that the Nigerian society is not static, it is very arguable that a legislation that had remained in force for that long would invariably have had some disconnect with the realities of modern day judicial proceedings and the need to ensure even-handed dispensation of justice by our courts. This is to be expected given the tremendous advancements made in information communication technology across the world including Nigeria.

Unarguably, if any piece of legislation is to remain useful, it must as far as is reasonably practicable be responsive to the needs and challenges facing the society that it is designed to serve. Thus, it could be said that the repeal of the old Evidence Act, Cap E14 Laws of the Federation of Nigeria 2004 (hereinafter referred to simply as “Evidence Act, cap E.14”) and the enactment of the Evidence Act, 2011 expressed the determination of the National Assembly to enact a new evidence law that would address the shortcomings identified in the old law and thereby bring the law in line with the realities of the new information age.

In other words, there is always a presumption that the legislature does nothing in vain and that whenever it enacts a new law to repeal or amend an existing law, such alterations in the new law are directed against defects which have been noticed in the existing law about the time the new law was passed.<sup>3</sup> Thus, it is reasonable to expect that the Evidence Act, 2011 which repeals the Evidence Act Cap E14 LFN 2004 has addressed some of the defects identified in the old legislation through the introduction of some innovative provisions and/or the adaptation of some of the provisions contained in the repealed Act.

The purpose of this article is primarily to identify and examine the innovative provisions contained in the Evidence Act, 2011 and define the advancement made in the law by the National Assembly. However, since no piece of legislation can lay claim to absolute perfection, this article also intends to examine briefly the defects identified in the Evidence Act, 2011 with a view to drawing attention to possible areas of reform in the near future.

This paper is divided into five sections. The introductory part addresses the background to the study. In section two, a brief sketch of the legislative development of the law of evidence in Nigeria from the pre-1945 to the post- 1945 era is provided to emphasize the fact that Nigeria operates a code of evidence and that decisions of our courts constitutes only but a secondary source of our evidence law. In section three, the paper discusses the innovative provisions contained in the Evidence Act, 2011 vis-à-vis the repealed Act. It is argued that the Evidence Act, 2011 represents an improvement in many respects on the repealed Act to the extent that it addresses some of the challenges being faced during trials in our courts, particularly in the area of electronically generated evidence. The lacunae in the Act are examined briefly in the fourth section of the paper while the concluding remarks are contained in fifth section.

<sup>1</sup> *Rex v. Onitiri* [1946-1949] 12 WACA 58, where the court admitted in evidence the expert opinion of a Police officer on the authorship of a typescript by reference to the English common law because s. 56 of the Evidence Act Cap 62 did not deal specifically with the matter; similarly in *Queen v. Itule* [1961] 1 ANLR 481 @ 485, a confessional statement which had both inculpatory and exculpatory contents was admitted in evidence by reference to the common law since s. 27 of the Evidence Act did not deal explicitly with the subject-matter.

<sup>2</sup> The two amendments prior to 2011 were introduced by the Evidence (Amendment) Act 1977 and the Evidence (Amendment) Decree 1991; the Act was first published as Cap 62 in the 1958 Edition of the Laws of the Federation of Nigeria and Lagos and later as Cap 112 in the 1990 Edition of the Laws of the Federation of Nigeria and as Cap E 14 in the 2004 Edition of the Laws of the Federation of Nigeria.

<sup>3</sup> *Ado v. Dije* [1984] 5 N. C. L. R. 260 @ 272.

## DEVELOPMENT OF NIGERIAN EVIDENCE LAW

The main or primary source of Nigerian Law of Evidence is the Evidence Act, 2011 which came into force on 3<sup>rd</sup> day of June, 2011.<sup>1</sup> Prior to 1945, there was no single local legislation on the law of evidence to be applied in judicial proceedings in or before courts established by the British colonial government in Nigeria such as the Magistrates' Courts and High Courts.<sup>2</sup> The law of evidence applicable in the Magistrates' Courts and the High Courts (then known as Supreme Court) was the English common law rules of evidence which were received in Nigeria as part of the common law of England. The statutory authority for the application of the English common law relating to evidence in those courts at least as at 1914, was s.10 of the Provincial Courts Ordinance, 1914 which provided that subject to the terms of that or other ordinances, the common law of England shall as far as applicable be in force in what was then known as the Colony and Protectorate of Nigeria.<sup>3</sup> Section 10 of the Provincial Courts' Ordinance was repealed but subsequently re-enacted as s.12 of the Protectorates' Courts Ordinance 1943<sup>4</sup> which provided for the application of the common law of England in the Protectorates' Courts. Similar provisions for the application of the common law of England were also contained in s.14 of the Supreme Court Ordinance, 1943<sup>5</sup>, and s.30 of the Magistrates' Court Ordinance, 1943.<sup>6</sup>

However, in 1943 the Evidence Ordinance, 1943<sup>7</sup> was enacted for the whole Colony and Protectorate of Nigeria but the Ordinance did not come into force until 1<sup>st</sup> June, 1945.<sup>8</sup> The Evidence Ordinance, 1943 was based largely on the seminal work authored by Sir James Fitzjames Stephen titled: *A Digest of the Law of Evidence*.<sup>9</sup> Arguably, the Digest of the Law of Evidence, itself was a bold attempt made by Sir James Stephen following his commission in 1872 by Lord Coleridge (then Attorney-General of England) to draw up a code of evidence law for England. The English Code of Evidence was "drawn on the model of the Indian Evidence Act, and contained a complete system of law upon the subject of evidence."<sup>10</sup> It is submitted that since the Evidence Ordinance, 1943 was based on Sir Stephen's Digest of the Law of Evidence which itself, was a codification of the common law relating to evidence, it follows invariably that the Evidence Ordinance, 1943 was to a large extent a transplant of the English common law relating to evidence.<sup>11</sup>

In 1958, the Evidence Ordinance, 1943 was incorporated in the Laws of the Federation of Nigeria and Lagos, 1958 as Evidence Act, Cap 62, Laws of the Federation of Nigeria and Lagos 1958. In 1990, a new edition of the Laws of the Federation of Nigeria and Lagos was published as the Laws of the Federation of Nigeria (LFN), 1990.<sup>12</sup> The Evidence Act was published in this new edition of the Laws of the Federation of Nigeria as the Evidence Act, Cap 112 Laws of the Federation of Nigeria, 1990.<sup>13</sup> Following the coming into force of the 1990 edition of the Laws of the Federation of Nigeria, the Evidence Act Cap 62 Laws of the Federation of Nigeria and Lagos 1958 ceased to have the force of law in Nigeria with effect from 31<sup>st</sup> day of January, 1990. Thus, with effect from that date, the Evidence Act Cap 112, L.F.N. 1990 came into force throughout the Federal Republic of Nigeria.<sup>14</sup>

The Evidence Amendment Decree, 1991<sup>15</sup> was promulgated by the Federal Military Government to amend the Evidence Act, Cap 112 L.F.N. 1990 by excluding in civil causes or matters and limiting in criminal

<sup>1</sup> Act No. 18 of 2011.

<sup>2</sup> However, the Native Courts (later renamed Customary Courts) in Southern Nigeria and the Islamic Courts in Northern Nigeria which administered justice according to customary laws and Islamic law respectively applied rules of evidence indigenous to the local communities.

<sup>3</sup> See *Attorney-General, Federation v. Attorney-General, Abia State (No.2)* [2002] 6 NWLR (Pt.764) 542 @ 647.

<sup>4</sup> No.45 of 1943.

<sup>5</sup> No.23 of 1943.

<sup>6</sup> No.24 of 1943.

<sup>7</sup> No.27 of 1943.

<sup>8</sup> See *Yero v. Union Bank of Nigeria Ltd.* [2000]5 NWLR (Pt.764) 542 @ 647.

<sup>9</sup> (Sixth edition Macmillan and Co., Limited, New York 1904).

<sup>10</sup> Sir James Stephen (op cit) vii; various attempts made by Lord Coleridge to introduce the code by way of a Bill in Parliament in the Session of 1873 was unsuccessful with the result that the Bill was never made public; See generally Niki Tobi V. R. "A critique of the Law of Evidence" in Ogbuigwe, A. E., & Uchegbu, A., (eds.) *Essays in Honour of Nabo-Graham Douglas* (1992)92; T. A. Aguda, *The Law of Evidence* (4<sup>th</sup> edn., Spectrum Books Limited, Ibadan 1999) 3-4.

