GBADEGBE J.S.C :

On 7 December 2012, Ghanaians went to the polls in the exercise of their constitutional right to vote in the presidential and parliamentary elections. Although the elections were scheduled for one day only, as a result of the breakdown at some polling stations of biometric verification equipments that were being used for the first time in our election history, the elections continued at some polling centres the following day, 8 December 2012.The postponement of the elections and or its continuation the following day was not unexpected as indeed, regulation 34(1) b of Public Elections Regulations, 2012 (CI 75) made provision to cater for such an occurrence in the following words:

"Where the proceedings at a polling station are interrupted by the breakdown of the equipment the presiding officer shall in consultation with the returning officer and subject to the approval of the Commission, adjourn the proceedings to the following day."

It is thus not surprising that in the matter herein, no issue has been raised over the adjournment of the polls as the law had actually contemplated the likely occurrence of such an event and quite rightly in my thinking made ample legislative provision for it.

At the end of the elections, the Chairman of the Electoral Commission (the 2nd Respondent herein) in compliance with the law by means of an instrument under his hand dated 9 December 2012 declared the 1st Respondent herein as having been duly elected as President of the Republic of Ghana. From the results declared, it was plain that this was quite a keenly contested election. The said declaration was met with disquiet by the NPP whose candidate, the first Petitioner together with two others, the 2nd and 3rd Petitioners herein, or about 29 December 2012 initiated the petition herein by which the results declared in the presidential election is being challenged and in particular, a declaration sought that the 1st Petitioner herein was validly elected as president.

The matter herein has gone through a full scale trial as provided for in the Supreme Court Rules, CI 16 as amended by CI 74. It repays to mention that the

parties have made full compliance with the direction given by us at the hearing of the application for directions by filing the necessary processes that enabled the court to give directions for trial in the matter herein. The parties have also tendered their evidence after which they submitted written and oral speeches to the court. The delivery herein is an evaluation of the respective cases of the parties in aid of the court's determination of the controversy herein. I need mention that although the petition as issued by the petitioners named only the first and second respondents, following an application at the instance of the NDC, it was joined to the matter herein as a 3rd Respondent. The petition herein thus became a contest between the three petitioners on the one hand and the three Respondents on the other side of the aisle, so to say. I pause at this stage to commend counsel in the matter for the industry that they have exhibited in their effort to assist the court in the determination of this landmark case. I think that when the history of the evolution of our democracy comes to be written they would occupy a place in the hearts of many.

Before proceeding further, I think it important to observe that this petition, which is unprecedented in the life of the Fourth Republic presented the court and the parties with a unique opportunity to contribute to the development not only of substantive law but also the practice and procedure of the Supreme Court in so far as the exercise of its exclusive jurisdiction to determine questions raised concerning the validity of presidential elections are concerned. This is a huge task that is conferred on the court by article 64 of the 1992 Constitution that came into being after several years of military rule that spanned the last day of December 1981 to January 1993. The return to constitutional rule that was ushered in by the1992 Constitution brought to Ghanaians the opportunity that was wrestled from her people more than a decade previously to exercise the right to elect representatives and a president once in every four years. Before the 2012 elections, elections were held in 1992, 1996, 2000, 2004, and 2008. These elections have been in the main applauded by the international community as free and fair and Ghana had on account of these earned a place of pride as the forerunner of democracy in Africa.

The petition herein, in my thinking, seeks to call in question compliance by the Electoral Commission, the 2nd Respondent herein with the rules contained in

the various laws-the 1992 Constitution, the Representation of the People Law, PNDC L 285 and its subsequent amendment by PNDCL 296, the Biometric Registration of Voters Regulations 2012, CI 72, and the Public Elections Regulations 2012, CI 75. In my view, contrary to the perception of some section of our society about the resort by the petitioners to court, it is healthy for our democracy as it seeks to ensure that the electoral rules were implemented at every stage of the electoral process thereby giving sanctity to the process. As elections are creatures of statute, the statutes that authorise their holding at stated intervals also provide for the procedures to be employed on Election Day as well as all matters reasonably connected therewith including the count of the ballots and the declaration of results at polling stations, constituencies and on the national plane. An election in this country therefore must be seen as the working of the various rules by which effect is given to the invaluable right provided for in article 42 of the 1992 Constitution in the words that follow shortly:

"Every citizen of Ghana of eighteen years of age and above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."

