

Law of Evidence

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CHAPTER 1 INTRODUCTION

- evidence” Latin term “evidentia”: to show clearly, to make clear, discover clearly certain, to ascertain or to prove
- serves to prove or disprove the existence or non-existence of an alleged fact
- presented before the court to prove/disprove fact in issue or conclusion
- Only relates to issues of fact not issues of a law (it is an issue of fact by itself)
- What about information?

Evidence law

- body of legal rules developed and enacted to govern
- A. facts that may be considered in court?
(This is the issue of relevant evidence that one should adduce before the court to support his allegation.
- 1. Facts in issue
- 2. Facts relevant to facts in issue)

- DER: “ a means whereby any alleged matter of fact, the truth of which is submitted to investigation, is proved and includes statements by accused persons, admission, Judicial notice, presumptions of law, and observation by the court in its Judicial capacity”.
- So, what is evidence law?

- The methods of securing consideration of these facts
- 1. By proof
- Real (e.g. documentary, exhibits) evidence and Oral evidence
- 2. Certain facts, which need not be proved (i. Judicial notice, ii. Judicial admission)
- C. The party that must secure consideration: burden of proof and degree of proof required to win the case.
- D. Appeal: deals with the effect of failure to comply with rules in any of the above categories of evidence law (e.g. improper admission or rejection of evidence)

- the admissibility or non admissibility of evidence may form the subject of a ground of appeal where an appeal is lodged against conviction, discharge or acquittal [see Art 184(c) of cr.p.c].
- Does evidentiary errors constitute Reversible error

Nature of Evidence law

- substantive and adjective.
- Adjective laws: the method of presenting cases to court proving them or generally enforcing the rights and duties provided under the substantive laws.
- substantive laws: defines rights and duties.
- procedural laws: how pleadings can be framed, investigation conducted, evidence collected etc...

Purpose /significance of Evidence law.

- Evidence provides the court with information.
- Proving facts through the presentation of evidence means convincing court to accept a particular version of events.
- process of proof: regulated by evidentiary rules and principles in order to achieve accelerated, fair and economic Justice.

- 1. the law of evidence regulates the process of proof
- 2. moral purpose: by establishing and regulating the rules relating to the process of proof in proceedings in courts and tribunals
- Is there a consensus on the importance of evidence law in regulating the questions of relevancy?

Development

- when people started to settle disputes before third parties
- ancient means of proof in to two: Proof by ordeals and Proof by oath
- walking on fire, holding glowing with heat, put hands in to boiling water etc
- proof by ordeal were extremely irrational and inhuman

- writing of scholars, judicial decisions and laws enacted at different times based on different legal traditions instrumental for the development of rules and principles of evidence.
- “laeba shai”
- “ Afersata” or “ awchachigh”.
- suspects do not have a chance to challenge the veracity or the truthfulness of the evidence
- hinder the people from doing their day to day activities

Evidence in civil and common law legal systems

a. organization of the rule of evidence.

- common law legal system: separate code of evidence law (mistrust of Juries)
- continental system: sparsely distributed in both substantive and procedural laws (responsibility for decision on professional judges)

- B. sources of evidence rules
- common law: law enacted by the law-making organ and judge made evidence rules/ precedent system
- the continental system- laws are enacted by the parliament

- C. the system of inquiry
- common law: "Adversarial system"/ two parties present competing version of the truth/ a party-lead system in which the judge has no investigative role
- to listen to the evidence and decide which version of the facts they tell is closest to the truth/ judge acts as an impartial umpire, policing the rules of the trial game there by ensuring fair play.

- the civil law system: "inquisitorial system"
- Court: making inquiry/question witnesses, directs the police investigation, commissions the service of expert witness and examines all relevant evidences.
- the trial judge plays active role as opposed to adversarial system
- role of the advocate: less important/ confined to ensuring client receives a fair trial, checking correct law is applied and procedural rights are respected

- Witnesses: are of the court, it is the judge who obtains most of the evidence through the process of questioning witnesses. The advocates' questions are restricted to clarifying points and obtaining further information.
- Treated humane and natural manner vs rigorous, some times aggressive

- (D) the types of evidences emphasized
- common law: the greatest weight and importance is attached to oral testimony of the parties
- continental law: written evidence including notary- attested records of every sort of transaction, written formalities, registration etc.
- documents : no lies and easily manageable, and economical to bring before the court of law

Conti...

