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Negative averments and the burden of proof: Some reflections on Ghanaian jurisprudence

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Abstract
The apportionment of the burden of proof in a trial remains a tricky endeavor. Many rules of thumb have evolved to resolve this difficulty among which includes the negation-based rule. The negation-based rule simply posits that the burden of proof is on he who avers the positive and not he who avers the negative. It need not be belabored that the practical application of this rule has presented its fair share of challenges to the many complications arising from allocating the burden of proof. This paper evaluates this rule in the light of Ghanaian Judicial pronouncements and attempts to propose an interpretation and application of the rule that achieves an operationally consistent result.

Keywords: burden of proof in adjudication

1. Introduction

The rule that the burden of persuasion lies on the person who makes the affirmative claim and not on the one denying a claim is a widely applied rule of evidence across jurisdictions [1]. It is supported by the view that positive claims are easier to prove than negative claims [2]. The correctness or otherwise of the rule however, has been widely contested in the common law world [3]. Saunders, in evaluating the logical basis of the rule calls it a folk lore [4]. McCormick cites the rule with disapproval [5]. Best, describes it as a misapplication of a Roman dictum [6]. In Ghanaian jurisprudence, we see some application of the rule by the Superior Courts in the determination and allocation of the burden of proof [7]. The atmosphere surrounding its application has often been contentious [8]. Judges and Counsels have held on uncompromisingly to conflicting judicial and academic opinions to justify their position [9]. A clear position on the legal effect of a negative averment on the burden of proof in the Ghanaian jurisdiction has thus been elusive. Put in more specific terms, whether or not a plaintiff who makes a negative averment has any duty to prove the facts he puts in issue remains a riddle. Admittedly, the Ghanaian Courts have good company in this struggle - the evidential position of a party who makes a negative averment has for long, troubled the common law court [10]. Unlike statutory and common law presumptions which could operate as an exception to the general rules on the allocation of the burden of proof, it is doubtful whether the negation based rule could operate as such. This is because, whilst presumptions have a definitional scope regarding what constitutes its content [11], the negation based rule has no clear rules or principles on the content of an affirmative statement or negative statement within the context of pleadings.

This paper proposes an approach to the application of the negation based rule that is consistent with statutes and the rule of pleadings as known to Ghanaian law. Such an approach is useful because it provides consistency in the application of the rules of evidence and certainty of the law which is a key constitutional aspiration [12].

2. Manifestations of the Negation Based Rule

For purposes of this paper, two cases are primarily of interest. The first is the case of Benjamin Sarfo v. University of Cape Coast [13]. The facts in so far as material are that, in 2017, twenty two (22) students of the University of Cape Coast brought a suit against the University seeking a declaration that their rustication from the University offends due process and is thus null and void [14]. The Plaintiff averred that the University (Defendants) did not give them a hearing before its decision to rusticate them. Defendants averred to the contrary that it gave them a hearing. None of the parties provided documentary evidence other than rehashing their pleadings through their witness [15].

On the issue of which of the parties carry the evidential burden and the burden of proof, the Learned Trial Judge reasoned as follows [16]:

"The general proposition of the law is that it is the Plaintiffs who sue the Defendant who is to prove his case against the Defendant. That generally it is the Plaintiff who carries the evidential burden imposed on him against the Defendant.

However as held in the case of: In Re Ashalley Botwe Lands case [17]*, the evidential burden on the other hand is an obligation that shifts between parties over the course of trial.*

It is the burden to adduce sufficient evidence to properly raise an issue in Court.

Section 14 of the Evidence Act (1976) NRCD 323 also states that the burden of persuasion may shift from the Plaintiff to the Defendant or vice versa [18].

It is also a common law rule that a person who makes a positive averment carries the burden of proving that positive averment. By necessary implication, a person who makes a negative averment bears no burden to proof the negative averment" [19]

The court then proceeded to demonstrate what in its view constitutes positive averments and what constitutes negative averments.

It observed:

"With reference to the triable issues, it is mainly the defendant who is making a positive averment whereas the

plaintiff makes a negative averment. For example, it is a positive averment for the defendants that:

1. The Plaintiffs were given a fair hearing before their rustication?
2. The Plaintiffs were charged with offences in the Student's Handbook during the trial?
3. The Defendant positively maintain that the action it took leading to the rustication of the Plaintiffs were in accordance with the rules of natural justice.