It appears that for the purpose of the presidential elections the entire country constituted one constituency with the Chairman of the Electoral Commission, the body charged with the responsibility and conduct of all elections being the returning officer. At every polling station and constituency, however, there were election officials- presiding officers and agents of political parties and or candidates who together ensured that the rules of the game, so to speak, were implemented at every stage of the election process. The role of presiding officers and the polling or counting agents is provided for by law and serves the purpose of ensuring transparency in the elections and renders the results that are subsequently declared acceptable to the citizenry. While the general principles regarding elections are contained in the 1992 Constitution, the details of the processes involved are contained in PNDC L 284 (as amended by PNDCL 296), CI 72 and CI 75.

As elections derive legitimacy from the various laws that provide for their exercise, allegations that seek to challenge its regularity must to be good grounds derive legitimacy from the enabling laws. In my thinking, the 1992

Constitution in terms of the electoral process is clear on its face, its rationale is plain and the means employed through it and other statutes to secure its purpose is reasonable. In this connection, it is observed that the fact that other methods could have been provided for the purpose of achieving the constitutional objective is not a proper consideration for this court in so far as the issues that arise for our decision in this case are concerned. In this delivery therefore, I shall measure the various allegations that make up the claim of the petitioners against the applicable laws, and where such an examination reveals a departure from the said laws in a manner that undermines the basic principle on which our constitutional democracy is founded then its breach calls for remedies that are provided at law in order to give integrity and sanctity to the electoral process. In my opinion, although the claims made by the petitioners are of great import in our evolving constitutional democracy and is in keeping with the requirements of the rule of law, as a bye-product of law, however, the demands contained therein must have their source and resolution within the law. I think these considerations informed the settling of the two issues for trial in the petition on 2 April 2013 as follows:

"(A) Whether or not there were violations, omissions, malpractices and irregularities in the conduct of the presidential election held on the 7th and 8th of December, 2012.

(B)Whether or not the said violations, omissions, malpractices and irregularities, if any affected the results of the election."

In presenting their case, the petitioners categorised the irregularities on which they relied under broad heads in respect of which pink sheets (official declaration of results) were exhibited to depositions a that have the effect of evidence in these proceedings.Additionally, the 2nd petitioner offered oral testimony and was cross-examined by the respondents. Originally, the number of polling stations relied upon to sustain the petition were said to be 11,1915 but in answer to a question in court on the last adjourned date, learned counsel for the petitioners said the total number of polling stations that formed the basis of their claim to have the presidential elections avoided are 10, 119. That answer is a clear indication that the number of pink sheets to be considered by the court in this matter is 10, 119.The designated categories are voting without biometric verification, over-voting, failure and or absence of

signatures by presiding officers on pink sheets, duplicate serial numbers and voting at locations that were not-designated as polling stations.

The petitioners contended that the votes involved in these irregularities that were described to be widespread in nature amounted to over four million (4,670,504.) Regarding these votes it was also contended that having been obtained by means of violations, omissions, irregularities and malpractices, they ought to be annulled and that following such annulment, the first petitioner herein, Nana Addo Dankwa Akuffo -Addo by a simple arithmetical computation of the valid votes cast satisfies the requirements of the law to be declared as the President of the Republic of Ghana. Should these allegations be proved, they are weighty enough to have the consequence that the petitioners attribute to them. Not unnaturally, the first respondent, the alleged beneficiary of the widespread irregularities resisted those claims and contended that he was regularly elected as President of the Republic of Ghana. The 2nd Respondent who was responsible for the conduct of the elections made no admission of the issues rose in the petition and urged the court to uphold the declaration of 9 December 2012 made by its Chairman. The 3rd Respondent, NDC, on whose ticket the first respondent contested the disputed presidential elections, also prayed the court substantially to the same effect as the other respondents.