- (E) competency of parties to be a witnesses?
- common law: are competent witnesses in their own case.
- civil law system: considered best if no one is a witness in his own case
- Art 261(2) of our civil procedure code
- criminal proceedings: no consensus
- Art 142 of Cr.p.c: not be a competent witness in the absence of tests of accuracy (cross examination.)
- Let the court to determine the weight to the testimony of the accused/ no any negative impact on the task of the administration of justice
- Art 20 (4) of the FDRE constitution

- Is hearsay evidence admissible as a rule?
- Common law: oral evidence/the direct one/
excluded hearsay evidences.
- no test of accuracy/ no possibility for the
opponent party to check the witness is
speaking the truth (cross- examination and
no physical presence of the real witness/ the
right of the accused to confront his or her
accusers)
- civil law: no general rule of admissibility of
proof/ judge discretion to determine the
admissibility or otherwise of the evidence by
applying his own personal evaluation.

Evidence in Ethiopia

- the ancient days Fitha-Negest, the document which governs the spiritual and secular life the society before the enactments of modern codes
- contains provisions dealing about proof and means of proof,
- it stressed the importance of man's oath in court and prevented parties and their kinsmen and close relatives from testifying
- means of proof like Afersata ,lebashai ,waqif sera
- evidentiary rules are found scattered

Evidence law in civil and criminal cases

- evidentiary rules: to assist the court in establishing the truth
- in criminal cases: the protection given to the accused in respect to his right to a fair trial.
- evidence of the defendant's bad character or his previous convictions will not be admitted at trial, (see art 138 of cr.p.c

- Civil case: relevant and probative to the fact are generally be admissible/ no mandatory rules requiring the exclusion of evidence in civil cases
- standard of proof
- beyond reasonable doubt. (be virtually certain)
- preponderance of evidence or probabilities.

burden of proof

- criminal cases: prosecution bears the burden/ presumption of innocence, procedural fairness, prosecutor always opens the case at trial and presents its evidence first
- Civil matters: "he who asserts must prove"/ "counterclaim (Art 258 of civ.P.C), documentary evidence
- proof by admissions: civil: deny each and every fact of allegations (Art 83 of civ.p.c and shall be presumed admitted and the court shall give judgment on such admitted facts. (see Art 242 of civic)

- criminal cases: says nothing in answer to the charge, a plea of not guilty shall be entered/ silence of the accused of the accused does not amounts to admission. (see Art 27, and 134(1) of civ.p.c, failure to cross-examine on a particular point does not constitute an admission of the truth of the point by the opposite party. [See Art 140 of cr.p.c]

- judicial admissions are conclusive in civil cases
- Not conclusive in criminal cases: the court may require the prosecution to call such evidence for the prosecution, as it considers necessary and may permit the accused to call evidence.
(see art 134 of cr.p.c)

Classification of evidence

- Manner of proof
 - A. testimonial
 - B. Document Evidence
 - C. Real or Demonstrative Evidence
- Relevance to the fact in issue
 - A. direct
 - B. indirect/ circumstantial

CHAPTER 2 Facts which may be proved other than by evidenceC

- The general rule: fact in issue, the fact has to be proven by relevant and admissible evidence
- three exceptions
- 1. a formal admission either before the trial or at the trial.
- 2. presumptions
- 3. judicial notice

Admitted facts

- a statement of fact, which waives or disputes with the production of evidence by conceding that the fact asserted by the opponent is true
- the fact admitted has to be taken as evidence
- “admission” and “confession”
- DER, the definition of confession is not given
- Art 134 (1) of cr.p.c used the term “admission “in criminal cases by saying “when the accused admits without reservation ...”.
- Art 19(5) of the FDRE constitution: used “admission” interchangeably with “confession”

- የእምነት ቃል” in criminal cases and “
ማመን” in civil cases. But we cannot
get such provision, which used the
term “confession” in civil cases.

Why admitted facts need no proof?

- where a party admits the truth of a fact in issue: any evidence to prove the fact will be ruled as inadmissible on the ground that it is irrelevant except in some serious criminal cases like a homicide case as did in practice.
- in the normal course of things, a person does not make himself liable
- undue delay will be created

- Art 242 of civ.p.c and Art 134 of cri.p.c required the court to pass judgment on the admitted facts
- Discretion of courts : require the admissions to be proved under Art 235(2) of civ.p.c and Art 134(2) of cr.p.c.