<sup>11</sup> Many provisions of the Evidence Act, 2011 are couched in identical terms with the articles in the Code of Evidence Law for England contained in Stephen's Digest of the Law of Evidence; for example articles 2, 4, 6, 7, 8, 9, 12, 13, and 14 in the Digest correspond with sections 1, 8, 18(3), 6(1), 6(4), 7, 12, 13, and 37 in the Evidence Act, 2011.

<sup>12</sup> The Revised Edition (Laws of the Federation of Nigeria) Act, No. 21 of 1990.

<sup>13</sup> In *Yero v. Union Bank of Nigeria Ltd.* (supra) at 476 the Court held that it was inappropriate to cite the Evidence Act as Evidence Act, 1990 as the Act was not enacted in 1990 but merely republished held in the 1990 edition of the Laws of the Federation of Nigeria. It was further held that the correct citation was Evidence Act, CAP 112, and L.F.N. 1990.

<sup>14</sup> The Revised Edition (Laws of the Federation of Nigeria) Act 1990, s. 9 which defined "appointed day" to mean 31<sup>st</sup> day of January 1990.

<sup>15</sup> No. 61 of 1991.

causes or matters the application of the Evidence Act to proceedings before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless the President, Commander-in-Chief of the Armed Forces or the Military Governor or Military Administrator of a State by Order published in the Gazette conferred upon any or all the courts aforementioned, power to enforce any or all the provisions of the Act. These amendments necessitated the insertion of s. 1(2) (c), 1(3) and 1(4) to the original s. 1 of the Evidence Act Cap. 112.<sup>1</sup>

The Evidence Act, Cap 112 L.F.N. 1990 was basically a reproduction of the Evidence Act, Cap 62 Laws of the Federation of Nigeria and Lagos, 1958 except for few minor differences which may be summarized thus: First, s.35 (A) of the Evidence Act Cap 62 which was introduced by the Evidence (Amendment) Act, 1977<sup>2</sup> was inserted in the Evidence Act Cap 112 as a new substantive s. 36. This section made provision for the admissibility of written statements of absent Investigating Police Officers in criminal trials in certain circumstances. By the insertion of s.35 (A) of the Evidence Act Cap 62 as the new substantive s.36 in the Evidence Act Cap 112, the original s.36 in the Evidence Act Cap 62 was consequently re-numbered as s.37 in the Evidence Act Cap 112 and this renumbering affected all successive sections in the Evidence Act Cap 112. However sections 1-35 in the Evidence Act Cap 62 and sections 1-35 in the Evidence Act Cap 112 remained exactly the same.

Secondly, s. 230 of the Evidence Act Cap 62 which dealt with service of processes issued in Nigeria in Southern Cameroon was expunged from the Evidence Act Cap 112 with the effect that s.229 of the Evidence Act Cap 62 was renumbered as s.230 of the Evidence Act Cap 112.

Thirdly, two new sub-sections which were not contained in the Evidence Act Cap 62 were added to s.1 of the Evidence Act Cap 112 as s.1 (3) and (4) respectively by the Evidence Amendment Decree, 1991. The two sub-sections provided for the limited application of the Evidence Act to judicial proceedings in any criminal cause or matter before an Area court.

Following the publication of a new edition of the Laws of the Federation of Nigeria in August, 2004 the Evidence Act was published as Cap E.14, Laws of the Federation of Nigeria 2004.<sup>3</sup> The Evidence Act, Cap E.14 Laws of the Federation of Nigeria, 2004 was deemed to have come into force on 1<sup>st</sup> day of June, 1945, thus bringing to an end the operation and application of the Evidence Act Cap 112. To be sure, the Evidence Act cap E14 was a complete reproduction of the Evidence Act, cap 112.

With effect from the 3<sup>rd</sup> day of June, 2011, the Evidence Act cap E14 was repealed and replaced with the Evidence Act, 2011 which came into force throughout the federation of Nigeria.<sup>4</sup> According to its long title, the Evidence Act, 2011 is an “Act to repeal the Evidence Act Cap E.14, Laws of the Federation of Nigeria and enact a new Evidence Act which shall apply to all judicial proceedings in or before courts in Nigeria and for related matters.” Consistent with its long title, s.257 of the Evidence Act, 2011 expressly repeals the Evidence Act Cap E.14, Laws of the Federation of Nigeria 2004 which therefore ceased to have any force of law in the federation of Nigeria with effect from the 3<sup>rd</sup> day of June 2011. As the code of Nigerian law of evidence, the Evidence Act, 2011 contains a complete system of law upon the subject of evidence as applicable in judicial proceedings before courts in Nigeria subject to the exclusionary provisions contained in s. 256(1) (a), (c), (d), and (2) thereof.

Although the Evidence Act 2011 has been in force for over four years, it is not uncommon to see legal practitioners and even members of the bench cite the repealed Evidence Act, Cap E14 as the applicable code of evidence law in our courts.<sup>5</sup> This is very worrisome because one would have expected that the coming into force of the new Evidence Act, 2011 would have been widely publicized amongst members of the noble profession of law so as to make its introduction a notorious fact.

It is also important to observe here that there are different prints of the Evidence Act, 2011 in circulation with some laced with avoidable typographical errors. The unauthorized printing of laws enacted by the National Assembly leaves much to be desired and poses a serious danger to the legal profession.

### **INNOVATIVE PROVISIONS INTRODUCED IN THE EVIDENCE ACT, 2011**

An examination of the Evidence Act, 2011 *vis-a-vis* the Evidence Act Cap E14 shows that it is a considerable improvement on the repealed Evidence Act, Cap E14 because it contains a number of innovative provisions.

<sup>1</sup>It would appear that the omission of s.1(2)(c) in Cap 112 was a product of printing error because the sub-section was part of Cap 62 and Cap 112 was basically a mechanical reproduction of Cap 62.

<sup>2</sup>No.68 of 1977

<sup>3</sup>The Revised Edition (Laws of the Federation of Nigeria) Act, 2004.

<sup>4</sup>No. 18 of 2011, See s.259 on citation.

<sup>5</sup>For instance, in the judgment delivered by the Rivers State Governorship Election Petition Tribunal sitting in Abuja on 24/10/2015 in Petition No. EPT/RV/GOV/04/2015 (Hon. Dr. Dakuku Adol Peterside & Anor v. Independent National Electoral Commission (INEC) & Ors) (Unreported), the tribunal consistently cited provisions of the repealed Evidence Act, cap E14.

These innovative provisions in the Evidence Act, 2011 fall into two broad categories. The first category covers entirely new provisions which were not contained in the repealed Evidence Act at all while the second category deals with modification, expansion or adaptation of provisions contained in the repealed Act. The innovative provisions falling under both categories may be briefly highlighted as follows:

### HEARSAY EVIDENCE

Unlike the Evidence Act, cap E14 which did not contain any specific or explicit provision on the inadmissibility of hearsay evidence in judicial proceedings or even a reference to the term “hearsay evidence”, the Evidence Act, 2011 contains two substantive provisions dealing specifically with hearsay evidence.<sup>1</sup> Hearsay evidence is defined under s. 37 of the Evidence Act, 2011 as meaning any statement “oral or written made otherwise than by a witness in a proceeding; or contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.” The above definition which is a reproduction of Article 14 in Sir James F. Stephen’s Digest of the Law of Evidence has been widely adopted in law case on hearsay evidence.<sup>2</sup>

It is also interesting to note that unlike the position under the repealed Evidence Act wherein the exclusion of hearsay evidence in judicial proceeding was not explicitly stated, but rather inferred from the combined provisions of sections 77 and 91 of that Act,<sup>3</sup> section 38 of the Evidence Act, 2011 explicitly codifies the general rule of exclusion of hearsay evidence in all judicial proceedings to which the Act applies. Thus, by virtue of section 38 of the Evidence Act, “hearsay evidence is not admissible except as provided in this Part or by or under any other provision of this or any other Act.” It is clear from a literal interpretation of this provision that the admissibility of hearsay evidence is permissible either under the Act itself or by virtue of the provisions of any other Act of the National Assembly. Thus, the statement of exclusion of hearsay evidence under s. 38 of the Evidence Act, 2011 is subject to the exceptions provided in the Evidence Act or in any other Act of the National Assembly.

The codification of the rule of exclusion of hearsay evidence in s. 37 of the Evidence Act, 2011 and the explicit provision in s. 38 of the Act that hearsay evidence may be admitted in evidence in judicial proceedings under certain circumstances specified either in the Act or in any other Act of the National Assembly have introduced a good measure of certainty into law on the subject-matter thus making further references to notable statements of the general rule of inadmissibility of hearsay evidence in the case law really unnecessary.

