NATIONAL OPEN UNIVERSITY OF NGERIA

SCHOOL OF LAW

COURSE CODE:LAW 100

COURSE TITLE:INTRODUCTION TO LAW

3.11 Trial

The basic procedure for a trial is dealt with under the heading **Evidence** later in this study guide.

3.11.1 Execution

After judgment has been delivered or signed and assuming the defendant does not pay up, the plaintiff can execute on the judgment. This may be done by commencing bankruptcy proceedings, by an enforcement warrant redirecting earnings (garnishee order) or by having the Sheriff levy execution against the defendant's goods or land.

3.11.2 Miscellaneous

The above steps are only a broad outline of what is involved. A myriad of steps might intervene e.g. arguments about jurisdiction of the court, about whether the pleadings are proper, about costs and so on. It is not uncommon for a defendant to pay some money into court which gives the plaintiff the choice of taking the money out and resolving the action or proceeding to trial. In the latter case if the plaintiff is awarded less than the amount paid into court he/she is not entitled to costs incurred after the date of the payment in.

4.0 CONCLUSION

Criminal and Civil Procedure prescribed the steps for having a right or duty judicially enforced whereas substantive law defines the specific rights or duties *per se*. but for the majority of civil action are commenced by a writ of summons. Others are commenced either by originating summons, application or petition. The Criminal Procedure is mainly regulated by the criminal Procedure Act, the Criminal Procedure Code and the Magistrate Acts. Other series of rules of Criminal Procedure are the Supreme Court Rules and High court Rules.

A Court may promote reconciliation and encourage and facilitate a settlement of disputes

If we lived in the Garden of Eden, at any rate in its early stages, the law would work in the way visualized by King Ludwig of Bavaria, the patron of Wagner, when he opened a new court house in Munich. He said, as he cut the tape: 'We sincerely trust and expect that all litigants who enter through these portals will emerge successful.'
Alas, soon afterwards – and perhaps not surprisingly – he went mad. The reality is unfortunately epitomized by the wise old judge – by then

slightly cynical – when he said: 'I sit here every day and administer what one side calls justice.'

There is no way out of this dilemma…

(Source: Kerr 1981)

5.0 SUMMARY

You have learnt some important legal terms like single offence, misdemeanour, felony. Summary and indictable offence etc. Also important is the distinction between civil and criminal procedure and between Police and Private Powers of Arrest. You should now be familiar with court process itself and be able to rehearse it.

1a. During a political demonstration, a police officer approaches a press photographer from behind, take hold of him around the neck and places him in a police wagon and then takes him to the police station. The Police officer had been concerned about what he and other police felt was biased reporting of such demonstrations in the past and sought to remove the photographer from the scene. Nothing was said to the reporter at the time of his detention.
What duties has the police described above breached and what might be his civil liability?

b. Assume the detention, described above took place in Ibadan at 8am on a Friday and the photographer was not brought before the Magistrate Court until Monday morning on a charge of disorderly conduct. Form a procedural point of view that might be the ramifications for the police?

c. Why should a private citizen be careful when arresting someone?

2a. Bob, a single man and a farmer, who has lived all his life in a particular area, is charged with the murder of a neighbour over a dispute concerning ownership of cattle. Assume Bob has no previous convictions. What considerations would a court take into account in hearing a bail application and what are Bob's chances of success?

b. what advantage might there be to person charged with a minor street offence such as obscene language, having a reasonable amount of cash with them when arrested?

6.0 TUTOR-MARKED ASSIGNMENT

1. By what means may the following be brought before the Court
2. The presumption of law is not in favour of Bail. Comment.
3. Forms of actions have long been buried but they still rule us imperiously from the rave. Discuss.

7.0 REFERENCES/FURTHER READINGS

Kerr: M. Boyer Lectures, 1984

LFN: Criminal Procedure Act,

LFN: Criminal Procedure Code

LFN: Magistrate Court Act

The Supreme Court Rules

The High Court Rules

UNIT 4 LAW OF EVIDENCE; ADJUDICATIVE AND NON-ADJUDICATIVE PROCESS

CONTENTS

1.0 INTRODUCTION

In this Unit, we shall learn about Law of Evidence as well as other processes of dispute settlement. Law of Evidence is part of adjudicative law, that part of Law of Procedure which, with a view to ascertaining individual rights and liabilities in particular cases, decides:

i. what facts, may and what not, be proved in such cases
ii. what sort of evidence must be given of a fact, which may be proved.
iii. by whom and in what manner the evidence must be produced by which any fact is to be proved.