Limitations of Admissions

- especially true in criminal cases
- oppression, unfairness and the like
- Confessions or self-incriminatory statements vs. presumption of innocence. ((Art 20(3) of the constitution))
- Art 134 of cr-p.c: plea of guilt has to be without reservation.
- Art 134(2), 135 of cr.pc). Even reject plea of guilty without reservations

- Admission: destructive in civil cases
- vague or doubtful, the court may require proof even in civil cases
- confession made by one of the co-offenders
- shall be limited only on such person who made it.
- Right to remain silent: Art 27(2) of cr.p.c and Art 19(2) of the constitution

- incriminating statements: by one of the co-offenders, shall not be admissible on those co-offenders (denies the opportunity to exercise the constitutional rights.)
- It will also have adverse effect on the fairness of the proceedings.
- co- offenders cannot be a witness against the others in the same trial

- may make incriminating statements against the other to make himself free
- the public prosecutor can call the accused who choose to incriminate himself and others as a witness against the others by providing him separate trial.

civil cases involving indispensable parties

- whose presence is necessary for the determination of all the questions involved in the suit (see Art 40(2) of civ-p-c)
- rights of recovery: fully exercised by the other joint owners. (see Art 1388 of civil code)
- fully exercised by the other joint owners. (see Art 1388 of civil code)
- the plaintiff can claim the full amount from the indispensable party who admitted his allegation, and the litigation shall be continue on the question of contribution between those indispensable parties

- the court shall not take the admission made by one indispensable party against the other unless one authorized the other to appear and defend the case in accordance with Art 69 of civ-p-code

Classification of Admission: formal and informal admissions

- A party may formally admit a fact in the pleadings: in statement of claim or in defense or in a counter claim or in reply
- in open court in the first hearing or at the trial
- Informal: made in a letter, fax or an e mail, in a witness's answer to a question asked in cross-examination and spontaneously by a person in response to the events given rise to the cause of action

- lesser weight shall be attached to the out of court admissions given to an authorized person

Judicial and Extra- Judicial

- Judicial admissions: admissions made as part of the proceeding in the lawsuit
- before the court handling the case
- Art 35 of cr.pc.
- judicial admission, which cannot be withdrawn afterward.

- Extra- Judicial admissions: not made in the course of court proceedings
- in criminal matters: may be made in the course of the criminal proceedings (Art 27 of cr.P.c)

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- Quiz:
- 1. Discuss exhaustively the difference between civil law system and the common law system and the justification for their difference ? (10 point)

Judicial Admissions civil and criminal cases

- confessions made before the trial court, and before other courts
- if the accused chooses he can at his trial contradict or explain his statement at the preliminary inquiry
- see Art 83(3) of cr.p.c
- judicial admission may not be contradicted if it is made voluntarily and intelligently.

Presumption

- party is relieved of the legal burden of proving a fact in issue
- inference made about one fact from which the court is entitled to presume certain other facts without having those facts directly prove by evidence
- party who wants to benefit from presumptions must go the half way i.e. he must first prove the basic fact unless such fact is admitted by the other party

Justifications for presumption

- to save time
- A. presumption is probabilistic relation
- B. procedural convenience
- C. to protect public policy or greater interest of government
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- *Do all presumptions depend on the proof of the basic fact?*
- presumptions are circumstantial evidences from which if one fact (basic fact) is proved to exist, the alleged fact exists
- there are certain presumptions not depending on proof of basic fact
- argument that they are mandatory rules of law or initial allocation of burden of production than presumption

- presumption of fact (permissive inferences)
- logical inferences that can be drawn by experience upon proof of the basic fact and mostly are true in the normal course of things.
- presumptions of law: which the law requires the court to make (the phrase “shall be deemed or presumed”)

Presumption of fact

- not prescribed by law
- logical inferences that can be made from a given fact
- Argument: whether it is subject of law of evidence or subject of rules of logic or reasoning.
- are not mandatory (are permissive)
- they can be rebutted, and require proof of a basic fact

- the court may make inference from the experience, the common course of natural events and from the custom and behavior of a person in particular and the community in general

Presumption of Law

- the law requires the court to make (mandatory)
- rebuttable and irrebutable presumptions

Irrebuttable Presumption

- Presumption: relieves a party from proving the fact in issue
- In principle, presumption has the effect of shifting the burden of proof
- conclusive or irrebuttable presumption: expressed rule of law which can not be disproved by another party.
- do not have the effect of shifting the burden of production to another party

Rebuttable presumptions.