At the close of evidence in the matter herein, the questions for our determination turning on the issues that were set down for trial on 2 April 2013 require us to patiently inquire into the allegations submitted by the petitioners and the answers thereto by the respondents, and if proved, determine their effect on the results declared at the various polling stations to which they relate. As the case herein was fought on the evidence placed before us, our task in keeping with a long and settled line of authorities is to reach our decision on all the evidence on a balance of probabilities. See: Sections, 10, 11, 12, 13 and 14 of the Evidence Act, NRCD 323 of 1975.This being a civil case, the petitioners bear the burden of leading evidence on a balance of probabilities. At this point, I venture to say that the effect of the acts on which the petitioners rely to sustain their action is one that must turn on a careful consideration of the applicable statutory provisions and so stated it would appear that our decision turns not solely on facts but a mixed

question of facts and law. Our courts have over the years determined several cases in which decisions are based on a consideration of mixed questions of fact and law and as such this case does not present to us a challenge that is historical in terms of the evaluation of evidence. While the cause of action in the matter herein as previously indicated in the course of this delivery is historic, the approach to decision making is no different from what we have been doing all the time. The burden of proof in an election petition was recently considered in the Nigerian case of Buhari v Obasanjo (2005) CLR 7K, in which the Supreme Court said:

" The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result……There must be clear evidence of non-compliance, then that the non-compliance has substantially affected the election."

Continuing, the Nigerian Supreme Court further said:

"He who asserts must prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence could not on the preponderance of evidence result in the court giving judgment in favour of the party"

The recent Canadian case of Optiz v Wrzesnewskyj (2012) SCC 55-2012-10-256 similarly observed of the burden of proof as follows:

"An applicant who seeks to annul an election bears the legal burden of proof throughout……."

The case of Buhari V INEC [2008] 4 NWR 546 at 565 also affirms the above pronouncements on the burden of proof as follows:

"Where a petitioner makes non-compliance with the Electoral Act the foundation of his complaint, he is fixed with the heavy burden to prove before the court, by cogent and compelling evidence that the non-compliance is of such a nature as to affect the result of the election. He must show and satisfy

the court that the non-compliance substantially affected the result of the election to his disadvantage."

Courts in these jurisdictions were not alone in expressing the burden of proof in an election petition in the above terms. In the recent presidential election dispute in Kenya numbered as Petition No 5 of 2013 and entitled…RAILA ODINGA v The INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 3 Others AS CONSOLIDATED WITH PETITIONS NUMBER 3,Entitled: MOSES KIARIE KURIA and 2 Others v THE INDEPENDENT ELECTORAL COMMISSION and Petition no 4 Entitled: GLADWELL WATHONI OTIENO and Another vAHMED ISSACK HASSAN and 3 Others , the Supreme Court in an unreported judgment dated 30 March 2013 (the full reasons therefor being delivered on 16 April 2013) expressed itself substantially in the same words as follows:

"There is apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.

We find merit in such a judicial approach, as is well exemplified in the several cases from Nigeria. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from the long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of public authority's departures from the prescriptions of the law."

Although the above decisions are of persuasive effect only, I think that the exposition of the applicable burden of proof is in no way different from that required of petitioners in an election case having regard to the provisions of the Evidence Act, NRCD 323 particularly sections 10- 14 and I propose in this

delivery to be guided thereby. Having stated the task of the court in terms of the claim before us, I now pass to consider the various categories of irregularities on which the petitioners claim to relief is based.

In opening the consideration, I shall commence with that category which in my thinking and indeed, on the petitioners' case raises issues regarding the largest number of votes that aggregate to a little below three million votes. The basis of this head of claim is that the 2nd Respondent in issuing out pink sheets on which the collated results at the various polling stations were declared did so in duplicates and in some cases in triplicates thereby affecting the integrity of the elections. According to the petitioners, the said pink sheets should have been unique to the polling stations and numbered serially so that no number was repeated at any of the over 26, 000 polling stations at which the presidential elections of 7th and 8th December 2012 was held. In the course of his evidence, the 2nd petitioner, who was designated by the first respondent as his Vice Presidential Candidate on the ticket of the NPP admitted under cross examination that the complaint relating to the serial numbers was not derived from any constitutional or statutory infraction but as the numbers were huge they were serious and inferentially must have affected the outcome of the elections.