Whereas the Defendant institution makes these positive averments, the Plaintiffs also averred negatively that

1. They were not given fair trial before their rustication.
2. They were not charged with any offences.
3. That the action which was taken by the Defendant before their rustication is not in accordance with natural justice.

Thus all the averments crucial to this case made by the Plaintiffs are to the negative whereas the Defendant made positive averments.

As required by law, the Defendant in this case is to prove its positive averments. The burden of proof in this case therefore totally shifts from the Plaintiffs to the Defendant.

It is therefore the Defendant's institution who is to carry the evidential burden in this case [20].

It is clear from the above that the determination of who makes a negative or positive statement was based on the linguistic construction of the pleadings. In other words, the party using the word 'not' in his pleadings is considered to be making a negative averment. The learned trial judge imposed both the evidential burden and the persuasive burden on the Defendant on the basis of this construction [21].

The Second case is Kwakye v. Attorney General [22]. The facts were that the Plaintiff was the Inspector General of Police. On 4th June, 1979, a military coup resulted in the overthrow of the government of which he was a member. He was arrested but managed to escape from detention. In his absence he was tried and sentenced by the special court set up by the new government, Armed Forces Revolutionary Council (AFRC), to twenty five (25) years imprisonment. He subsequently brought an action seeking for a declaration that he was never tried, convicted or sentenced by the special court established for that purpose and that the purported sentence of twenty five (25) years imposed on him was void and of no effect [23]. The Defendant, the Attorney General, sought to have the case dismissed on grounds that the court has no jurisdiction to entertain the matter. In support of the Attorney General's claim, he referred to section 15(2) of the transitional provisions of the 1979 constitution, which provided as follows:

"(2) For the avoidance of doubt it is hereby declared that no executive, legislative or judicial action taken or purported to have been taken by the Armed Forces Revolutionary Council or by any person in the name of that Council shall be questioned in any proceedings whatsoever, and, accordingly it shall not be lawful for any Court or other tribunal to make any order or grant any remedy or relief in respect of any such act."

The defendant by an amended writ produced both oral and documentary evidence with a view to show that judicial action or purported legal action within the true meaning of section 15(2) had been taken against the Plaintiff and that the Court was constitutionally enjoined to decline jurisdiction.

The Court's task was to decide whether a factual basis existed for the application of section 15(2) of the transitional provisions. In resolving this task, the court had to determine whether the defendant had any burden at all to prove that indeed there was no judicial action taken against plaintiff as alleged by plaintiff. Two judges of the court, Apaloo (JSC) and Sowah (JSC), disagreed on this vital issue. For ease of reference, I reproduce the relevant portions of their opinions below:

There seems to be some school of thought that where the subject-matter of a party's allegation, whether affirmative or negative, is peculiarly within the knowledge of his opponent, it lies upon the latter to rebut the allegation. So it may be argued in this case that whether the plaintiff was tried or not is peculiarly within the knowledge of the defendant and the burden is on him to prove it although it is the plaintiff who makes the averment. But according to Phipson, the cases in which that principle was applied turned largely on construction of legislation. As the learned author put it: "These cases, however, have been considered to rest partly upon the construction of the Acts; and in the absence of statutory provision, the better opinion now seems to be that, in general, some prima facie evidence must be given by the complainant in order to cast the burden on his adversary. The difficulty of proving a fact peculiarly known to an opponent, may . . . affect the quantum of evidence demanded in the first instance, but does not change the rule of law . . . "" [24]

Contrary to the opinion of Apaloo JSC. Above, Sowah JSC observed as follows:

"The substance of plaintiff's claim is that he heard on the radio on 21 September 1979 that he was amongst the persons tried in absentia and sentenced to 25 years' imprisonment. He denies any such trial and asserts that the purported sentence was an infringement on his human rights. He raises a presumption in his favour which must be rebutted. But I would also add that the matters being agitated are peculiarly within the knowledge of the defence and would adopt the dictum of Bayley J. in R. v. Turner (1816) 5 M. & S. 206 at p. 211. (See also Cross on Evidence (2nd ed.) at p. 81): "If a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is to prove it, and not he who asserts the negative."" [25]

What we see from this case is that Justice Apaloo maintains that at least the initial evidential burden remains with the Plaintiff, no matter the form of pleading. Sowah JSC. on the other hand relying on an English case, combines the negation based rule and the peculiar knowledge rule and adopts the view that where a negative averment are made upon facts within the peculiar knowledge of the other party, the burden of proof shifts to that other party. Thus, essentially, the initial evidential burden rest on the person making the positive averment – the defendant.