Only an outline of law of evidence is attempted here before we proceed to other adjudicative and non-adjudicative forms of settling disputes.

2.0 OBJECTIVES

On successful completion of this unit, you should be able to:

- describe in broad outline the different means by which disputes are resolved and in particular the difference between adjudicative and non-adjudicative methods
- state how the issues in dispute which must be determined by a court can be identified prior to the hearing commencing
- describe the basic procedure involved in civil litigation
- list the kinds of evidence which will be accepted by a court and who may give such evidence
- distinguish between the criminal and civil onus of proof.

3.0 MAIN CONTENT

SECTION A Law of Evidence

Evidence

There are four main areas with which the law of evidence is concerned:

- the **kind** of evidence which will be accepted by a court;
- the **amount** of evidence which will be required by a court;
- the **manner** in which evidence is presented to a court; and
- the **persons** who may or must or may not give evidence.

3.1 The Kind of Evidence

Under this heading, evidence may be classified in a number of ways:

- Between direct and circumstantial. Most of you will be familiar with this distinction. **Direct evidence** is evidence of the facts in issue themselves such as the fact that a witness saw one person stab another with a knife. **Circumstantial evidence** is an evidence of facts which are not in issue but from which a fact in issue may be inferred such as the fact that a person was seen running from the vicinity of a murder scene with blood on his clothes.

- Between original and hearsay evidence. **Original evidence** is that which a person sees or hears him/herself: **hearsay evidence** is evidence of what someone else has said about an event. In general terms, hearsay evidence is not admissible in a court. It is one of a number of exclusionary rules of evidence designed to eliminate evidence which might be prejudicial to a party.

- Between oral, documentary and real evidence. **Oral evidence** is the most common form of evidence. Here a person is called as a witness and is asked questions. The advantage of this process is that a court

can evaluate a witness because of the manner in which the witness gives evidence.

3.1.1 Documentary Evidence

Involves the production of documents for the court's inspection.

3.1.2 Real Evidence

Consists of producing objects for inspection other than a document such as a knife, clothing etc. Perhaps best listed in the category of real evidence is the procedure where judges and the jury for example visit the scene of the alleged crime to make an assessment of the site themselves. This procedure frequently occurs in cases involving motor vehicle accidents, where the physical make-up of the road may be said to have caused or contributed to the accident. In this case, the jury may well view the scene to make a judgment themselves.

3.2 The Amount of Evidence

This area of the law of evidence is essentially concerned with the amount of evidence one party has to adduce before satisfying the tribunal of the issues in contest before it. With civil cases, the plaintiff or claimant carries the onus of proof and must prove his/her case on the **balance of probabilities.** With criminal cases the prosecution carries the **onus of proof** and must prove the guilt of the accused beyond reasonable doubt. In other words, the onus is heavier in criminal than in civil cases. The level of proof that a plaintiff or prosecution must reach to discharge their onus, that is balance of probabilities and **beyond reasonable doubt,** is referred to as the standard of proof.

When evidence generally is being considered by a court, there are two questions which frequently arise. Firstly, is the evidence **admissible?** – that is, can it be received by the court at all. There are a large number of rules which exclude evidence of one kind and another such as the hearsay rule. Secondly, if the evidence is admissible, what **weight** can the court place on the evidence. Relevant factors here might be whether it is circumstantial, whether witnesses are biased, whether their memories are vague and so on.

3.3 The Manner in Which Evidence is presented

The form of trial in Nigeria is known as the adversarial or accusatorial system which involves the presentation of facts by the responses of witnesses to questions. The witnesses are called to give evidence by the parties to the litigation and are questioned by the legal representatives of

those parties or by the parties themselves. The function of the judge is to act as an adjudicator rather than an additional inquisitor.

In United Kingdom where cases are tried before a judge and jury, the function of the jury is to decide questions of fact while the judge adjudicates on matters of law. In Nigeria, Judges decide both questions of facts and matter of law. Judges can and do ask questions of witnesses themselves but if there is excessive interference by the judge there may be grounds for appeal.

A case will be opened by the plaintiff or the prosecutor who briefly outlines the nature of the case and the evidence to be called. Generally, the party which bears the burden of proof, the plaintiff or the prosecutor, has the right to begin calling witnesses.

Whoever calls a witness elicits answers to the questions by a process known as **examination in chief.** There are a number of rules regarding the manner in which examination in chief may be conducted. The most important is the fact that leading questions cannot be asked. Leading questions are those which suggest the answer or assume the existence of facts which may well be in dispute. An example of a leading question would be 'After you saw the car go through the red light did you follow it?'. This question assumes that the car went through the red light, a matter which may well be in dispute.