### ADMISSIBILITY OF ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE

Prior to the enactment of the Evidence Act, 2011, there was no explicit provision in the Evidence Act, Cap E14 that dealt with the admissibility of improperly or illegally procured evidence in judicial proceedings. Our courts had relied on principles of the English common law in admitting such evidence subject to the discretionary power of the trial Judge, particularly in criminal proceedings to exclude such evidence where its admissibility would operate unfairly against the accused in all the circumstances of the case.<sup>4</sup> This gap in our code of evidence law has now been filled by the insertion of sections 14 and 15 in the Evidence Act, 2011. Section 14 of the Evidence Act, 2011 provides that:

s. 14- Evidence obtained-

(a) improperly or in contravention of a law; or

(b) in consequence of an impropriety or of a contravention of a law, shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is out-weighted by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

Section 15(a)-(g) of the Evidence Act, 2011 specifies the matters that the court would take into consideration in forming its opinion that the admissibility of evidence which has been improperly or illegally obtained may operate unfairly against the adverse party and that such evidence should be excluded in the interest of justice. These matters include the probative value of the evidence; the importance of the evidence in the proceedings; the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of

<sup>1</sup> Under the Evidence Act, cap E14, the application of the hearsay rule was predicated on the second proviso to s. 6 which incorporated the common law rules of exclusion of evidence and s. 77 which prescribed that oral evidence must in all cases whatever be direct in the sense defined in paragraphs (a)-(d) thereof. See *Ozude v. I. G. P.* [1965] A. N. L. R. 106 @ 107-8; *Thomas v. Queen* [1957] S. C. N. L. R. 310 @ 312.

<sup>2</sup> *Ojiako v. State* [1991] 2 NWLR (Pt.175) 578 at 584; *Ajiboye v. State* [1994] 8 NWLR (Pt.364) 587 at 600, *Utteh v. State* [1992] 2 NWLR (Pt.223) 257 at 272-283; *Onuoha v. State* [1995] 3 NWLR (Pt.383) 591 at 598.

<sup>3</sup> *Jolayemi v. Alaoye* [2004] 12 N. W. L. R. (Pt. 887) 322 @ 341; *Ogbonna v. Ogbuji* [2014] 6 N. W. L. R. (Pt. 1403) 205 @ 231.

<sup>4</sup> See *Jones v. Owen* (1870) 34 J.P 759; *R v. Leathan* (1861) 8 Cox C. C. 777; *Kuruma, Son of Kaniu v. Queen* (1955) A. C. 197 @ 204; *Musa Sadau & Yaro v. State* [1968] A. N. L. R. 125 @ 129-130; *Abubakar v. Chuks* [2007] 18 N. W. L. R. (Pt. 1066) 386 @ 402-3.

the proceeding; the gravity of the impropriety or contravention; whether the impropriety or contravention was deliberate or reckless; whether other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and the difficulty, if any, of obtaining the evidence without impropriety or contravention of law.

Clearly, the intendment of s. 15 of the Evidence Act, 2011 is to provide a guide for the exercise of the court's discretion to exclude improperly or illegally obtained evidence in deserving cases without necessarily limiting that discretion. The importance of the inclusion of these provisions in the Evidence Act, 2011 lies in the fact that the admissibility or inadmissibility of improperly obtained evidence is now governed expressly by the Act thus rendering the law in Nigeria on this matter predictably certain.

### **RESTRICTION ON THE USE OF EVIDENCE OF PREVIOUS CONVICTION TO PROVE BAD CHARACTER OF AN ACCUSED**

The Evidence Act, 2011 contains a new provision in s.82 (5) which restricts the application of s. 82(4) of the Act. To be sure, s. 70 (4) of the repealed Evidence Act, cap E14 (identical with s. 82(4) of Evidence Act, 2011) provided that whenever evidence of bad character was admissible, evidence of previous conviction was also admissible. However, the repealed Act was silent on the kind of evidence of previous conviction that could be tendered to prove bad character pursuant to s. 70(4) thereof. In other words, it was not clear from the repealed Evidence Act whether the evidence of previous conviction rendered admissible under s. 70 (4) should be related in substance to the offence charged in the latter proceeding wherein the evidence was sought to be tendered. Put differently, the repealed Evidence Act was not explicit on whether evidence of a previous conviction for rape, for instance, would be admissible to prove the accused's bad character in a latter charge of stealing since both offences are not related. This lacuna in the repealed Evidence Act was worrisome because at common law, whenever evidence of bad character is admissible; such evidence needs not be confined to those bearing direct relevance to the offence charged in the latter proceeding. In *R v. Winfield*,<sup>1</sup> it was held that there is no such thing "as putting half a prisoner's character in issue and leaving out the other half."

However, the unrestricted use of evidence of previous conviction to prove bad character of an accused in a subsequent criminal proceeding involving an offence completely unrelated to the subject-matter of the previous criminal conviction may not advance the cause of justice as it merely permits the admissibility of evidence of a highly prejudicial quality by the courts.

The uncertainty and potential prejudice have now been put to rest by the Evidence Act, 2011 because s. 82(5) provides specifically that in cases where s. 82(4) of the Act applies, the court "shall only admit evidence of the previous convictions which are related in substance to the offence charged." It is submitted that the effect of s. 82(5) of the Evidence Act, 2011 is to displace the common law principle which gives the prosecution the right to tender evidence of previous conviction of an accused to establish his bad character in subsequent judicial proceeding irrespective of whether the previous conviction is related to the offence charged in the subsequent proceeding. Thus, under the Evidence Act, 2011, evidence of an accused's previous conviction for stealing would be inadmissible to prove his bad character in a subsequent trial for rape under s. 82 (4) of the Evidence Act, 2011 as both offences are not related.

### **JUDICIAL NOTICE OF CUSTOM BASED ON A SINGLE PREVIOUS DECISION OF A SUPERIOR COURT OF RECORD**

It is now trite law that customary law is a question of fact to be pleaded and proved by evidence by the party asserting its existence unless it can be judicially noticed and the burden of proving the alleged custom lies on the party alleging its existence.<sup>2</sup> In other words, where a custom cannot be established as one judicially noticed, it shall be proved as a fact.<sup>3</sup> Thus, proof of a custom either by judicial notice or by evidence was expressly provided for under the repealed Evidence and the same position is maintained in the Evidence Act 2011.

However, the point of divergence between the repealed Evidence Act and the Evidence Act, 2011 lies in the condition precedent that must be satisfied before a court can take judicial notice of a custom that is relevant to the proceeding before it. Section 14(2) of the repealed Evidence Act, cap. E14 provided that:

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 class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

<sup>1</sup> (1939) 27 C. A. R. 139.

<sup>2</sup> Evidence Act, cap E14, s. 14(1), (2), (3); Evidence Act, 2011, s. 16; *Dong v. A-G, Adamawa State* [2014] 6 N. W. L. R. (Pt. 1404) 558 @ 573.

<sup>3</sup> Evidence Act 2011, s. 18; Evidence Act cap E14, s. 14(1); *Dong v. A. G., Adamawa State* (supra) @ 573-4; *Onyenge v. Ebere* [2004] 13 N. W. L. R. (Pt. 889) 20 @ 38; *Chukwu v. Amadi* [2009] 3 N. W. L. R. (Pt. 1127) 56 @ 84.

Thus, under the repealed Evidence Act, more than one previous decision of a court of superior record on the applicability of a particular custom was required before a another court called upon to enforce a right based on that same custom could take judicial notice of it without the necessity for proving same by evidence. In other words, the custom in question must have frequently been the subject-matter of litigation and must have been pronounced upon repeatedly by superior courts of record within the same area as to become notorious and common knowledge. In *Buraimo v. Gbamgboye*,<sup>1</sup> it was held that it was unnecessary to bring evidence to prove particular customs which have been so frequently before the courts as to be well established and notorious. However, the requirement of frequent or repeated judicial pronouncement on a rule of customary law as the criteria for judicial notice created confusion since it did not specify the number of judicial pronouncements on an applicable rule of customary law necessary to justify judicial notice. This may be illustrated by reference to three decided cases. In *Larinde v. Afikpo*<sup>2</sup> the court declined to take judicial notice of a custom which had been acted upon only once by a superior court of record. On the other hand, in *Cole v. Akinyele*,<sup>3</sup> the court took judicial notice of a custom which had been acted upon only once in the earlier case of *Alake v. Pratt*.<sup>4</sup> Finally, in *Osinowo v. Fagbenro*<sup>5</sup> the court took judicial notice of a custom which had been acted upon thrice.