To properly evaluate the positions adopted by the Ghanaian courts in these cases, it is crucial to examine the scope and remit of the burden of proof as provided by statute. It is to this discussion that I now turn.

3. The Burden of Proof under Evidence Statute

Ghana's evidence statute does not use the term burden of

proof. It uses the term burden of producing evidence and burden of persuasion to represent the burden of proof as understood in the common law world. The 'burdens' as I shall refer to them subsequently, constitutes the onus of proof in a trial [26]. Section 11(1) of the Evidence Act of Ghana defines the evidential burden as follows: "For the purposes of this decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on an issue" [27]. Generally speaking, it is a party who commences an action before a competent court who seeks a remedy before that court. It follows that it is such party who stand the danger of not being granted these remedies if no evidence is led [28].

Section 17 (1) of the law provides "Except as otherwise provided by law, the burden of producing evidence on a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence". Section 17 (2) adds "Except as otherwise provided by law, the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact". This provision shows that the initial evidential burden lies with the party with the burden of persuasion. Thus, once we establish where the burden of persuasion falls we can find the bearer of the evidential burden on a fact. This statutory approach appears to be consistent with the view of Emson who notes "Under normal circumstances the party bearing the legal burden of proof on a fact in issue also bears the evidential burden to make it a live issue [29]." Thus essentially the evidential burden is conceptualized as a function of the legal burden of proof.

Section 15 of the Evidence Act defines the burden of persuasion as follows: "For the purposes of this decree the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court". Section 17 allocates the burden as follows "Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defense he is asserting". This provision is also not without ambiguity regarding which party specifically bears the burden of persuasion. What we can however reasonably deduce is that in the absence of exceptions, the persuasive burden arises where there are facts essential to establishing a claim or a defense. Thus, where no facts are introduced there is nothing to persuade the Court about.

4. The Burden of Proof and the Nature of Pleadings

A plaintiff sets out a cause of action by means of pleadings contained in a statement of claim. The defendant who intends to fight the case does so by either of three main means or a combination of them: a traverse, confession and avoidance, or legal objection [30]. A traverse simply disputes what the plaintiff says by means of a denial or statement of non-admission [31]. A confession and avoidance admits the fact stated by plaintiff subject to a justification or excuse [32]. Thus it imposes new facts on the admission which seeks to destroy opponents' facts. A legal objection questions the legal basis of the opponents claim by contesting its validity or regularity as a cause of action. These three typologies of defense are generally accepted in the common law world [33]. The structure of a defense discussed above provide good grounds for analyzing the 'burdens' as used in legislation.

As already mentioned, the persuasive burden in Ghanaian Statutes, relates to an obligation to prove facts essential to a claim or defense up to a certain requisite level of belief [34]. Viewed logically, it is only where a party introduces a fact that he or she bears the persuasive burden. Thus, drawn from the premises already discussed, the persuasive burden will not arise where a party only deny or make a statement of non-admission because no fresh facts will be introduced to warrant proof. And as shown, where there is no persuasive burden, there is no initial burden of proof.

The Ghanaian Courts captures this succinctly as follows: "In a claim made by the Plaintiff, there is no onus on the defendant to disprove the claim so that however unsatisfactory or conflicting the defendants' evidence may be, it cannot avail the plaintiff. The evidence of the defense only becomes important if it can upset the balance of probabilities which the plaintiff's evidence might have created in the plaintiffs favor or if tends to corroborate the plaintiffs evidence or tends to show that evidence led on behalf of the plaintiff were true [35]." If a burden to disprove does not generally exist, then there is no other burden on Defendants in the absence of any fresh facts raised by means of avoidance and confession or foundational facts that may constitute a legal objection [36]. Even where an evidential burden arises in relation to the Defendant, it appears that the inability of the Defendant to discharge the burden does not relieve the Plaintiff of the legal burden of proof [37]. The case of Pickford v. Imperial Chemical Industries p/c affords illustrates [38]. The plaintiffs had been employed by the defendants as a secretary. She developed a disease in both hands which was recognized as a basis for industrial injury benefit. She sued defendants for negligence. Defendants said that it was psychogenic in origin. Plaintiffs said that it was organic in origin. Both sides produced medical experts. The trial judge said that he was not satisfied by either side's assertions and found for the defendants. The House of Lords in reversing the Court of Appeals decision observed that the defendants only had to rebut plaintiffs' assertions but had no duty to prove that the disease was psychogenic in origin. They further observed that failure to prove the explanation that they did put forward still left open the question of whether the disease was organic in origin.

