KOGI STATE UNIVERSITY
BI-ANNUAL JOURNAL OF PUBLIC LAW

ISSN: 2141-4300

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KOGI STATE UNIVERSITY BI-ANNUAL JOURNAL OF PUBLIC LAW (KSU – BJ PL), VOL. 3, NO. 1, 2010
epartment of Public Law, Kogi State University, Anyigba – Nigeria
ISSN: 2141-4300

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Printed by:
Chenglo Limited
Plot 1123 No. ECA Moneke Cresent
Corridor Layout Enugu
Phone: 08037032855, 08026757825, 08053034988.
Email: chengloltd@yahoo.com
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EDITORIAL

In the last edition of this journal, we stated, among other things, that: "Department of Public Law, Kogi State University, Anyigba ..... has taken a stand to continue with the publication of this Journal despite the problems associated with publication in Nigeria". We wish to reiterate our stand by restating explicitly that our commitment remains unshakeable and unchangeable. Our dream is no longer a mere glimmer of hope but has come to reality. Few months after the publication of the last edition we received, with glee, over sixty articles for publication. It was glaring to us that one set alone could not accommodate all the edited and publishable articles. We, therefore, decided to publish this edition in two sets as Volume 3, Number 1 and Volume 3, Number 2.

It is crucial to reveal that in many of the articles sent to us, the contributors did not comply strictly with our guidelines for publication; presumably they did not see or read our letter calling for articles. Indeed, members of the Board of Editors had difficulty in editing those articles. In this edition, we have published our guidelines at the last page, hoping that contributors will follow the guidelines.

This edition contains many articles on procedure, evidence and legal clinic or clinical education: "a practical approach to learning law", to borrow the sentiment of Titi Hameed. No doubt, it is a source of both substantive law and procedural law. We are sincerely grateful to the senior members of the academia who publish in this edition. Indeed, the younger members of the profession, who are desirous to publish, will benefit tremendously from your contributions.

We wish to acknowledge and congratulate three of our members of the Editoral Advisory Board, namely: Professor Joash Amupitan, Professor Felicia N. Monye and Professor Y. Y. Bambale that have been elevated to the rank of professor. That your professorial advice will aid in the development of our journal is not in doubt. We also congratulate two contributors in this edition – Osita Nnamani Ogbu and Muhtar A. Etudaiye, for successfully bagging their Doctor of Philosophy (Ph.D); and to all our contributors, we wish you flying colours in your academic undertakings.

Timothy F. Yerima
Editor-in- Chief

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AN ASSESMENT OF THE RELEVANCE OF PROPER CUSTODY IN NIGERIAN LAW OF EVIDENCE*

I. Introduction

This article is motivated by the surprising trend not only on the part of counsel raising objection to the admissibility of documentary evidence, but also by some trial courts upholding same and refusing to admit it in evidence mainly because it did not emanate from the appropriate custody or was irregularly obtained. More often, we find counsel arguing that the party or witness through whom a document is sought to be tendered was not the maker or the addressee. This trend calls for a critical evaluation of the relevance of proper custody in the law of evidence. It is against this background that this paper intends to answer the call, by putting in view the extent of the relevance of proper custody in the law of evidence. In this regard an attempt would be made to examine the meaning of the expression *proper custody* in relation to documentary evidence under the Act and under case laws. The paper examines further the contending positions and what should be the correct or acceptable position on the issue.