The confusion arising from the above subjective application of the requirement that the custom must have been so frequently before the courts as to be well established and notorious underscored the need for amendment to facilitate judicial notice of customs. The amendment is set out in s. 17 of the Evidence Act, 2011 which provides that “A custom may be judicially noticed when it has been adjudicated upon *once* by a superior court of record.” Thus, under the Evidence Act, 2011 a single decision by a superior court of record is sufficient to justify judicial notice of that custom in another judicial proceeding. Thus, it is sufficient for the purpose of taking judicial notice of a custom that there exists a single decision delivered by a superior court of record on that custom which is still subsisting and has not been set aside on appeal.

Given the emphasis placed by section 17 of the Evidence Act, 2011 on “superior court of record,” it is obvious that the decision of an inferior court such as the customary court on an applicable rule of customary law cannot be relied upon for purposes of taking judicial notice of a custom in a subsequent judicial proceeding. This is because an inferior court such as a customary court is not a superior court of record within the meaning of section 17 of the Evidence Act, 2011. To be sure, a superior court of record is a court of general jurisdiction; it is a court that is “presumed to have jurisdiction until the contrary is proved.”<sup>6</sup> Thus, the High Court, Court of Appeal and Supreme Court are superior courts of record and a decision delivered by any of these courts on an applicable rule of customary law can be relied on in subsequent proceedings to take judicial notice of the custom in question.

#### **ADMISSIBILITY OF COMPUTER-GENERATED EVIDENCE**

Perhaps, one of the most far-reaching innovations introduced by the Evidence Act, 2011 is the inclusion of several provisions dealing specifically with the admissibility of computer-generated evidence. Although computer-generated evidence, particularly entries in bankers’ books has been held admissible under the provisions of the repealed Evidence Act,<sup>7</sup> the Evidence Act, 2011 contains elaborate provisions dealing with the admissibility of computer-generated evidence.<sup>8</sup> In this regard, s. 84(1) of the Evidence Act, 2011 provides that:

In any proceeding a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.

It is clear from the above section that the admissibility of computer-generated evidence or document downloaded from the internet in any judicial proceeding is made subject to the fulfilment of the conditions prescribed in sub-section (2) of s. 84 of the Evidence Act, 2011. In *Kubor v. Dickson*,<sup>9</sup> it was held by the Supreme Court that a party that seeks to tender in evidence a computer-generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions specified in s. 84(2) of the Evidence Act, 2011 and that failure to fulfil those conditions will render the computer-generated evidence inadmissible. Therefore, the conditions set out in s. 84(2) must be

<sup>1</sup> 15 N. L. R. 139; see also *Ehigie v. Ehigie* [1961] ANLR 871 @ 876; *Angu v. Attah* (1960) 15 WACA 20.

<sup>2</sup> (1940) WACA 108.

<sup>3</sup> (1960) 5 FSC 84.

<sup>4</sup> (1955) 15 WACA 20.

<sup>5</sup> (1954) 21 NLR 3.

<sup>6</sup> *Emerah & Sons Ltd., v. A-G, Plateau State* [1990] 4 N. W. L. R. (Pt. 147) 788@ 804.

<sup>7</sup> Repealed Evidence Act cap E14, s. 97(1)(h) and 97(2)(e); *F. R. N. v. Fani-Kayode* [2010] 14 N. W. L. R. (1214) 481; *NUBA Commercial Farms Limited v. NAL Merchant Bank Limited* [2001] 16 N. W. L. R. (Pt. 740) 510.

<sup>8</sup> See sections 50, 51, 84, 86, 87, and 93 of the Act.

<sup>9</sup> [2013] 4 N. W. L. R. (Pt. 1345) 534 @ 577-8.

fulfilled by the party seeking to tender computer-generated evidence before same can be admitted by the court. The conditions specified in s. 84(2) of the Act which must be proved in evidence in order to render computer-generated evidence admissible are-

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;
- (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- (d) that the information contained in the statement reproduces or is derived from the information supplied to the computer in the ordinary course of those activities.

### **EXPANSION OF THE DEFINITION OF “DOCUMENT”**

Section 2(1) of the repealed Evidence Act defined the term “document” to include books, maps, plans, drawings, photographs and 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. Thus, the term “document” was defined narrowly in terms of inscriptions made on paper thereby excluding materials stored in disc, tape, video cassette, film, negative etc., from the categories of document. Based on this restrictive provision, it was held in *Udoro v. Governor Akwa Ibom State*,<sup>1</sup> that a video cassette did not qualify as documentary evidence under the repealed Evidence Act.

The definition of “document” has now been extended under s. 258(1) of the Evidence Act, 2011 to cover disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable of being reproduced from it; any film, negative, tape or other device in which one or more visual images are embodied so as to be capable of being reproduced from it; and device by means of which information, is recorded, stored or retrievable including computer output.

### **RECOGNITION OF MARRIAGES CELEBRATED UNDER CUSTOMARY AND ISLAMIC LAWS**

Another major innovation introduced in the Evidence Act, 2011 is the formal recognition accorded marriages celebrated under customary and Islamic laws at least for the purposes of enjoying testimonial privileges. It will be recalled that under s. 2(1) of the repealed Evidence Act, cap E14, the terms “wife” and “husband” were defined to mean respectively “the wife and husband of a monogamous marriage.” The practical implication of the above definition was that spouses of polygamous marriages celebrated in accordance with customary and Islamic laws were denied the testimonial privileges guaranteed under sections 161(2), (3) (4), 162, 163 and 164 of the Act. This discriminatory policy against spouses of customary and Islamic marriages which was a painful relic of colonialism had been roundly condemned by learned writers. According to Hon. Justice Niki Tobi:

The point which must be made and quickly too for that matter is that the provisions of the section apply only to husband and wife of a monogamous marriage within the meaning of section 2 of the Evidence Act. And this is where our problem emanates. It is rather sad that the immunities contained in the section are restricted only to monogamous marriages, excluding polygamous marriages. In a society which is mostly polygamous, both in its cultural and sociological content, the restriction is out of tone with the practice and realities of the people. . . It is obvious that the discriminatory piece of legislation is a relic of colonialism which should no longer find a place in modern Nigeria. Certainly, the sociological and cultural content of the society will not lend support to that parochial and sophisticated definition of wife and husband in the Evidence Act. It is too English for our liking. It is our submission that the definition of wife and husband under section 2 of the Act should be expunged. The implication of this is that the provision will then automatically apply to both types of marriages. That is how it should be.<sup>2</sup>

The above criticism has now been addressed in s.258 (1) of the Evidence Act, 2011 which defines “wife and husband” to mean respectively “the wife and husband of a marriage validly contracted under the Marriage Act, or under Islamic or Customary law applicable in Nigeria, and includes any marriage recognized as valid

<sup>1</sup> [2010] 11 N. W. L. R. (Pt. 1205) 322 @ 334-6.

<sup>2</sup> Hon. Justice Niki Tobi, “A Critique of the Law of Evidence” in A. E. Ogbuigwe and A. Uchegbu (eds), *Essays in Honour of Nabo Graham-Douglas* (1992) 92, 108-9, the learned Justice restated his criticism in his judgment in *Udobong v. State* [1996] 6 D. T. L. R. (Pt. 1) 116 @ 120.

under the Marriage Act.” The implication of the recognition accorded customary and Islamic marriages is that the testimonial privileges guaranteed under sections 182(2), (3), (4), 183, 186 and 187 of the Evidence Act 2011 also enure to spouses of customary and Islamic marriages thus bringing to an end the discriminatory policy sanctioned in the repealed Evidence Act.

### **ADMISSIBILITY OF DYING DECLARATION IN JUDICIAL PROCEEDINGS WHERE CAUSE OF DEATH COMES INTO QUESTION**

Under s. 33(1) of the repealed Evidence Act, a dying declaration, that is a statement 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, was rendered relevant and admissible 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. Thus, under the repealed Evidence Act, a dying declaration was inadmissible in all judicial proceedings except those involving murder and manslaughter.

Section 40(2) of the Evidence Act, 2011 has now relaxed the restriction contained in s. 33(1) of the repealed Evidence Act by providing that a dying declaration “shall be admissible whatever may be the nature of the proceeding in which the cause of death comes into question.” Thus, evidence of a dying declaration is admissible in all judicial proceedings where the cause of death of the declarant is a fact in issue irrespective of whether the proceeding involves murder or manslaughter.