How do we apply the negation based rule in the light of the structure of pleadings discussed above and our understanding of the statutory position? Does a positive statement in answer to a negative statement make it any less a denial or a rebuttal? My view on this is in the negative. Where a fact is introduced in a negative statement in support of a claim, it is my view that a positive answer that essentially contradicts the statement is a valid denial or non-admission. Odgers demonstrate this as follows: For a statement that "the premises were handed over in an unfinished condition", the right denial should be: "the premises were finished when handed over" [39]. From this illustration we see that though as a rule, a traverse is stated in the negative and a defendant claim is stated in the negative, the proper means of traversing may be to state it in the opposite way. That does not make it any less a statement of denial or at least a statement of non-admission. Thus the form of a defendant statement may not be in the negative but the effect will be to deny what plaintiff has said. The case of Soward v. Leggatt [40] is instructive. In this case, a landlord claimed against the tenants under a repairing contract in a lease. In the pleadings he alleged that the

defendants did not repair and did not paint the premises. The defendant responded that he did well paint and that he did repair the premises. Thus on paper, it looked like defendant was making denials and plaintiff making positive assertions. At trial, the defendant counsel claimed that he had the burden of proof and so he had the right to open the case. Lord Abinger said:

"Looking at these things according to common sense, we should consider what the substantive fact to be made out is, and on whom it lies to make it out. It is not so much the form of the issue which ought to be considered, as the substance and effect of it. In many cases, a party, by a little difference in the drawing of his pleadings, might make [his allegation] either affirmative or negative, as he pleased. The plaintiff here says, 'You did not repair'; he might have said, 'You let the house become dilapidated.' I shall endeavor by my own view to arrive at the substance of the issue, and I think in the present case that the plaintiff's counsel should begin [41]."

The Abinger test allocates the burden on the basis of where the cause of action lies. Since the defendants answer, though positively worded essentially denied plaintiff's claim, Abinger imposed the burden of proof on the plaintiff being the party pursuing a cause of action. Abinger shows that the mere form of pleadings may not be a safe guide in the allocation of the 'burdens'.

The UCC case allocates the 'burdens' according to whether a negative or positive averment has been made [42]. Thus, based on the linguistic structure of the pleadings the defendant is made to bear the 'burdens' though he has no cause of action before the Court for which he must persuade or any new facts which he must prove. This view obviously pays no attention to the structure of a defense as known to the rules of pleadings and the statutory position correctly interpreted [43].

Sowah JSC on the other hand applies the negation based rule in conjunction with another common law rule - the peculiar knowledge rule to shift the burden of proof entirely unto the defendant. The merits of the rule as it relates to shifting the 'burdens' under Ghanaian law is interrogated in the next section.

5. The Peculiar Knowledge Rule

The peculiar knowledge rule simply says that, the defendant bears the burden of proving a matter that lies peculiarly within his knowledge [44]. In the criminal law, peculiar knowledge is applied in cases where a charge contains a negative averment [45]. Sowah JSC referring to R v. Turner in his judgment combines the peculiar knowledge rule and negation rule to shift the burden of proof. This seems to be consistent with the general view that connect these rules which is that litigants making affirmative claims have greater accessibility to evidence than litigants making a negative claim [46]. In the Nwadoro case we see a more recent endorsement of the rule by the Ghanaian Courts [47]. The facts were that -appellants had been dismissed by the respondents for breach of the school's regulation. The appellants alleged that their dismissal by respondents was unlawful. The respondents in answer traversed that they have complied with their procedures and thus the dismissal was lawful. The defendants did not tender evidence showing compliance with their own procedures. The court, reversing the decision of the two lower courts observed:

*"*How the committee, if any, was constituted, how evidence was taken etc. did not matter to the courts below. How in a crucial matter of this nature a security officer can sign a committee's report without even indicating his status escaped the lower courts. In my opinion, as the setting up of the Committee of Enquiry, its terms of reference and the modalities for its work were known exclusively by the respondent which allegedly set it up, it behooves the respondent to have given particulars thereof as regards at least the composition and terms of reference, etc. Section 17(1) of the Evidence Act, 1975 NRCD323 states the position clearly as follows: 17(1) except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof. The facts of the commission of Enquiry, if any, was within the particular knowledge of the respondent who allegedly set it up and claimed to have heard the appellants. In such a case, there would be no hardship on them to produce the full record of proceedings, including of course, the evidence, if any, and the membership thereof etc". *See the case of: Nimmo V Alexander Cowans &* Sons Ltd [1968] AC 107 and the opinion of Lord Pearson who was of the view that a party's respective means of knowledge and spheres of responsibility are vital factors in determining the incidence of burden of proof. I think it would be right to hold against the respondents that given the circumstances of the case, they were enjoined by basic principles of administrative fairness to have provided the names of the members of the Committee of Enquiry, their mandate, and when the appellants were allegedly heard in the matter to warrant the serious sanctions imposed on them [48]. *"*

Similar to the UCC case, plaintiffs had averred the negative, that the respondents did not follow their procedures in dismissing them. The defendants on the other hand had averred the positive by saying that they followed their procedures.

The Court, applying the peculiar knowledge rule to relieve the plaintiff of the evidential burden, holds that the facts were within the exclusive knowledge of the respondent and thus the plaintiff bears the evidential burden. Such application of the rule may be problematic. How could a Judge have concluded that a Plaintiff has no knowledge of facts he has supplied himself?, Perhaps he meant that he has no knowledge of the additional facts he needs to prove the facts he avers but even that view does not completely relieve the plaintiff of some evidential burden [49]. A preliminary enquiry into whether or not plaintiff can or can't reasonably access relevant facts to prove his case in my view must precede any decision to shift the evidential burden unto the defendant if at all necessary [50]. The test laid in the Nimo case referred to supra and relied upon in the Nwadoro case, refers to the parties' respective means of knowledge and spheres of responsibility as vital factors in determining the burden of proof. This test requires at least enquiry into whether or not Plaintiff indeed has no means of proving the facts he alleges.

Thus, for example in this case plaintiff should have at least produced evidence that: He was charged for an offence, He was invited for hearing, and that there were some procedures of the school which were not followed [51]. This process requires some evidence from the Plaintiff and as such some evidential burden [52]. Even where the peculiar knowledge rule causes a shift of the evidential burden, the statutory position reviewed overwhelming suggest that the

persuasive burden remains with the plaintiff [53]. Also we know that at common law the peculiar knowledge rule may only be successful at shifting the evidential burden [54] and not the entire 'burdens' of proof.

6. Some Comments on Exceptions

The defining provisions of the 'burdens' admits of exceptions. Notoriously known exception at common law which is also widely recognized under Ghanaian Statute are presumptions [55]. Presumptions as a matter of law or as a matter of fact presume the existence of certain facts in the context of certain facts that are proved [56]. Thus, for a presumption to become applicable, the party will have the initial evidential burden to prove each of the relevant facts grounding the presumption. Where there is no opportunity for rebuttal, the presumption is conclusive [57]. If the presumption is rebuttable, then the evidential burden will be on the party against whom the presumption is being made to rebut the said presumption [58]. In effect, rebuttable presumptions do not completely shift the evidential burden. The plaintiff bearing in mind the applicable presumptions will prove his case up to the point of the presumptions being applicable, and then the presumption will come into play to complete the plaintiff's pleaded case. There is thus an initial burden to prove the factual foundation of the presumption.

The negation based rule in my view does not operate as an exception to the general rule on the evidential and persuasive burden afforested. This is because apart from its poverty of content, the negation based rule construed in line with correct meaning and structure of pleadings invariably lead to the same result as the statutory rule –namely he who makes a claim has the persuasive burden to prove the facts constituting the claim and as such has the initial evidential burden. Thus, it does not depart from the effect and incidence of the statutory rule as applied except some exception known to the law is invoked. Also, as already discussed, the peculiar knowledge rule even if used in conjunction with the negation based rule will require the plaintiff making the negative averment to prove the basic facts that support the claim that defendants possess exclusive knowledge. It is safe therefore to say that the negation based rule and peculiar knowledge rule whether used conjunctively or separately can't displace the legal burden of proof.