II. Meaning of the Expression *Proper Custody* in Relation to Documentary Evidence

For a proper understanding of this issue, it is instructive howbeit briefly to define proper custody. Proper Custody means the place and in the care of the person with whom such document would as a matter of course is. Accordingly, the Evidence Act provides as follows:

> 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...[1]

Relying on judicial decisions in *Mearth v Winchester*[2] and *Croughton v Black*[3] the learned author of Phipson on Evidence stated that:

> Proper custody of a document means its deposit with a person and in a place where, if authentic, it might naturally and reasonably be expected to be found. Such custody is sufficient, although there might be another which would be more strictly and absolutely proper.[4]

Judicial pronouncements seem to follow this definition. For instance, in the well known case of *Ogbunyiya v Okudo* [5] the Supreme Court, per Idigbe, JSC (as he then was) held as follows:

> What after all, is meant by the expression proper custody of a document? It 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.[6]

On the authority of *Torti v Ukpabi*[7] the test to be applied both in civil and criminal cases in considering whether documentary evidence is admissible is whether it is relevant to the matter in issue. If it is relevant, it is admissible, however a party came about or obtained it is not material in the consideration of the admissibility of the document.

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1. Cap E14, Laws of the Federation of Nigeria, 2004 ('*the EA*') S 124.
2. 3 Bing NC 183.
3. 12 M & W 205.
4. M N Howard, *Phipson on Evidence* (14th edn.) (London: Sweet and Maxwell, 1990), p. 953.
5. (2001) FWLR (Pt 72) 2000-1, (1979) 6-9 SC, 39.
6. Similarly opinions were expressed in *Anyakora v Obiako* (1990) 2 NWLR (Pt 130) 52; *Isibor v State* (1970) NRNLR 248.
7. (1984) 1 SCNLR 214.

The illegality may only be attached to the person who obtained it illegally. And it may affect the weight to be attached to the evidence.[8] What then is the relevance of proper custody?

III. Relevance of Proper Custody to the Issue of Genuiness of Documents

For ease of reference, it is appropriate at this stage to reproduce the provisions of section 116 EA. It states as follows:

> The Court shall presume the genuiness 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.

However for a quick and easy understanding of section 116 EA, the section should be divided into two arms, namely, the part which is not underlined and which may be referred to as Group A documents and the underlined part of it otherwise referred to as Group B documents. Documents, which come under Group A, include Official Gazette of Nigeria or of a State, a government notice, the Gazette of any part of the Commonwealth, or newspaper and journal, a copy of the resolutions of the National Assembly printed by the government printer, and on the authority of *Ogbunyiya v Okudo*[9] the question as to production from proper custody does not arise in respect of them before they can be presumed genuine.

In that case, the trial judge after listening to addresses of counsel on both sides on 13, June 1977, adjourned the matter to 17 June 1977 for delivering of judgment. But subsequent to the delivery of the judgment he was appointed a Judge of the (Federal) Court of Appeal with effect from 15 June 1977, as contained in the Official Gazette announcing his appointment. He was unaware of his appointment when he delivered judgment two days later. On appeal against the judgment, Counsel for the appellants produced a copy of the Official Gazette from which he read from the Bar, the appointment of the trial judge. He urged the court to hold that on 15 June 1977, the trial judge had ceased to be a High Court Judge and accordingly had no jurisdiction to deliver the judgment of 17 June, 1977.
The (Federal) Court of Appeal rejected the argument on the ground that it was not bound to take judicial notice of the Gazette as it was not produced from proper custody.[10] Consequently, the appeal was dismissed and the appellants further appealed to the Supreme Court which construed sections 113 and 116 EA. It was held that under section 115 EA such documents as Official Gazette and the government notice or any fact of a public nature which they were intended to convey did not need to be produced from proper custody before their genuiness can be presumed by a court.

Thus, the pre-requisite of production from proper custody can not properly apply to an Official Gazette, a Newspaper, a Journal and a Government printed copy of a resolution of the National Assembly and it could not be a *sine qua non* to the application of the presumption of genuiness to the government notice in an official Gazette. Therefore, a party to a suit who intend to rely on such documents may tender or rely on his own copy of them. If the opposing party does not agree with the genuiness of that other party's copy he is always entitled to produce his own copy. The practice of bringing court Registrar, or Registrar of Newspapers or the Ministry of Information to court for the purpose of tendering a copy of records of judicial proceedings in a suit or newspaper complained of is therefore unnecessary.