### **EXCLUSION OF EVIDENCE UNDER THE EVIDENCE ACT OR UNDER OTHER LEGISLATION**

Prior to the coming into force of the Evidence Act 2011, the settled principle of law was that no piece of evidence could be excluded in any judicial proceeding except as otherwise provided by the Evidence Act. In other words, no court could reject a piece of evidence except such rejection was permitted by the Evidence Act which implied that neither the common law of England nor any other local Nigerian legislation could form the basis for the inadmissibility of evidence. This principle was settled by the West African Court of Appeal in *R v. Agwuna*, when it held that “there is no provision in the Evidence Act which allows any evidence to be rejected as inadmissible saved as provided in the Act itself.”<sup>1</sup> Thus, where a piece of evidence was rendered admissible under the Evidence Act, such evidence could not be excluded or rejected in any judicial proceeding by reference to either the common law or any other Nigerian legislation. Therefore, inadmissibility of evidence was governed by the Evidence Act alone.<sup>2</sup> Consistent with this principle, it was held in *Jadesimi v. Egbe*,<sup>3</sup> that the common law rules of evidence which barred the admissibility of statements made without prejudice could not be used to exclude evidence in Nigerian courts since the matter was specifically dealt with in s. 25 of the repealed Evidence Act.<sup>4</sup>

It is submitted that the above legal position has been modified under the Evidence Act, 2011 because of the explicit provision in s. 2 of the Act which provides that:

For the avoidance of doubt, all evidence given in accordance with section 1 shall, *unless excluded in accordance with this or any other Act or any other legislation validly in force in Nigeria* be admissible in judicial proceedings to which this Act applies.

Provided that admissibility of such evidence shall be subject to all such conditions as may be specified in each case by or under this Act.

It is clear from a literal interpretation of the above cited s. 2 of the Evidence Act, 2011 that the exclusion, rejection or inadmissibility of evidence in any judicial proceeding is explicitly permitted by reference to:

- (a) The Evidence Act, 2011; or
- (b) Any other Act validly in force in Nigeria; or
- (c) Any other legislation validly in force in Nigeria.

Thus, the Evidence Act 2011, any other Act of the National Assembly or any law passed by the House of Assembly of a State of the Federation which is validly in force in Nigeria may provide for the exclusion or inadmissibility of a piece of evidence in any judicial provision. For instance, with reference to the Evidence Act, 2011, the relevancy of a piece of evidence *per se* is not enough to render it admissible because in addition to its relevancy, such evidence must satisfy such conditions as may be specified under the relevant provisions of the Act. Therefore, although relevancy is the primary basis of admissibility of evidence, it is by no means the only yardstick for admissibility. A court of law may lawfully reject a piece of evidence which is otherwise relevant pursuant to the provisos to s. 1 or s. 2 of the Evidence Act, 2011. This principle was stated tersely by Fabiyi, J. S. C., in *Suberu v. State* as follows:

<sup>1</sup> 12 WACA 456 @ 458.

<sup>2</sup> *Jacob v. Attorney-General of Akwa-Ibom State* [2002] 7 N. W. L. R. (Pt. 765) 18 @ 35.

<sup>3</sup> [2003] 10 N. W. L. R. (Pt. 827) 1 @ 25

<sup>4</sup> See the corresponding provision in s. 26 of the Evidence Act 2011.



The court below held that exhibit '1' was admissible against the appellant because it was relevant. With due respect, relevancy is not the only yardstick or test for admissibility. A document may be relevant and still be excluded if there is in existence a law, like the provision of section 27(3) of the Evidence Act, which renders exhibit 1 inadmissible as against the appellant. It is akin to a deed of conveyance which though relevant in an action for declaration of title and yet may be excluded because it had not been registered.<sup>1</sup>

It is also recognized in civil proceedings that admissibility of documentary evidence is not based on relevancy alone but also by the rules of pleading and that a relevant document may be rejected in evidence unless it is pleaded. Therefore, an un-pleaded document is inadmissible in evidence.<sup>2</sup> Another clear instance where the court may exercise its power to exclude a relevant piece of evidence under the Evidence Act 2011 is where an uncertified copy of a public document is sought to be tendered in evidence. In such a case, irrespective of the relevance of the document to the determination of the facts in issue, the court will be bound to reject it in evidence by virtue of the provisions of sections 89(e), (f) and 90(1)(c) of the Evidence Act, 2011. In *Aromolaran v. Agoro*,<sup>3</sup> the Supreme Court of Nigeria held that by virtue of section 97(1)(e) and 2(c) of the repealed Evidence Act, Cap. 112, Laws of the Federation of Nigeria 1990, only a certified copy of a public document is admissible as secondary evidence of the document. Galadima, J. S. C., stated the law thus:

There is no exception provided in the kind of secondary evidence of a public document admissible other than a certified true copy. The fact that the original has been lost or destroyed does not give the court any power to admit a photocopy which is not certified. The plausible reasons advanced by the court below for the admission of exhibit 7 are not in compliance with the relevant evidence law dealing with the matter.<sup>4</sup>

As already argued, inadmissibility of evidence is also governed by any other Act in force in Nigeria including subsidiary legislation to the extent that a piece of evidence may be excluded by a court of trial based on the provisions of a federal legislation other than the Evidence Act, 2011. For instance, by virtue of s. 23 of the Legislative Houses (Powers and Privileges) Act:<sup>5</sup>

s.23. No evidence relating to any of the following matters, that is to say—

- (a) debate or other proceedings in a Legislative House;
- (b) the contents of the minutes of evidence taken or any documents laid before a committee of a Legislative House or any proceedings or examinations held before any such committee by any member or officer of the House or any shorthand-writer employed to take minutes of any such evidence or proceedings or, in respect of any of the matters specified in paragraph (b) of this section, by any person who was a witness before the committee shall be admissible in any proceedings before a court or person authorized by law to take evidence unless the court or such last-mentioned person is satisfied that permission has been given by the President or Speaker, as the case may be, of the House or the chairman of the committee (as the case may require) for such evidence to be given.

Reference may also be made to the provisions of Order 20 Rule 3 of the Federal High Court (Civil Procedure) Rules 2009 which provides that "No document, plan, photograph or model shall be receivable in evidence at the trial of an action unless it has been filed along with the pleadings of the parties under these Rules, except the Judge in the interest of justice otherwise orders or directs." It is submitted that the purport of the above quoted provisions of the Act and Rules of Court is to render evidence inadmissible in judicial proceedings under certain circumstances thus supporting the position that inadmissibility of evidence is no longer governed exclusively by the Evidence Act, 2011.

There are also a number of laws enacted by the State Houses of Assembly in the Federation which render specified classes of evidence inadmissible in judicial proceedings unless certain conditions precedent are satisfied. In this regard, s. 20 of the Land Instruments (Preparation & Registration) Law of Rivers State,<sup>6</sup> provides that: "No instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall have been registered." Clearly, this provision renders inadmissible in evidence any unregistered registrable instrument which is sought to be tendered as proof of legal title to land although the same unregistered registrable instrument may be received in evidence to prove payment of purchase money or rent for

<sup>1</sup> [2010] 8 N. W. L. R. (Pt. 1197) 586 @ 604.

<sup>2</sup> *Okoye v. Obiaso* [2010] 8 N. W. L. R. (Pt. 1195) 145 @ 168-9.

<sup>3</sup> [2014] 18 N. W. L. R. (Pt. 1438) 153 @ 170.

<sup>4</sup> *Supra* @ 170; *Araka v. Egbue* [2003] 17 N. W. L. R. (Pt. 848) 1; *Minister of Land, Western Nigeria v. Dr. Nnamdi Azikiwe* [1969] A. N. L. R. 48 @ 57-8; *Alashe v. Ilu* [1969] A. N. L. R. 390 @ 397; *Kubor v. Dickson* [2013] 4 N. W. L. R. (Pt. 1345) 534 @ 579.

<sup>5</sup> Cap. L12 L. F. N. 2004.