At the conclusion of the examination in chief, counsel for the other party has the opportunity to **cross examine** the witness. The rules of cross examination are more relaxed than with examination in chief and in particular leading questions are permitted. The cross examiner is, in certain circumstances, entitled to question the witness on matters seemingly unrelated to the main issues in order to attack the credit of the witness.

After the cross examination is finished the other party then has a right to **re-examine** the witness. This right is limited to asking non-leading questions about matters arising out of cross examination.

After the plaintiff or prosecutor has no more witnesses to call, then the defendant may call the witnesses for the defence case. The same rules apply as to the mode of questioning.
If the defendant calls evidence then the defendant addresses the judge first, followed by the plaintiff or prosecutor. Otherwise the counsel for the plaintiff or prosecution has the right to give the final address.

3.4 The Persons Who May or Must Give Evidence

Again, there are a number of exclusionary rules which govern this area. Some of these are:

i. Only experts in a certain field can give evidence based on an opinion. Otherwise a witness is not entitled to give evidence beyond what he/she sees or hears.

ii. Certain witnesses or communications are privileged such as the communications between solicitor and client. In some instances, the government can claim privilege of, say, defence secrets.

Section B

3.5 Other Adjudication and Non-Adjudicative Processes of Settling Disputes

3.5.1 Arbitration

i. You may be familiar with the arbitration process that is often associated with the resolution of industrial disputes. This is not the type of arbitration we are concerned with here, but rather with what is sometimes called commercial or private arbitration.

ii. There are three main differences between commercial arbitration and litigation;

iii. With arbitration, the parties must agree to submit the dispute to arbitration. They may do that after the dispute has arisen or (more commonly) they may do it in advance by inserting a clause in their contract to that effect.

vi. In an arbitration, the parties choose the arbitrator. This means that it is possible to use a person who is skilled in the area in dispute.

v. The arbitration process does not need to follow a formal hearing process such as will be found in litigation. The rules of evidence are more likely to be relaxed and there are no detailed pleadings as are required in litigation. Nevertheless, depending upon the arbitrator and the parties, the informality of arbitration can be quickly lost. Not infrequently, barristers are appointed as arbitrators and they tend to run the arbitration hearing more like a court case.

One other point should be made. Originally, arbitration was seen as less costly than litigation. Nowadays this advantage is not heavily relied upon because so often the parties use a similar battery of lawyers as they

would in litigation and, what's more, the parties to arbitration have to pay for the arbitrator.

3.5.2 Non-Adjudicative Processes

Dispute resolution processes can be seen along a continuum from private negotiation between the parties all the way to litigation. Moving along this continuum, changes in three factors may be observed.

Firstly, control passes from the disputants to the third party. In private negotiation, the parties control the process itself, the content and the outcome. 'Content' refers to the issues that can be discussed during the application of the process and 'outcome' refers to the final result of the application of the process. As you move further along the continuum, more control is given each of these to the third party who is intervening to help solve the dispute. A mediator controls the process, but not the content or the outcome. Whereas in adjudication, the rules of procedure and evidence ensure that the judge or arbitrator controls the process and content. As the decision-making power is vested in either the judge or the arbitrator they also control, and indeed impose, the outcome.