- party relying on the presumption bears the legal and evidentiary burdens of proving the primary fact
- has the effect of shifting the burden of proof to another party
- standard of proof required to rebut the presumption

- In a civil case: has the legal burden of rebutting the presumption is required to prove the issue to the normal standard of “on the balance of probabilities”
- in some cases: it seems that the provision requires the party to prove the issue to the higher standard of proof which confirms to the standard of “beyond responsible doubt

- types of evidence: law restricts the ground upon which the presumption may be rebutted, and in other cases does not impose any restriction
- rebuttable on unlimited: *proof to the contrary may be adduced by any means*
- as far as the law does not impose any restriction
- *proof to the contrary is admissible to rebut such presumption*” or “*unless the country is proved or proof to the country by any means is admissible*
- *Who can rebut?* the law may impose a limitation
- Art 172 of civil code: case of absence
- presumptions rebuttable on limited grounds

Permissive presumptions

- prescribed under the law
- are not mandatory
- phrase” *may presume...*
- the court may call the production of evidence or may consider the disputed fact as established
- Rebuttable or not?: Arguments
 - 1. once considers the disputed fact as established the other party doesn't have the right to rebut
 - 2. has the effect of shifting the burden of proof to another party
- rebuttable though depend on the discretion of the court

Judicial Notice

- circumstances in which the judicial system assumes a factual proposition to be true even without proof of that proposition
- Advantages: saving time
- is left to the discretion of the court
- Mandatory judicial notice: laws published (DER art. 42)

facts are subject of judicial notice

- the proposition in question appears overwhelmingly probable
- matter of common knowledge or
- capable of certain determination by sources whose authority is not questioned
- criteria of '*indisputability*'
- A. Facts of common knowledge
- fact generally known to be true by the ordinary intelligence
- matter of ordinary course of nature or matters that a member of a given community can easily recognize like known public places and customary practices

- excludes personal knowledge (to increase the confidence of the society)
- does not have to be universally known
- B. Verifiable facts
- facts that can indisputably be ascertained by reference to authoritative means and those matters of public knowledge.
- All people need not have a consensus on ascertain scientific or historical facts

Judicial notice of law

- process by which the courts determine the applicable law in a case
- Art 240 of civ.p.c
- presumed that judges are familiar with those laws which have a nationwide application
- Common law vs. civil law
- *laws* subject to judicial notice of law
- federal Negarit gazeta establishment
proclamation no 3/1995 of art 2(3) provides all federal or regional legislative, executive and judiciary organ as well as any natural or judicial person shall take judicial notice of laws published in federal negarit gazeta

- federal treaties federal laws?
- Administrative regulations and directives laws?
- the decisions of the cassation division of the federal Supreme Court laws?
- art 2(4) of the federal courts establishment proclamation re-amendment proclamation no 454/2005, the interpretation of law rendered by the federal supreme court cassation bench are binding on federal as well as regional courts of all level
- *state laws?* judicial notice of laws published in “*state Negarit Gazeta*”

- proclamation no 25/96, the federal courts may apply a state laws (art. 6)
- proclamation No 3/1995 does not talk about the judicial notice of laws published in “*state Negarit Gazeta*”
- Are state court obliged to take judicial notice of laws of other state?
- **where taking judicial notice be come mandatory?**
- A party or his counsel should be prepared to suggest to the trial court matters he feels should be judicially noticed

- most matters of judicial notice are discretionary not mandatory with the trial judge
- refusing to take judicial notice of matters that are clearly certain and indisputable would be an error

CHAPTER 3 Relevance and admissibility of evidences

- **A. Facts in issue**

- evidence is all about proof of facts
- Fact: any thing or relations of things capable of being perceived by the senses and includes any mental conditions of which a person is conscious
- Fact in issue: disputed between the parties and to be resolved by the help of evidence
- criminal code determines what the prosecution must prove in order to establish an accused's guilt