<sup>6</sup> Cap. 74 Laws of Rivers State of Nigeria, 1999.

land and to establish an equitable interest therein.<sup>1</sup> Section 12 (3) of the Land Instruments (Preparation & Registration) Law of Rivers State provides that “No instrument executed after the 1<sup>st</sup> June 1918, having thereon or attached thereto a plan of the land affected, shall be registered unless the plan is signed by a surveyor or is a copy of a plan which has been signed by a surveyor.” Section 3 of the Survey Law of Oyo State also prescribes that no map, plan or diagram of land if prepared after the 1<sup>st</sup> June 1918 shall be accepted for registration with any registrable instrument which is required by any written law to contain a map, plan or diagram; and if prepared after 20<sup>th</sup> October, 1897 shall save for good cause shown to the court, be admitted in evidence in any court unless the map, plan or diagram has been prepared and signed by a surveyor or is a copy of a map, plan or diagram so prepared and signed and is certified by a surveyor as being a true copy.

In *Babatola v. Aladejana*,<sup>2</sup> it was held by the Supreme Court that the sketch map (Exhibit “C”) of the land in dispute prepared by the appellant who was said to be a geography teacher was inadmissible in evidence having been prepared and signed by a person who was not a surveyor as required by s. 3 of the Survey Law of Oyo State. In *Alashe v. Ilu*,<sup>3</sup> it was also held by the Supreme Court that a survey plan which was not countersigned by the Regional Director of Surveys contrary to s. 23(1)(b) of the Survey Act was inadmissible in evidence. Thus, a survey plan which does not comply with the provisions of the Survey Act or Law is inadmissible in evidence.<sup>4</sup> Finally, in *Suberu v. State*,<sup>5</sup> it was held by the Supreme Court that by virtue of Rule 7(1) of the Criminal Procedure (Statement to Police Officers) Rules 1960 which is applicable to Kogi State, if the prosecution intends to employ the extra-judicial statement of an accused against a co-accused, a copy of such statement should be made available to the co-accused to enable him react to it and that failure to so renders the extra-judicial statement legally inadmissible in evidence.

#### **INADMISSIBILITY OF STATEMENTS CONTAINED IN DOCUMENTS MARKED “WITHOUT PREJUDICE”**

The inadmissibility of documents marked “without prejudice” in judicial proceedings is always justified on the ground that parties to a dispute should be encouraged to negotiate settlement or compromise without any fear that concessions or admissions made by them in the course of the negotiations could be used against them in court. Accordingly, statements contained in a letter marked “without prejudice” or evidence of facts emanating from offers of compromise or attempt at negotiation for out of court settlement of dispute is not admissible in evidence.<sup>6</sup> Prior to the coming into force of the Evidence Act 2011, the exclusion of such evidence had been based on s. 25 of the repealed Evidence Act which provided that: “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.” Marking a document “without prejudice” was thought to imply an understanding by the parties that evidence of the statements or facts contained therein is not to be used against the maker of such document if negotiations failed.

Although s.25 of the repealed Evidence Act has been re-enacted as s. 26 in the Evidence Act 2011, the new Act has gone a step further by enacting s. 196 as a substantive provision dealing with the exclusion of statements contained in documents marked “without prejudice.” Section 196 of the Evidence Act 2011 provides as follows: “A statement in any document marked “without prejudice” made in the course of negotiation for a settlement of a dispute out of court, shall not be given in evidence in any civil proceeding in proof of the matters stated in it.”

It is clear from a literal interpretation of s. 196 of the Evidence Act 2011 that the exclusionary rule applies only to statements contained in documents marked “without prejudice” made in the course of negotiation for a settlement of a dispute out of court. Thus, a document marked “without prejudice” which was not made in the course of negotiation for a settlement of a dispute out of court cannot be excluded pursuant to s. 196 of the Evidence Act. Section 196 of the Evidence Act, 2011 therefore has a limited application than s. 26 of the repealed Act.

#### **POWER OF THE MINISTER RESPONSIBLE FOR JUSTICE TO MAKE REGULATIONS**

Section 255 of the Evidence Act 2011 empowers the Minister charged with responsibility for justice from time to time, to make regulations generally prescribing further conditions with respect to admissibility of any class of

<sup>1</sup> *Etim v. Ekpe* [1983] 1 S. C. N. L. R. 120 @ 132; *Registered Trustees of Apostolic Faith Mission v. James* [1987] 3 N. W. L. R. (Pt. 61) 556 @ 568; *Okoye v. Dumez (Nig) Limited* [1985] 1 N. W. L. R. (Pt. 4) 783 @ 790; *Ogunbambi v. Abowaba* (1951) WACA 222.

<sup>2</sup> [2001] 12 N. W. L. R. (Pt. 728) 597

<sup>3</sup> [1964] A. N. L. R. 379 @ 387-8.

<sup>4</sup> *Agboola v. Abimbola* [1969] A. N. L. R. 277 @ 285.

<sup>5</sup> (Supra) @ 603-604, 608.

<sup>6</sup> *Kolo v. F. B. N. Plc.* (supra) @ 236; *Fawehinmi v. NBA* (No. 2) [1989] 2 N. W. L. R. (Pt. 105) 558; *Ashibuogwu v. A-G, Bendel State* [1988] 1 N. W. L. R. (Pt. 69) 138.

evidence that may be relevant under the Act. By virtue of this grant of specific power, the Hon. Attorney-General and Minister of Justice of the Federation may enact subsidiary legislation prescribing further conditions which any class of evidence declared to be relevant under the Act must satisfy to render it admissible in any judicial proceedings. Given that every statutory power must be exercised for the purpose for which it is granted, it is arguable that the Attorney-General & Minister of Justice can only make subsidiary legislation prescribing further conditions for admissibility of any class of relevant evidence under the Evidence Act. Any subsidiary legislation that goes beyond this limit may be challenged as being *ultra vires* the power granted under s. 255 of the Act.

### **ADMISSIBILITY OF STATEMENT AGAINST INTEREST OF MAKER**

One of the known exceptions at common law to the rule against hearsay evidence is the admissibility of statements or declarations made against interest. By this exception oral or written statements of relevant facts made by deceased persons are admissible between third persons when the statements are against their proprietary or pecuniary interest. Accordingly to Sarkar, such statements are “received on the ground that what a man says against his interest is in all probability true. . . The principle of admissibility is that in the ordinary course of business a person is not likely to make a statement to his own detriment unless it is true.”<sup>1</sup> Therefore, the condition for admissibility of such statement or declaration at common law is that the statement or declaration must be prejudicial to the pecuniary or proprietary interest of the maker. It must be a statement by which the maker acknowledges that his legal right to recover certain sum of money or debt from a named third party or that his entitlement to certain estate has ceased to exist or that he holds a lesser estate than he originally possessed. In *Taylor v. Witham*, Jessel, MR, emphasized the point thus:

What is the meaning of being against interest? I adopt the view of Mr. Baron Parke in *R v. Lower Heyford*, 2 Sm LC 313 (12<sup>th</sup> ED), that it must be prima facie against his interest, that is to say, the natural meaning of the entry standing alone must be against the interest of the man who made it. Of course, if you can prove *aliunde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of evidence altogether, but the question of admissibility is not a question of value.<sup>2</sup>

Thus, in *Higham v. Ridgway*,<sup>3</sup> it was held that an entry in a deceased man-midwife’s book showing that his fee for midwifery services rendered to a certain Mrs. Fowden in respect of the birth of one Fallow had been paid was admissible in evidence as a statement against the pecuniary interest of the maker. Similarly, in *Briggs v. Wilson*,<sup>4</sup> it was held that a statement made by a deceased declarant wherein he acknowledged that he was an illegitimate child was admissible as being against his pecuniary or proprietary interest. However, statements or declarations against other interest, such as penal, are inadmissible. In *Sussex Peerage Case*,<sup>5</sup> it was held that a statement made by a deceased clergyman which would have exposed him to criminal prosecution if alive was inadmissible under the rule since it did not affect his proprietary or pecuniary interest.

The above common law rules were codified in s. 33(1)(c) of the Evidence Act, cap E14 which stipulated that statements, written or verbal of relevant facts made by a deceased person against his pecuniary or proprietary interest were admissible if the person making the statement had personal knowledge of the matter stated therein and had no interest to misrepresent it. Therefore, under cap E14, only two forms of statement or declaration against interest were admissible, namely statements against pecuniary interest and those against proprietary interest. Statements against other interest such as one that would render the maker liable to criminal prosecution or payment of damages in a civil action were inadmissible under the Evidence Act, cap E14.