7. Conclusion

The negation based rule is a difficult rule to interprete and apply. In the two cases reviewed, we see that the Court apply the rule with less regard to the rules of pleadings and the relevant statutory framework. This work has shown that a correct application of statutory position and the common law rule essentially lead to the same result. It has further shown that the negation based rule whether or not with its counterpart, the peculiar knowledge rule can't shift the persuasive burden and thus the initial evidential burden. The work has further illustrated the permissible spaces within which the burdens may shift within the context of the rules of pleadings. Having established all these, a worthwhile question to ask is: How do we avoid conflict between the negation based rule and the statutory rules as well as the known rules of pleadings in applying the negation based rule? How do we achieve an outcome in applying the rule that leads to consistency with statutes and internal coherence in the legal system? The answer as shown in this paper lies in conceptualizing an affirmative statement as one that introduces a fact and a negative statement as one that denies a fact or does not admit same, this will put the rule in line with the rules of pleading and the statutory position.

References

1. See a discussion of the Rule in, Sydney Lovell Phipson, and Derek William Elliot Manual on the Law of Evidence (2nd edn, Sweet & Maxwell), 1987.
2. See generally, Kevin W. Saunders, 'The Mythic Difficulty in Proving a Negative' 15 Seton Hall L. 276, 1985.
3. See, ibid (n 1).
4. Ibid.
5. Charles Tilford McCormick, Handbook of the Law Of. Evidence (E. Cleary 3d. ed.)337, 1984.
6. Best W. A Treatise on the Principles of evidence (Garland Publishing) 255, 1849.
7. Benjamin Sarfo. & 21 Ors Suit No: J5/11/2018. HC; Kwakye v Attorney - General GLR 944 -1071, 1981.
8. Ibid.
9. Ibid.
10. See, e.g. Ibid (n 1). See also, Levison v Patent Steam Carpet Cleaning Co, [81 -82], 1978.
11. See, Evidence Act, NRCD (323), s 12, 1976.
12. The preamble to the Constitution of Ghana identifies the Rule of Law as an important constitutional value, 1992.
13. Benjamin Sarfo &21 Ors J5/11/2018. HC, 2011.
14. Ibid.
15. At page 10 of the Judgment, the Judge remarked: The defendants' representative instead of using the documentary proof to substantiate its stand that the plaintiffs were put before Disciplinary Committee and tried, just mounted the witness box and merely repeated his averments on oath. Not even a single member of the said committee or an eye witness of the Committee sitting was called to corroborate the evidence.
16. Ibid
17. In Re-Ashalley Botwe Lands [2003-2004]SCGLR 420
18. The relevant provision provides as follows " Except as otherwise provided by law, unless it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting'
19. Benjamin Sarfo. & 21 Ors (n 7); and Best (n 6)255.
20. Ibid.
21. Ibid.
22. GLR 944 -1071, 1981.
23. The AFRC amended the law that set up the special court to give it power to trial and sentence persons in absentia, Ibid [7-8]
24. See Kwakye v Attorney General (n 7) [9-10], for opinion of Apaloo JSC. The learned Justice further observes "indeed is the plaintiff's own conception of the law because, as I said, he pleaded "'that the law does not hold him to strict proof of such negative . . ." This is an admission that he knew he ought to offer some proof of his negative averment. If he had considered that his mere allegation placed the burden on the defendant to disprove his negative allegation, he would not have so pleaded. I think the plaintiff conceived the law on this issue correctly although he did not offer a scrap of evidence in proof or attempted proof of his allegation.