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8. *Agagu* v *Mimiko* (2009) 7 NWLR (Pt1140); *Agbahomovo's Case(1999) 2SC79* citing *Kuruma v R* (1953) AC 197, 203 with approval at 86; *Okonji & or v Elinwa* (1999) 12 SCNJ 259, 273; *Motanya* v *Elinwa* (1994) 7 NWLR (Pt 356) 252; *Okafor* v *Obiwo* (1978) 9-11SC 115.
9. *Supra.*
10 *Ibid.*

On the other hand, the proper interpretation of the section would appear to be that only the Group B documents must be proved to have been kept substantially in the form required by law and be proved to have been produce from proper custody before their gunuiness can be presumed by a court.[11] Thus, a party who intends to tender such documents must show that they emanates from proper custody or that he is also the proper depository, for a court to presume that the document is genuine until contrary is proved.[12] Thus, it is sufficient for overseers to produce a parish certificate without showing where it came or for a corporation to produce corporation documents. [13]

Under this heading, if the genuiness of the document is in dispute, it must be proved to be genuine by the party seeking to rely on it. The proof of relevance is needed to presume the genuiness of the document, not as a basis of its reception.[14] Recognition of this principle was made in Ogbunyiya's case[15] where the Supreme Court held:

> ...and proof of production from custody is required not as a ground for reading the document....but to afford the Judge reasonable assurance of it as being what it purport to be.

To put it in a nutshell, whether documents are from proper custody or not, they are legally admissible but can not be presumed to be genuine unless they are from proper custody as defined in section 124 EA.

However, the presumption of genuiness of every document purporting to be a certificate, certified copy or other document is specifically provided for in section 114 EA and once the requirements of the section are met, i.e. being certified by an officer duly authorize to do so, the document is presumed genuine whether or not it is from proper custody, provided that the document is substantially in the form and executed in the manner directed by law.

Other issues that may arise in connection with tendering of public documents are whether they are to be produced only by a witness testifying under the oath? Or whether it is sufficient for such documents to be brought forward simply without necessity for it to be produced by a public officer who has custody of it?
The answer to this question can be found in section 113 EA which is also produced hereunder:113: The following public documents may be proved as follows-

(a) Act of the National Assembly or Laws of State legislature, proclamations, treaties or other acts of State, orders, notifications 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...

On proper reading of section 113 EA, it is obvious that it is not the contemplation of the section that production of the documents mentioned in sub-section (a) (i) must be by a witness testifying under oath[16]especially where the witness is summoned only to produce the documents *(subpoena duces tecum)* without being compel to attend court to give

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[11] *Ibid.*
[12] *Ibid.*
[13] See Phipson, *supra* note 4, at 953; Ogbunyiya, *supra* note note 5.
[14] *Ibid.*
[15] *Supra* note 4.
[16] As far back as 1834, it was decided in *Perry* v. *Gibson* (1834) 1 A & El that a witness called merely for the purpose of producing documents need not be sworn. Following *Perry's Case*, the Supreme Court of New Zealand in 1961 held that a person called in Criminal Proceedings merely to produce documents was not required to be sworn but that he could place the document on the table in Court where they could be identified and made evidence and use of by the other witness: *R v. Gilmose* (1961) NZLR 384.

evidence *(subpoena ad testificandum)*.[17] Indeed, such a person does not become a witness by the mere fact that h produces the document in his possession and cannot be cross examined unless and until he is called as a witness.[1] And section 34(3) EA states that:

> ...it shall be sufficient to account for his non attendance[19] at 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.