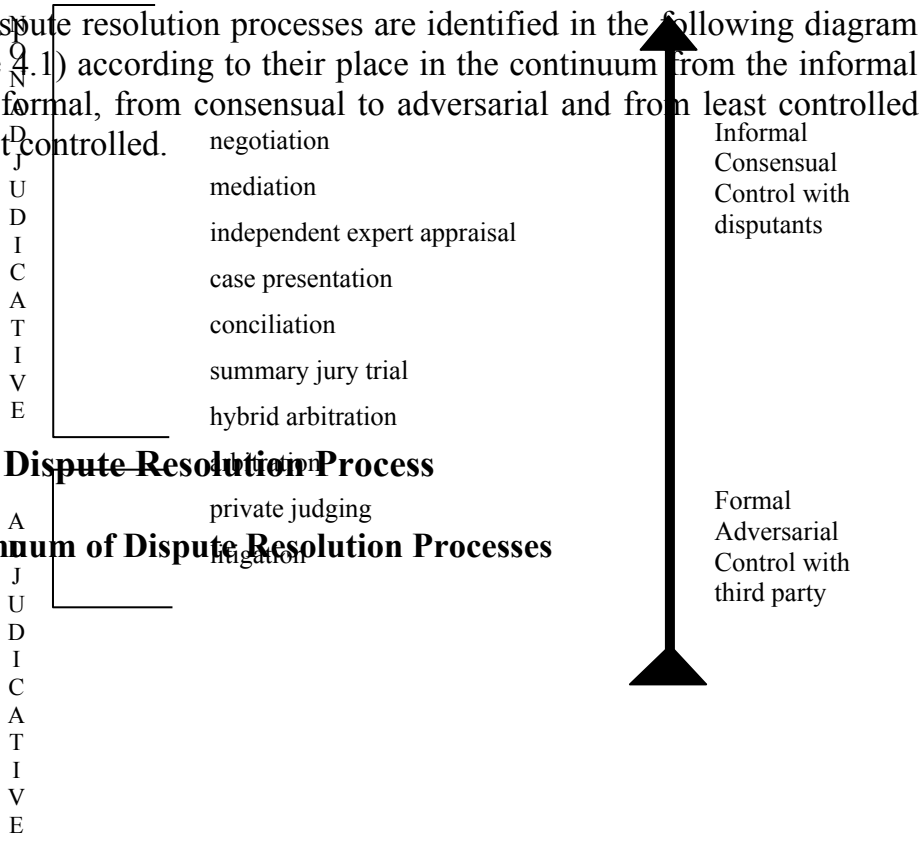
Secondly, the processes move from a consensual mode of dispute resolution, where the disputants attempt to agree on a solution that is acceptable to all, through to an adversarial mode where the decision is imposed by the third party in arbitration and in adjudication.

Thirdly, the further one moves along the continuum the more formal the processes become.

The dispute resolution processes are identified in the following diagram (figure 4.1) according to their place in the continuum from the informal to the formal, from consensual to adversarial and from least controlled to most controlled.

3.5.3 Dispute Resolution Process

Continuum of Dispute Resolution Processes



3.5.4 Advantages of ADR

The commonly given reasons for using these non-court processes may be listed as follows:

(a) **Quicker** – Settlements are usually achieved within weeks or months of starting the process rather than within months and years as can occur within the adjudicative processes.

(b) **Cheaper** – With settlement being achieved earlier, there are usually less legal fees, witness expenses and fewer lost business opportunities whilst management, time and business finance are set aside to fight the litigation.

(c) **Informal** – The rules of procedure and evidence of the adjudicative processes are often incomprehensible to non-initiates, but with a consensual process the disputants can organize meeting times and places that are convenient to them and can organize rules for the process that suit their particular requirements. They can emphasize what is important to them regardless of its legal relevance. Consequently, the disputants have a better understanding of the process and, accordingly, are able to contribute more. They are more in control of the resolution of their own dispute.

(d) **Enhances Business Relationship** – Because the informal processes are consensual and strive for solutions that suit the parties rather than those necessary according to the letter of the law, often all the parties come away with solutions that satisfy their wants or needs. This enhances business relationships between them. Solutions that people agree to themselves and which they feel have advantaged themselves are usually more readily adhered to than those that have been imposed. If one side wins and the other side loses, as in the adversarial processes, usually the loser feels resentment and has no commitment to the solution but only adheres to it because of the fear of punitive action. This situation does little to enhance the business relationship between the parties.

(e) **Wider Remedies** – As the informal processes are not limited to the remedies provided by the law or legal system, a wider range of remedies or solutions may be contemplated and implemented by the disputants. For instance, whilst renegotiation of the whole contract is not a remedy a court can impose, informal processes do allow for this. This is often the most appropriate remedy since most disputants in a commercial dispute have an investment in seeing all parties continue in business, and being profitable. There is a mutual interdependence among businesses which can be enhanced by the informal processes.

(f) **Confidentiality** – As these processes are private they keep the disputants from adverse publicity. Within the process, communications, including those with the third party, are confidential and this encourages more honest exchanges.

3.5.5 Main Types of ADR

(a) **Negotiation** needs no introduction except perhaps to say it is used in this instance to indicate negotiation without the assistance of a third party.

(b) **Mediation** is a significant growth area in ADR in Nigeria today, especially in court-connected schemes. There are many variations of procedure in mediations. However, the usual concept of a mediation is a structured process in which a neutral third party (mediator) helps the parties to negotiate their own solution to their dispute by assisting them to systematically isolate the issues in dispute, to develop options for their resolution, and to reach an agreement that accommodates the needs of the parties. This agreement reached in mediation is not legally binding. However, the parties normally redraft the