Relevance and admissibility of evidences

- civil cases: found in the pleadings: Art 246 of civ.p.c)
- affirmed by one party and denied by the other
- Art254 of civ.P.c: parties not at issue
- Art 242 of civ-p.c: decide on the fact admitted
- subordinate facts or collateral fact: competence of a witness, credibility of a witness, facts which show the condition to the admissibility of certain types of evidence,

Relevance and admissibility of evidences

- **B. Relevant facts**
- two components: materiality and probative value
- Materiality refers the relational aspect of relevancy. that a logical relationship needs to be established between the evidence tendered and the fact to be proved.
- Art 137 of cr.p.c and Art 263 of civ.p.c: examination in chief shall only relate to facts which are relevant to the issue to be decided
- Art 138 of civ.p.c: the court may at any stage of the suit reject any document, which it considers irrelevant or otherwise inadmissible

Relevance and admissibility of evidences

- objection: Art 146 of cr.p.c or Art 270 of civ.P.c on the ground of irrelevancy
- probative value: the capacity to prove (not only mere connection)
- "*Relevant evidence*: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- trials will not ordinarily prove or disprove the factual propositions absolutely

Relevance and admissibility of evidences

- each evidentiary item is a single brick with a limited function
- **C. Facts Relevant to facts in issue**
- the determination of relevancy is based on logic and common sense
- **i. Facts forming part of the same transaction (Res-Gestae)**
- Res-Gestsae: things done or said in the course of a transaction
- **ii. Facts being the occasion, cause or effect of facts in issue**

Relevance and admissibility of evidences

- Occasion: inquires in to the existence of a favorable environment for the alleged fact to exist or not.
- Cause or effect:
- State of things:
- iii. Motive, preparation, and previous and subsequent conduct
- Motive: compelling force to do a certain act
- Preparation: things you do to a result by trying to obtain the means

Relevance and admissibility of evidences

- **D. Relevancy of Confession:** unless a given confession is true it shall not be relevant evidence
- Art 134(2) of cr.p.c: excluding b/c of unreliability
- obtained in violation of rules of procedure
- Art 31(1) of cr.p.c: improper means
- Art 19(5) of the constitution
- **E. Relevancy of Circumstantial Evidence**
- proves a certain fact indirectly
- 1. Prospectant evidence, 2. Concomitant evidence and 3. Retrospectant evidence.

Relevance and admissibility of evidences

- **F. Relevancy of similar Occurrence**
- **G. Relevancy of Judicial decision**
- Art 154 of cr.p.c (joinder of criminal and civil case)
- Art 155 of criminal procedure code (may refuse where joinder likely to confuse, complicate or delay the hearing of the criminal case)
- Judgement of the civil bench to criminal matter: not binding and relevant (standards of proof)
- Criminal judgement for civil matter
- Common law: not relevant (civil bench are capable to decide on a fact based on the evidences thereof, and the standards of proof)

Relevance and admissibility of evidences

- Civil law: binding on civil court
- Ethiopia: Art 158 of cr.p.c (acquittal judgment of the criminal court does not have any relevancy in civil cases)
- Art 2149 of civil code (criminal court judgment shall not have abiding effect up on the civil court)
- Art 145 (1) of civ (requires the production of records or judgments of criminal court)

Relevance and admissibility of evidences

- **Relevancy of character evidence**
- Relevant evidence may not be admissible
- result in an unfair prejudice
- “character” includes both “*disposition*” and “*reputation*”
- In civil cases, character is generally irrelevant. (exception: defamation Art 2047)
- In criminal cases good character of the accused is always relevant.
- bad character is irrelevant in criminal cases. (Art 149 of the criminal procedure)
- only irrelevant before conviction Art 149(3) of cr.p.c)

Admissibility

- legal prohibitions against some relevant evidences: for social and public policy reasons
- evidence that is not relevant is not admissible
- relevant evidence may be excluded if it is unfairly prejudicial, confusing,
- social policies: exclude relevant evidence (private privilege or public interest immunity)
- Admissibility: exclusion of evidence irrespective of its relevancy.
- probative value to determine its admissibility, waste of time, Consideration of undue delay (art 137(1) (3) and Art 256 of civ.p.c),