When this section was considered by the West African Court of Appeal, that court was satisfied that the mere production of Official Gazette showing that a witness (having testified at the preliminary inquiry) was required to testify again at a subsequent trial, was out of the country on leave (without formality of production on oath from the witness box), was sufficient foundation for the admission under section 34 (1) EA of the deposition of the witness.[20] Thus, once a Gazette dealt with facts of a public nature (and of which it was the intention of government to notify the public) and the document (containing the said notice) is produced before a trial court then unless the contents of the notice are irrelevant to the matter in issue that court, having the document before it ought to take account of the same, and if need be, admit same in evidence under sections 115 (part A) and 112 (a) E A.

Similarly, as section 110 EA does not make any provision as to who should tender a Certified True Copy of public documents in Court proceedings whoever procures them is competent to tender same without calling the public officer who is deemed to have the custody. It is therefore not the law that public records of private documents kept in Nigeria by virtue of section 109 EA can only be tendered by the officer who in the ordinary cause of his official duty authorized to deliver certified copies of same. As succinctly put by Kolawole JCA, in *Agagu v. Dawodu:* [21]

> It will be most anomalous to prevent a party to a proceeding from tendering in evidence a certified true copy of a document for which he paid in accordance with section 110 of the Evidence Act.

Indeed such public documents may be tendered from the bar.[22]

IV. Relevance of Proper Custody to the Issue of Maker or Signatory to the Document

Another common forensic battle among counsel is to take objection against an application to tender written evidence on the ground that neither the maker nor the addressee of the document was called to tender same.[23] It is necessary to deal with this issue with the provisions of section 91(1) E A. By virtue of that section, where the maker of a statement or the person to whom such document is addressed is available, he must normally be called to testify or swear to the correctness of the contents before the document can be admitted in evidence.[24]It is therefore generally necessary for the maker or the person to whom such document is addressed to appear in court to tender the document.

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[17] S. 192 EA.

[18] S. 193, see also the case of *Famakinwa* v. *University of Ibadan* [992] 7 NWLR (Pt 255) 608.

[19] That is non- attendance of a witness employed in the public service who having testified on oath at earlier judicial proceedings was required to testify in subsequently judicial proceedings.

[20] *Majekodunmi* v. *The Queen* (1952) 14 WACA 64, 667; see also *Isibor* v *State* (n 6) where the Supreme Court held that the trial court erred in law in refusing to admit the deposition of a witness duly signed by the Magistrate when the learned counsel for the accused sought to tender the same in evidence from the Bar, and insisting that it could only be proved in evidence through a *witness on oath.*

[21] (1990) 7 NWLR (Pt 160) 565.

[22] *Ogbunyiya v Okudo* (n5)677; *Anyakora v Obiako, supra* note 6.

[23] S 91 (1) EA.

[24] *Ibid.*

The proviso to section 91(I) (b) however treats the documents admissible even if the maker is not called as a witness on the ground that he is dead or unfit, bodily or mentally to attend as witness. The presence of the maker of the document may also be dispensed with if he is overseas and is not reasonably practicable to call him or can not be found after all reasonable efforts to find him has been made or on ground of undue delay or expenses.[25]

In addition, section 91(2) (a) E A specifically provides:

> In any civil proceedings the court may at any stage of the proceedings if having regards 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.

By virtue of the above provisions of the law, it is plain that the Court expressly has discretion having considered the circumstances of the case to either admit or refuse to admit documents even if the maker is available but not called as a witness. And such an order need not be made by the Court explaining why; once the Court is satisfied that undue delay or expense would otherwise be caused. The imputation here is that the Court needs not to call the party tendering to explain.[26] In exercising such discretion, the only criterion to guide the court is whether the document is relevant. If the document is relevant to the fact in issue, it should be admitted.[27] From these provisions of the law, it is clear that it is not mandatory that a document must be tendered through its maker. The court has discretion to admit or refuse to admit a document in evidence even if the maker is available and has not been called as a witness.[28]