In *Alli v. Alesinloye*,<sup>6</sup> it was held by the Supreme Court that the evidence of Ladejo Adeleke Alesinloye, a member of the respondents’ family, who had testified on behalf of his family as a boundary man in a previous suit involving the appellants’ family and another family to the effect that the land in dispute belonged to the appellants’ family was admissible as a declaration against the proprietary interest of the respondents in the land in dispute within the meaning of s. 33(1)(c) of the repealed Evidence Act. Karibi-Whyte, J.S.C., in his concurring judgment stated the law at page 215 of the Law Reports as follows:

The evidence before the learned trial judge who admitted Exhibit A was that Ladejo Adeleke Alesinloye represented his family when he testified in suit No. 1/65/77: that the land in dispute belonged to the Oroye family. He is now deceased. His evidence that the land disputed belongs to Oroye family is without doubt against the proprietary interest of his family in the land in dispute. There is no doubt the evidence admitted falls within the provisions of s. 33(1)(c) of the

<sup>1</sup> M. C. Sarkar, S. C. Sarkar and Prabhas C. Sarkar, *Sarkar’s Law of Evidence in India, Pakistan, Bangladesh, Burma, & Ceylon Volume 1* (Sixteenth Edition Wadhwa and Company Nagpur, New Delhi 2007) 808.

<sup>2</sup> 3 Ch. D 605: 45 LJ 798.

<sup>3</sup> (1808) 10 East 109, 119; 103 E. R. 717.

<sup>4</sup> (1854) 5 DEGM & G 12; 43 ER 772.

<sup>5</sup> (1844) 11 C1 & F 86.

<sup>6</sup> [2000] 6 N.W. L. R (Pt. 660) 177 @ 214-5; see also *Joe Iga v. Amakiri* (1976) 11 S. C. 1 @ 12-13.

Evidence Act.

The law as currently stated in s. 42 of the Evidence Act, 2011 makes a departure from the provisions of s. 33(1)(c) of the repealed Evidence Act in that the restriction that the declaration would only be admissible if it was against the pecuniary or proprietary interest of the maker has been removed. Section 42 of the Evidence Act, 2011 recognizes declarations against four distinct interests: (i) pecuniary interest; (ii) proprietary interest; (iii) criminal liberty; and (iv) civil liability. Thus a statement which renders the maker liable to criminal prosecution or to damages in civil action is admissible under the section. The implication therefore is that the decision of the English court in *Sussex Peerage Case*,<sup>1</sup> which excludes a declaration that will expose the maker to criminal prosecution no longer represents the current position of the law in Nigeria. Clearly, such declarations are admissible under s. 42(b) of the Evidence Act, 2011.

### NOTICEABLE LACUNAE IN THE EVIDENCE ACT 2011

It is submitted that the Evidence Act, 2011 represents a substantial improvement on the repealed Evidence Act in terms of the innovative provisions discussed above. Arguably, the Evidence Act, 2011 will serve to fill the gaps identified in the repealed Evidence Act. However, this is not to say that the Evidence Act, 2011 is a perfect piece of legislation. It is far from it! No piece of legislation ever is!

For instance, in spite of the observations made by the Court of Appeal in *Onwuka v. Owolewa*,<sup>2</sup> drawing attention to a lacuna in the repealed Evidence Act concerning recall of witnesses and the urgent need to make specific provisions in the Act dealing with that matter, it is regrettable to observe that the Evidence Act, 2011 like its precursor does not contain any provision dealing with recall of witnesses. Thus, the exercise of the power to grant an application to recall a witness is left entirely at the discretion of the court in accordance with the justice of each case without any clear statutory guidelines as to the materials which the court may take into consideration in determining such application.

Another area of concern is the restriction of the application of s. 66 of the Act dealing with traditional evidence or oral evidence of tradition to proceedings involving proof of title or interest in family or communal land. There is no doubt that evidence of traditional history is also admissible in proceeding where title or interest to family or communal land is not directly in issue. Indeed in *Akpagher v. Gbungu*<sup>3</sup> it was held that traditional evidence is also admissible in chieftaincy matters. Since this is so, there is need to extend the application of s. 66 of the Evidence Act, 2011 to other civil matters not necessarily involving claim for title or interest in family or communal land.

Another contentious issue that has arisen under the new Evidence Act is whether or not a Nigerian court can rely on inclusionary rules of the English common law of evidence to admit a piece of evidence where the Act is silent on a particular subject-matter. Prior to the coming into force of the Evidence Act, 2011 it was generally agreed that by virtue of s. 5(a) of the repealed Evidence Act, cap E14, inclusionary rules of the English common law of evidence constituted subsidiary source of the Nigerian law of evidence in the sense that a Nigerian court could rely on such common law rules to admit a piece of evidence where the Evidence Act was silent on a particular subject-matter provided that there was nothing in the Act that explicitly rendered such evidence inadmissible.<sup>4</sup>

Thus, our courts frequently referred to and relied on rules of the English common law relating to evidence to fill gaps in our Evidence Act on matters of admissibility of evidence. To be sure, s. 5(a) of the repealed Evidence Act provided that:

“Nothing in this Act shall –

(a) prejudice the admissibility of any evidence which would apart from the provisions of this Act be admissible.”

Unarguably, the Evidence Act, 2011 does not contain an identical provision like s. 5(a) of the repealed Act. However, the Evidence Act, 2011 contains a new s.3 which provides that: “Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.” It has been argued by learned writers that based on s. 3 of the new Act, “the window for the application of common law rules of evidence in Nigeria courts has been closed and that our law of evidence is now strictly statutory.”<sup>5</sup> While the above view remains highly contentious, it suffices to say for our present

<sup>1</sup> *Supra*

<sup>2</sup> [2001] 7 NWLR (Pt. 713) 695 @ 712.

<sup>3</sup> [2015] 1 N. W. L. R. (Pt. 1440) 209 @ 233; See also *Iheanacho v. Chigere* [2004] 17 N. W. L. R. (Pt. 901) 130; *Arowolo v. Olowo* [2011] 18 N. W. L. R. (Pt. 1278) 280.

<sup>4</sup> *Rex v. Onitiri* (supra); *Queen v. Itule* (supra); see also Osinbajo Yemi, “The Common Law, the Evidence Act and Interpretation of s.5(a)” in Omotola, J.A., (ed), *Essays in Honour of Judge T. O. Elias* (University of Lagos Press, Lagos 1987) 268 ; Fidelis Nwadialo, *Modern Nigerian Law of Evidence* (2<sup>nd</sup> ed., University of Lagos Press, Lagos 1999) 17-18.

<sup>5</sup> Gabriel O. Arishe & Desmond O. Oriakogba, “The Evidence Act, 2011: Closing the window for the application of common law rules of evidence” (2013-June 2014) 2 *Journal of Contemporary Law* 151, 152.

purposes that it is very doubtful if the law maker intended to completely exclude the application of the common law rules of evidence on matters of admissibility of evidence where the Act is silent.

It is indeed arguable that the gaps in sections 27 and 57 of the repealed Evidence Act which necessitated resort to the common law rules of evidence in the cases of *R v. Onitiri*<sup>1</sup> and *Queen v. Itule*,<sup>2</sup> have not been addressed in the Evidence Act, 2011 and there is a likelihood that if similar situations arise in our trial courts today, resort may still be made to the common law rules of evidence as articulated in the afore-cited decisions of the apex court.

The point being made here, therefore, is that the wording of s. 3 of the Evidence Act, 2011 leaves much to be desired. There is need to make the provision explicit on the power of the court to resort to the common law rules of evidence in determining the admissibility of a piece of evidence that is not specifically dealt with in the Act. Such power would enable our courts to deal with questions of admissibility of evidence not specifically dealt with in the Act and thereby ensure the dispensation of fair and even-handed justice.

### CONCLUDING REMARKS

The repeal of the Evidence Act cap E14 was long overdue having regard to the fact that some of its provisions were out of step with the realities of the new information age. Previous attempt by the National Law Reform Commission to propose a review of the Evidence Act through the introduction of a new code of evidence during the military era did not see the light of the day. Unarguably, the coming into force of Evidence Act, 2011 was received by members of the legal profession and all stakeholders in the justice sector with enthusiasm and sense of fulfilment.

The Act has been in operation in our courts since the 3<sup>rd</sup> day of June, 2011 and it is believed that most legal practitioners and members of the bench are sufficiently abreast of the innovations introduced by the Act. Like any other new legislation, consistent and focused study of its provisions by all persons involved in the justice sector is desirable in order to ensure its smooth application.

As innovative as the Evidence Act, 2011 may appear to be, there are identifiable gaps in it that may require review in the near future. Having that no single legislation could provide a complete set of answers to all the issues it is designed to address, it may be necessary to explicitly preserve the power of our courts to resort to the common law rules of evidence on any question of admissibility whenever the Act is silent. Such power will enable our evidence law to benefit from the progressive developments made in the common law rules of evidence with respect to matters not dealt with in the Act.