Admissibility

- In practice: Amendment of pleading (Art 91 of civ.p.c) rather than Art 256 of Civ.p.c
- *the danger of undue prejudice: bias*
- *Generally: an evidence is inadmissible: not relevant and if there is a legal prohibition behind it*
- **Public policy and privilege**
- **A. Public policy:** if disclosed, the national interest and governmental secrecy or the administration of judicial process may be affected
- **(i) Evidence as to affairs of state**

Admissibility

- **(i) Evidence as to affairs of state**
- government secrets or public security, information concerning the stand and organization of military force, and other internal security matters
- **(ii) Information for the detection of crime**
- compelling the police to disclose the person who gave information
- information as to the ways of detecting a crime
- **(iii) Judicial disclosures**
- judicial process of a given case or judgment (to protect the principle of independence of judiciary Art 77 of FDRE constitution)

Admissibility

- **2. Privilege**

- to protect certain social interest, which prevails over the individual interest (spousal privilege, protect professional secrecy)

- **3. Parole evidence or extrinsic evidence in relation to document**

- best evidence rule: the best proof of a document's content is the document itself
- Art 2003 of civil code
- parole evidence rule

Admissibility

- parole evidence rule: limits proof of the fact to the contents of the writing and prohibits consideration of any evidence which contradicts, alter, vary, change, and modify any of the terms or provisions of the written agreement
- Art 2006(2) of the civil code
- it is possible to challenge the contents of a written contract by other written document?
- A. no Art 2006(2)
- B. yes Art 1722

CHAPTER 4 REAL EVIDENCE

- *Verbal evidence: which is given by word of mouth: the oral testimony given by witnesses in court”*
- statement made by a competent witness, under oath or affirmation, usually related to legal proceeding
- Witness: one who being present, personally sees or perceives a thing; who testifies to what he has seen, heard, or otherwise observed, offer an opinion applying his expert knowledge to facts he has not personally observed

ORAL EVIDENCE

- **Importance of Oral Evidence**
- 1. to assist in the achievement of rectitude or correctness of decision. This can be done
- overemphasized or which could lead to erroneous inferences being drawn is inadmissible (hearsay evidence)
- There is standard of proof
- Cross-examination: testing credibility of witness
- 2. absence of documentary evidence: The eyes and ears of justices

ORAL EVIDENCE

- **Nature and Development**
- **Common Law**
- given considerable weight and will usually prevail over written evidence.
- Draw the significance from the process
- gives his testimony is before the judge and the action is physical expression and helps the jury the matter to be clear and for the accused to have a chance of cross-examination
- preparation of witnesses:
- Hearsay

ORAL EVIDENCE

- **Civil Law**
- left almost entirely to the discretion of the judge rather than the parties
- oral witnesses are the courts' witnesses
- no "hearsay rule"
- preparation of witnesses is strictly forbidden: disciplinary sanctions and not be given full credibility.
- less emphasis on oral arguments and examination.

ORAL EVIDENCE

- **Traditional Ethiopian Oral Litigation**
- oral evidence was recognized in the law firstly by the 'Fetha Negest
- sophisticated technique of interrogation and cross-examination known as 'Tatayyaq muget'. "Esette-ageba-muget
- Oath

ORAL EVIDENCE

- **Competence of witnesses**
- capacity of a person to do something
- which persons are capable to testify or are competent witnesses
- one who is fit and commonly gives his testimony before courts or a judicial proceeding under oath or affirmation
- **i) General Competency**
- witness` ability to testify to facts he has observed
- every body is presumed to be competent

ORAL EVIDENCE

- waste of court time to conduct an inquiry in to the competency of every witness testimony
- But a person must posses the organic and moral capacities: the ability to understand questions and give rational answers.
- competency of a person is determined by his ability to perceive, remember, communicate and understand the duty to tell truth.
- **ii) Special Competency**
- the ability to analyze facts about which one testifies
- not presumed

ORAL EVIDENCE

- subdivided in to two: **layman's opinion**, and **expert opinion**
- Lay witness is a witness with no expertise in the matter concerning which he testifies beyond that of the judge
- may testify to opinions based only on facts he has observed
- expert witness: must show special experience
- **Grounds of incompetence:**
- due to lack of organic and moral capacities

ORAL EVIDENCE

- **A. Mental incapacity**
- ground for raising objections in both the common law and the Ethiopian legal system
- children, insane, and intoxicated persons, whose conditions may be long lasting or intermittent in nature
- witness must be able to perceive, to understand and to communicate in order to be a competent witness
- there is inherently presumed civil right of persons to stand as witness before courts