25. The plaintiff's averment that he was not tried, convicted or sentenced can be established by circumstantial evidence. The plaintiff may lead evidence from which a prima facie inference can be drawn that he could not have been so tried or if tried, could not have been convicted or sentenced. He may show by evidence that persons who would normally know of the trial did not know of it or that the special court did not, in fact, sit or that those who constituted the court were imposters. That done, on well-known principles of the law of evidence, the defendant would assume the burden of showing that a trial took place. The fact that the plaintiff was absent from the jurisdiction could not by itself show that no judicial action was taken or purported to have been taken against him especially when the Armed Forces Revolutionary Council (Special Courts) (Amendment) Decree, (A.F.R.C.D. 19), makes provision for trial in absentia, 1979.
26. Our earlier ruling therefore cannot mean that the plaintiff in such a case simply folds his arms and demands all the proof from the defendant. As is often said, judicial dicta take their colour from the context. At the time we gave our earlier ruling, the defendant did not file a statement of his case as required by rule 48 of the Supreme Court Rules, (C.I. 13), nor provide any factual basis for a plea under section 15 (2). The only material before the court was the plaintiff's statement of case. Yet at that time, the defendant was seeking the shield of that section. We said he could not do so then. We proceeded to give each party an opportunity to lead evidence. The plaintiff did not avail himself of this. He chose, as it were, to rely on his case as contained in the papers filed and to rely on the insufficiency of the defendant's evidence as far as the invocation of section 15 (2) of the transitional provisions is concerned", 1970.
27. Ibid. (Sowah JSC)
28. See, Stephen Allan Brobbey, Essentials of the Ghana Law of Evidence (Datro Publications) 21, 2014.
29. Evidence Act (n 11) s. 11
30. Odgers (n 30) makes it clear that remedies are sought by the party who commences the action through his statement of claim. Apparently, it is the party who seek remedies who stand to lose if no evidence is led.
31. See Raymond Emson Evidence (2nd edn, Palgrave Macmillan) 7 and 421, 2004.
32. See GF Harwood, Odgers' Principles of Pleadings and Practice (20th edn, Sweet & Maxwell) 126, 2017.
33. Ibid.
34. Ibid.
35. See Peter Gabriel Burden of Proof & Standard of Proof in Civil Litigation. Singapore Law Journal 25 SALJ also see Odgers (n 30) 126 & 127, 2013.
36. This is generally called standard of proof. See Ghana Evidence Act, (NRCD 323), s 12, 1975.
37. Barima Gyamfi v Ama Badu 2 GLR 596, 1963.
38. Sometimes it may be necessary to prove the foundational facts that constitute the legal objection. See (n 29) which discusses the need to prove basic facts that may constitute a legal presumption.
39. The legal burden of proof on a fact in issue is used in the same sense as the persuasive burden. See, Ghana Evidence Act, (n 11) s. 10
40. 3 All ER 462, 1998.
41. See, Kenneth v Mundy (not reported) cited in Odgers (n 30) 139.
42. Soward v Leggatt 7 Car. & P. 613, 1836.
43. Ibid
44. See, (n 7).
45. See Harwood (n 30)127.Odgers is emphatic that there are only three forms of Defenses and that a denial or statement of non-admission introduce no new facts
46. See Yuval Sinai "The Doctrine of Affirmative Defense in Civil Cases- Between Common Law and Jewish Law" 34 N.C.J.INT'L & COM. Reg 111,124, 2008.
47. Glanville Williams, "The Logic of Exceptions 47(2) Cambridge Law Journal 261, 1988.
48. See, Metropolitan Dade County v Hernandez, 708 So.2d 1008, 19009 (Fla. Dist. Ct. App), 1998.
49. Republic v Vice Chancellor, KNUST Ex-Parte: Nnambi Nnakwadoro Enekwa& 4ors (J4/7/2008) GHASC 16, 2008.
50. Ibid (Anin Yeboah JSC)
51. See Glanville Williams (n 45) 290.
52. See, Colin Tapper, Cross & Tapper on Evidence (12th edn, Oxford University Press), 2010, 133-135.
53. The principle of discoveries in pleadings should avail the Plaintiff and enable him to discharge this duty.
54. See Glanville Williams supra. In reviewing the peculiar knowledge rule in the criminal law context he notes the need for some initial evidence from the prosecution. He observes that once a charge is made then obviously some evidence must be heard from the person who brings the charge.
55. As discussed, failure of the Defendants to prove his defense or affirmative pleading does not relieve plaintiff of the ultimate burden. See Pickford (n 38).
56. Glanville William (n 24) 268 observes that the peculiar knowledge rule would be reasonable if it referred only to the evidential burden.
57. Evidence Act (n 11) s. 18 defines a presumption as follows: A presumption is an assumption of fact that the law requires to be made from another fact or group of facts otherwise established by an action. It defines a Conclusive Presumption at section 24 as follows: Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the conclusively presumed fact may be considered by the tribunal of fact. Grounds that constitute a rebuttable presumption are provided in sections 301-49 and 51 -162
58. Ibid
59. See, Evidence Act (n 11) s. 21. Ghana
60. Ibid (n 11) s. 20. This provision defines effect of rebuttable presumptions as follows: "A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed facts".