### REFERENCES

1. Abubakar v. Chuks [2007] 18 N. W. L. R. (Pt. 1066) 386.
2. Ado v. Dije [1984] 5 N. C. L. R. 260.
3. Agboola v. Abimbola [1969] A. N. L. R. 277.
4. Aguda, T. A., *The Law of Evidence* (4<sup>th</sup> edn, Spectrum Books Limited, Ibadan 1999).
5. Ajiboye v. State [1994] 8 NWLR (Pt.364) 587.
6. Akpagher v. Gbunju [2015] 1 NWLR (Pt. 1440) 209.
7. Alake v. Pratt (1955) 15 WACA 20.
8. Alashe v. Ilu [1964] A. N. L. R. 379.
9. Alashe v. Ilu [1969] A. N. L. R. 390.
10. Angu v. Attah (1960) 15 WACA 20.
11. Araka v. Egbue [2003] 17 N. W. L. R. (Pt. 848) 1.
12. Arishe, G. O., and Oriakogba, D. O., "The Evidence Act, 2011: Closing the window for the application of common law rules of evidence" (2013-June 2014) 2 *Journal of Contemporary Law* 151.
13. Aromolaran v. Agoro [2014] 18 NWLR (Pt. 1438) 153.
14. Arowolo v. Olowo [2011] 18 N. W. L. R. (Pt. 1278) 280.
15. Ashibuogwu v. A-G., Bendel State [1988] 1 N. W. L. R. (Pt. 69) 138.
16. Attorney-General, Federation v. Attorney-General, Abia State (No.2) [2002] 6 NWLR (Pt.764) 542.
17. Babatola v. Aladejana [2001] 12N.W.L.R. (Pt. 728) 597.
18. Briggs v. Wilson (1854) DEGM & G. 12; 43 E.R. 77.
19. Buraimo v. Gbamgboye 15 N. L. R.139.
20. Chukwu v. Amadi [2009] 3 N. W. L. R. (Pt. 1127) 56.
21. Cole v. Akinyele, 5 F. S. C.84.
22. Criminal Procedure (Statement to Police Officers) Rules 1960
23. Dong v. A-G., Adamawa State [2014] 6 N. W. L. R. (Pt. 1404) 558.

<sup>1</sup> Supra.

<sup>2</sup> Supra.

24. Ehigie v. Ehigie [1961] ANLR 871.
25. Emerah & Sons Ltd., v. A-G., Plateau State [1990] 4 N. W. L. R. (Pt. 147) 788.
26. Etim v. Ekpe [1983] 1 S. C. N. L. R. 120.
27. Evidence (Amendment) Act, No. 68, 1977.
28. Evidence (Amendment) Decree, No. 61, 1991.
29. Evidence Act, (No. 18) of 2011.
30. Evidence Act, Cap 112 Laws of the Federation of Nigeria, 1990.
31. Evidence Act, Cap 62, Laws of the Federation of Nigeria and Lagos 1958.
32. Evidence Act, Cap E14, Laws of the Federation of Nigeria 2004.
33. Evidence Ordinance, No. 27, 1943
34. F. R. N. v. Fani-Kayode [2010] 14 N. W. L. R. (1214) 481.
35. Fawehinmi v. NBA (No. 2) [1989] 2 N. W. L. R. (Pt. 105) 558.
36. Federal High Court (Civil Procedure) Rules 2009
37. Higham v. Ridgway (1808) 10 East 109; 103 E.R 717.
38. Hon. Dr. Dakuku Adol Peterside & Anor v. Independent National Electoral Commission (INEC) & Ors (Petition No. EPT/RV/GOV/04/2015) (Unreported): Judgment delivered by the Rivers State Governorship Election Petition Tribunal sitting in Abuja on 24/10/2015.
39. Iheanacho v. Chigere [2004] 17 N. W. L. R. (Pt. 901) 130.
40. Jacob v. Attorney-General of Akwa-Ibom State [2002] 7 N. W. L. R. (Pt. 765) 18
41. Jadesimi v. Egbe [2003] 10 N. W. L. R. (Pt. 827) 1.
42. Joe Iga v. Amakiri (1976) 11 S. C. 1.
43. Jolayemi v. Alaoye [2004] 12 N. W. L. R. (Pt. 887) 322.
44. Jones v. Owen (1870) 34 J.P. 759.
45. Kubor v. Dickson [2013] 4 N. W. L. R. (Pt. 1345) 534.
46. Kuruma, Son of Kaniu v. Queen (1955) A. C. 197.
47. Land Instruments (Preparation & Registration) Law of Rivers State Cap 74 Laws of Rivers State of Nigeria, 1999.
48. Larinde v. Afikpo (1940) WACA 108.
49. Legislative Houses (Powers and Privileges) Act Cap L12 LFN, 2004.
50. Magistrates' Court Ordinance, No. 24, 1943.
51. Minister of Land, Western Nigeria v. Dr. Nnamdi Azikiwe [1969] A. N. L. R. 48.
52. Musa Sadau & Yaro v. State [1968] A. N. L. R. 125.
53. NUBA Commercial Farms Limited v. NAL Merchant Bank Limited [2001] 16 N. W. L. R. (Pt. 740) 510.
54. Nwadialo, F., Modern Nigerian Law of Evidence (2<sup>nd</sup> ed., University of Lagos Press, Lagos 1999).
55. Ogbonna v. Ogbuji [2014] 6 N. W. L. R. (Pt. 1403) 205.
56. Ogbuigwe, A. E., & Uchegbu, A., (eds.) Essays in Honour of Nabo-Graham Douglas (1992) 92.
57. Ogunbambi v. Abowaba (1951) WACA 222.
58. Ojiako v. State [1991] 2 NWLR (Pt.175) 578.
59. Okoye v. Dumez (Nig) Limited [1985] 1 N. W. L. R. (Pt. 4) 783.
60. Okoye v. Obiaso [2010] 8 N. W. L. R. (Pt. 1195) 145.
61. Onuoha v. State [1995] 3 NWLR (Pt.383) 591.
62. Onwuka v. Owolewa [2001] 7 N. W. L. R. (Pt. 713) 695
63. Onyenge v. Ebere [2004] 13 N. W. L. R. (Pt. 889) 20.
64. Osinbajo Y., "The Common Law, the Evidence Act and Interpretation of S.5(a)" in Omotola, J.A., (ed), Essays in Honour of Judge T. O. Elias (University of Lagos Press, Lagos 1987).
65. Ozude v. I. G. P. [1965] A. N. L. R. 106.
66. Protectorates' Courts Ordinance, No. 45, 1943.
67. Provincial Courts Ordinance, 1914
68. Queen v. Itule [1961]1 ANLR 481.
69. R v. Agwuna, 12 WACA 456.
70. R v. Leathan (1861) 8 Cox C. C. 777.
71. R v. Winfield (1939)27 C. A. R139.
72. Registered Trustees of Apostolic Faith Mission v. James [1987]3 N. W. L. R. (Pt. 61) 556.
73. Rex v. Onitiri [1946-1949] 12 WACA 58.
74. Sarkar, M. C., Sarkar, S. C., and Sarkar, P. C., Sarkar's Law of Evidence in India, Pakistan, Bangladesh, Burma, & Ceylon Volume 1 (Sixteenth Edition Wadhwa and Company Nagpur, New Delhi 2007).
75. Sir James Fitzjames Stephen, A Digest of the Law of Evidence (Sixth edition Macmillan and Co., Limited, New York 1904).
76. Suberu v. State [2010]8 NWLR (Part1197) 586.

77. Supreme Court Ordinance, No. 23, 1943.
78. Sussex Peerage Case (1884) 11CI & F 86.
79. Taylor v. Witham 3 Ch. D 605:45 LJ 798.
80. The Revised Edition (Laws of the Federation of Nigeria) Act, 2004.
81. The Revised Edition (Laws of the Federation of Nigeria) Act, No. 21 of 1990.
82. Thomas v. Queen [1957] S. C. N. L. R. 310.
83. Udobong v. State [1996] 6 D. T. L. R. (Pt. 1) 116.
84. Udoro v. Governor Akwa Ibom State [2010] 11 N. W. L. R. (Pt. 1205) 322.
85. Utteh v. State [1992] 2 NWLR (Pt.223) 257.
86. Yero v. Union Bank of Nigeria Ltd. [2000]5 NWLR (Pt.764) 542.