ORAL EVIDENCE

- **B. Physical incapacity**
- have visual, hearing, and speaking deficiencies
- physical incapacity is no bar to a witness's competency as long as he can understand the questions put to him and give rational answers to those questions
- **C. Legal interdiction**
- no longer a bar to competency of a witness
- Art 142 of the Criminal Procedure Code, and Art 268 of the Civil Procedure

ORAL EVIDENCE

- **E. Interest in the outcome of the case**
- parties to the case, consanguinal and affinal relatives, other emotional grounds and so on
- **Examination of witness**
- **A. Examination-in-chief**
- a party who has called a witness to give evidence on his behalf elicits from that witness evidence relevant to the issues and favorable to the case
- Art.137 of cr P c and Art.263 of civ.P c

ORAL EVIDENCE

- to enable the witness to tell an interesting, persuasive, and credible story
- prohibition of leading question
- Art. 263(2) c.p.c and Art.137 (2) cr.p.c
- **B. Cross examination**
- The opponent has right to cross-examine
- probes the credibility of an adverse witness
- an important aspect of due process of law and in criminal cases of the right of confrontation (an absolute right and not merely a privilege)

ORAL EVIDENCE

- C.p.c. article 263(3)
- Leading question possible: 137(2) of criminal procedure code
- article 20(4) of FDRE
- **C. Re-examination**
- to repair any damage done to his evidence
- confined to issues that were covered in cross-examination
- Article 139 cr. P.
- C.p.c Article 263(4)

ORAL EVIDENCE

- **Hearsay evidence**
- reports on the stand that she heard
- statements made out side of court
- does not originate from the individual's direct knowledge and observation of facts sought to be proved, but from the mere narration and repetition of what has been said by another who is not in court to ascertain the fact
- **Justification for exclusion**

ORAL EVIDENCE

- does not have first hand information
- Art 137(1) and Art 263(1) of the Ethiopian cr. Pr. and ci.pr. Codes: “*indirect knowledge*” hearsay evidence is admissible as a rule, not as an exception/implies the circumstantial evidences rather than hearsay evidence
- **A. Lack of cross- examination:**
- **B. Absence of oath**
- **C. Testimonial infirmities**
- problems of misperception, faulty memory, ambiguity and distortion in relation to an oral statement of an out of court declarant

ORAL EVIDENCE

- **Exception to hearsay evidence**
- **i. Dying Declaration**
- A person who is going to die does not have the motive for which he has to lie.
- If the original declarant is dead or cannot be found, there could be no better evidence than the hearsay
- **ii. Statements made in the ordinary course of Business**
- a person's means of earning a livelihood
- **iii. Declarations against interest**
- against the pecuniary or proprietary interest of the person making it

ORAL EVIDENCE

- **iv. Statements of opinion as to the existence of a public or general right or custom.**
- statements of pedigree, statements contained in documents, expression of a crowd, and evidence given in prior proceedings
- **Exclusionary rule: Privileges**
- freedom from compulsion to give evidence, or a right to prevent or bar evidence from other sources
- designed to promote certain kinds of relationship (to promote confidential communication)

ORAL EVIDENCE

- **Policies underlying privileges**
- **to encourage desirable communication**
- attorney-client, physician-patient, psychotherapist-patient, and husband-wife
- **to protect the desired relationship itself**
- **to uphold the integrity** of a profession;
- **to avoid futile efforts to coerce testimony** against principled resistance;
- **to avoid likely perjury** if so coerced;
- to serve commonly shared principles of **privacy, fairness, or morality**

ORAL EVIDENCE

- **to advance economic policies**, such as those protecting trade secrets
- **to encourage voluntary compliance with law**, as in the case of privileges for certain required reports to government agencies
- **to limit governmental invasion of the security of individuals:** privilege against self-incrimination

ORAL EVIDENCE

- **Types of privileges**
- **A. The right against self-incrimination**
- **B. Governmental privileges**
- **c. Professional confidentiality**
- **i. Attorney-client privilege**
- to foster legitimate legal services
- But not about how to commit crimes or frauds would not be privileged
-

ORAL EVIDENCE

- **ii. Doctor-patient privileges**
- to encourage the seeking of professional help
- **iii. Marital privileges**