V. CRITERIA GOVERNING ADMISSIBILITY OF DOCUMENTS

Generally, three main criteria govern the admissibility of a document in evidence, namely,

i. Question on the Plea of the Document

Generally, documentary evidence needs to be specifically pleaded to be admissible in evidence.[29] A document which is not pleaded is as a general rule inadmissible unless if it falls within one of the exceptions provided by law, for instance, where tendered in evidence in support of some facts pleaded by the party and is relevant to the issue raised in the suit.[30] And where an un-pleaded document is testified to or inadvertently admitted, it is a matter that goes to no issue and such 'piece of evidence will not avail the parties.' Thus, a trial court ought to discountenance such document in its judgment.[31]

See *Obembe v Okele* (2001) 10 NWLR (Pt 677) 690; *Bello v Ringin* (1991) 7 NWLR (Pt 206) 688.

[26] *Igbodehin v Obiante* (1978) 9-10 SC; *Obembe* v *Ekele supra.*

[27] *Obembe v Ekele supra* 694.

[28] *Ibid.*

[29] *NNPC v A I C Ltd* (2003) NWLR (Pt 805) 569 CA.

[30] *Oba Ipinlaye II v Olukotun* (1996) 6 SCNJ 74, 87; *Okeke v Oruh* (1999) 4 S C (Pt 11) 37, 51.

[31] *NNPC v AIC Ltd* (n 29) 583; *Adpra v Ajufa* (1988)12 NWLR (Pt 80) 1, *Ajide v Kilani* (1985) 3 NWLR (Pt 12), *Emegokwe v Okadigbo* (1973) 4 SC 113, *UBN PLC v Sepok* (Nig) Ltd (1998) 12 NWLR (Pt 578) 439, 477-478; *Uba Ltd v Ademuyiwa* (1999) 11 NWLR (Pt 628)590.

ii. Wheather it is relevant to the Inquiry Being Tried

In the law of evidence, the relevance of facts encompasses a wide area.[32] Generally, in order for evidence of a fact to be receivable under section 6 EA, the fact must be relevant to the fact in issue or relevant to some other facts which are relevant to the fact in issue.[33]
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 the Act relating to the relevancy of fact.[34] Evidence which is not relevant to the matter in issue is not admissible.

iii. Whether it is a Form Admissible in Law

Having scaled the hurdles of pleadings and relevancy, the next question which is the real bone of contention is whether formal requirements lay down under the Evidence Act for the admissibility of such documentary evidence are satisfied? For example, the formalities for admissibility of public documents are lucidly and comprehensively laid down under sections 111(1) and 112EA.

Sections 111(1) and 112EA stipulate as follows:

> 111(1) Every public officer having the custody of a public document which any person has right to inspect shall give that person on demand a copy of it on payment of the legal fees therefore, together with a certificate written at the foot of such copy that it is a true copy of such documents 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 authorized by law to make use of a seal, and copies so certified shall be called certified copies.
> 112 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.

Thus, if the formal requirements of a public document within the purview of section 109 (a) (iii) EA, for example, a record of judicial proceedings in a suit, have been satisfied by bearing out the fact that it was duly certified by a Registrar of a court as a 'Certified True Copy;' that an appropriate legal fees in respect therefore was paid and finally, showing that it was duly stamped with the court stamp. There being proper conformance with these provisions of the Acts, the document would be properly admitted in evidence.[35]

IV. Distinction Between Admissibility and Weight to be Attached to a Piece of Documentary Evidence

More often than not mistake is also made not to realize that there is a distinction between the admissibility of a document and the weight to be attached to it. Indeed, most courts have employed the rules of the weight of evidence to refuse the admissibility of the documents. This, it is submitted is wrong in law. A document may be admissible in evidence but when it passes through the crucible of the probative value and weight to be attached to it, it may be

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[32] See Sections 6-18EA.

[33] T A Aguda, *The Law of Evidence* (4th edn) (Ibadan: Spectrum Law Publishing, 1999), p. 26.