CHAPTER 5 REAL EVIDENCE

- Real evidence is evidence that, in a sense, speaks for itself
- **Demonstrative evidence:** any type of physical objects which are capable of being inspected by the court and demonstrate the existence of a fact in issue
- Plaster casts or molds
 - Scale models
 - Maps, charts, diagrams, and drawings
 - Police composites, mug shots, sketches
 - Photographs
 - Microscopic enlargements
 - Videotapes
 - Computer reconstruction or animation
 - Scientific tests or experiments
- S

REAL EVIDENCE

- **A) General rules**
- i. there must be some other piece of evidences
- ii. “laying the foundation: authentication and accuracy
- **Authentication** - demonstrative evidence should convey what it is meant to convey
- **Representational accuracy**—the demonstrative evidence should fairly depict the scale, dimensions, and contours of the underlying evidence
- **Identification**—the demonstrative evidence must be an exact match to the underlying evidence or the testimony illustrated

REAL EVIDENCE

- Iii. must pass the “three hurdles” of admissibility: relevancy; materiality; and competency
- Iv. must pass an additional balancing test for relevancy__ a weighing of what is probative/ prejudicial
- **B) Specific rules**
-

REAL EVIDENCE

- **Documentary evidence:** written proof that is offered at a trial to establish the existence or nonexistence of a fact that is in dispute
- is any inscription found in any material for which the content are submitted as proof.
- **Authentication of Documentary Evidence**
- mechanism of ascertaining authorship of the document and genuineness of the document sought to be introduced
- **A) Admission of authorship by the writer**
- articles 2007 and 2008 of the civil code

REAL EVIDENCE

- B) Proof of signature or handwriting
- C) Presumption as to documents not produced
- D) Comparison of signature /writing with others admitted or proved
- E) Opinions of experts
- **Best evidence rule**
- of a document can only be proved by adducing the original document itself.
- **Proof of contents of documents:** by primary evidence (this is the best evidence) or by way of exception that secondary evidence

CHAPTER 6 BURDEN AND STANDARD OF PROOF

- **Meaning and concept of burden of proof:** describes two different aspects of burdens, burden of production and burden of persuasion
- **Burden of production**
- A party who has a claim or an allegation bears the burden of producing evidence to enable the court believe that there is an issue in the case.
- **Burden of persuasion:** determined by rules of substantive laws
- beyond reasonable doubt in criminal cases and by preponderance of Evidence in civil actions.

BURDEN AND STANDARD OF PROOF

- **Burden of proof under the evidence law of Ethiopia**
- **A) Burden of proof in civil actions:**
dependent up on the issue to be proved or the allegation (claim) raised by the party
- **i) Burden of Production in civil cases:**
adducing evidences to make a case.
- Art 259(1) of the civil procedure code
- party having burden of production bears the risk of non-producing that evidence (non-production)

BURDEN AND STANDARD OF PROOF

- **ii) Burden of persuasion in civil cases:**
party has burden of persuasion as to the facts he must put in his pleading
- **B) Burden of proof in criminal cases:**
prosecution has burden of proof on the elements of his charge
- art 136(2) of the criminal procedure code
- Article 20(3) of the FDRE constitution
- **i) Burden of Production in criminal cases**
- **ii) Burden of persuasion in criminal cases**

BURDEN AND STANDARD OF PROOF

- **Burden of proof in case of presumptions**
- **Standard of proof**
- level of proof required in a legal action to discharge the burden of proof, that is to convince the court that a given proposition is true
- most countries have two levels of proof or *the balance of probabilities*:
 - preponderance of evidence - (lowest level of proof, used mainly in civil trials)
 - beyond a reasonable doubt - (highest level of proof, used mainly in criminal trials)

BURDEN AND STANDARD OF PROOF

- **In civil cases**
- Balance of probabilities, also known as the preponderance of the evidence: is more likely to be true than not true.
- **i. Clear and convincing evidence**
- it is substantially more likely than not that the thing is in fact true
- **In criminal cases:** standard of '*beyond reasonable doubt*': proposition being presented by the government must be proven to the extent that there is no "reasonable doubt" in the mind of a reasonable person that the defendant is guilty

Quiz 1 (11/06/13)

1. Discuss the justification why presumption need no proof before court of law? (5 point)
2. What is the legal consequence of confession/admission in civil and criminal matters ?