[34] Section 3, 7-11EA see also F Nwadialo, *Modern Nigerian Law of Evidence* (Benin: Ethiope Publishing Corporation, 1998), p. 29; T A Aguda, *supra* note 33.

[35] It must be added that a document may be admissible in evidence if it satisfied the prescribed conditions for admissibility for the purpose, yet those conditions may be wholly unsatisfactory if such document is sought to be admitted in evidence for yet another purpose. This is another way of saying that if a document is admissible under certain provision of the Evidence Act that does not Ipso Facto make the same document admissible for all intents and purposes because such document is intended in proof of a specific item under the relevant law, the specific requirements or provisions under that law must be satisfied to the hilt in order to effectuate the reception of that document in evidence: Okonyi v. Njokanma *supra* note 8 161.

found to be a worthless document with no weight to be attached to it.[36] Similarly, the competence of a witness to tender evidence in a case is difference from the weight to be attached to the evidence he will tender.[37]

Based on the foregoing, the Supreme Court in *James Igbinoria v The State*[38] cited with approval the statement of Lord Diplock in *R v Sang*[39] to the effect that:

> A trial judge in criminal trial... has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concern with how it was obtained...

Thus, even stolen documentary evidence or evidence obtained as a result of an illegal search of the body or of the residence of an accused is admissible provided it is relevant.[40]

In *Agagu v Mimiko*,[41] the State Security Service (SSS) report which was pleaded by the two principal parties to the appeal was alleged by the witness sent by the SSS not to be in existence. Nevertheless, the first respondent tendered the document. Learned counsel for the appellant urged the court not to attach any weight to it because the witness who was summonsed to tender it denied the existence of the document. It was held that the document does not detract from its evidential value or the weight to be attached to it since in any case it was a relevant document. It follows, therefore, that, there is no law that requires that a document must emanate from proper custody for its admission provided it is pleaded, relevant to the inquiry being tried and is in a form admissible in law. All that the law says is that, a document emanating from proper custody raises at best the presumption of genuiness in favour of the party seeking to utilize it in evidence and at worst may affect the evidential value to be attached thereto after its admission.[42]

V. Conclusion

In line with its stated aims, the focus of this paper has been an analysis of the relevance of proper custody in Nigeria law of evidence. In doing this, the expression proper custody was defined in relation to documentary evidence and how it relates to the issue of genuiness of documents as well as the maker or signatory thereto. Criteria governing the admissibility of documents, the distinction between admissibility, and weight to be attached to a piece of documentary evidence, has also been extensively analyzed.

Germane to the issue of proper custody is whether public documents are to be produced only by a witness testifying under the sanctity of an oath or by a public officer who has custody of it. This paper submitted that it is sufficient for such documents to be brought forward simply by whoever procures its certified copy without the necessity for it to be produced under oath or by any public officer. It is further submitted that proper custody only raises the issue of presumption and the weight to be attached to the document after admission by the court.

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36 *Etajata v. Ologbo* (2007) 6 SCNJ 462, 485; *Comptoir Commercial & Ind. S P R Ltd. v Ogun State Water Corporation & Anor* (2002) 4 SCNJ 342; *Buraimon v. Karimu* (1999) 9 NWLR (Pt 618) 319CA; 296, *Ayeni v. Dada* (1978) 3 SCNJ 27, 37.

37 *Motanya v. Elinwa supra* note 8; *Okafor v. Obiwo supra* note 8.

38 (1981) 2 SC.

39 (1979) 2 All ER 1282; [1979] 2 WLR 263.

40 *Karuma v R.* (1955) AC 197, 203; *Elias v Pasmore* (1934) 2 KB 164.

41 (2009) 7 NWLR (Pt1140) 347, 403 -5.

42 *Oshunrinde v Akande* (1999) 6 SCNJ 193,199-209, (1999) NWLR (Pt 455); *Adebayo v Adusei* (1994) 4 NWLR (Pt 862) 44 C A.