It is observed straightaway in respect of this head of complaint that although with hindsight one might be tempted to appreciate the reasoning inherent in it, as elections are created by statute and contested on rules and regulations that are widely acknowledged by all, it is not competent for anyone to raise as a ground of complaint a matter which is not known to the laws by which the elections were regulated. The contention regarding serial numbers though apparently attractive, appear to me on closer examination to be untenable. Interesting as the complaint relating thereto tends to be particularly in view of the numbers to which they are said to relate, the constitution and the subsidiary laws passed thereunder have provided very clear rules by which our elections are to be guided and it is only the non-observance of any of those clearly established rules that can properly come within the designation of an irregularity whether in the nature of an omission, violation or a malpractice. I think that the word irregularity is synonymous within the context of this case with the other words commonly associated with it in the claim before us. For a

better understanding of the point being made in relation to the word "irregularity"(ies) and those associated therewith, reference is made to the use to which it is employed in ordinary language by a reference to the meaning as provided in Oxford Advanced earners Dictionary (International Student's Edition) at page 790 thus:

"an activity or practice which is not according to the usual rules, or not normal; alleged irregularities in the election campaign"

Similarly, the word "violate" as defined at page 1642 of the same Dictionary means "to refuse to obey a law, an agreement etc." And a "malpractice" means a wrong or illegal practice. In view of the fact that the associated words all mean that which is contrary to rules or laws, I propose in this delivery to use the word irregularity to refer to any such word. In doing so, I do not think that I do injustice to any of the parties as an irregularity is one whether called by the description a malpractice, violation and or an omission, the later which denotes failing to do that which should be done or lawful.

Further to the above, the evidence of the petitioners unfortunately did not place before the court in what manner the mere repetition of the slight number of duplicated pink sheets that was proved in evidence affected the declared results. There was no challenge to the fact that the results declared were in respect of elections held at designated polling stations. Also not in dispute is that there occurred no infraction or violation of any of the electoral laws. Added to these, none of the results declared at any of the polling stations is under challenge. It is observed that the only features that the law insists on in relation to the ballots and elections are the serial numbering of ballot papers and the allocation of polling stations to each person on the electoral register such that no registered voter is enabled to exercise his franchise more than once in order to give real meaning to the right to vote that is provided for in article 42 of the 1992 Constitution. In my view, a fair reading of the constitutional provisions on the electoral processes reveals that it is premised on the right to vote according to one's choice. This necessarily implies that it is only when that right has been infringed by the arrangements put in place at any public elections that the results can be annulled. The category of irregularity under consideration does not come within the scope of the Constitution and indeed any other law in force in Ghana to which reference

could be made. I think this should be enough to dispose of the grounds turning on serial numbers.

In my view if the actors in the political scene consider the issues arising from the serial numbers that have just been considered of some importance to the integrity of the electoral process then they should consider for the purpose of future elections the adoption either by way of an amendment to the existing regime of laws on elections, or by a clear understanding and or agreement between all the stakeholders in our electoral system that serial numbers of pink sheets be better protected in the same manner as is the case regarding ballot papers and polling stations. Until then, the complaint regarding serial numbers in the form that they have been revealed in the petition herein is a constraint that is unknown to the law and as such lacks the nature of an irregularity and accordingly, I am unable to yield to it as a legitimate ground.

I next turn my attention to the category which concerns over-voting. In the case presented to us in support thereof, the petitioners based their claim on two interpretations. The first one is when the number of ballot papers at the end of the elections exceeds the number of registered voters at the polling station. The second instance, it was contended arises when there is excess of ballot papers over the number of ballots issued at the polling station. To prove their claim of over voting, the petitioners relied on entries on the pink sheets at the end of the elections at the various polling stations. No reference was made to the register of voters at any of the polling stations to sustain this ground of complaint. On the contrary, great reliance was placed on portions of the pink sheets which were required to be filled by the presiding officers in answer to questions numbered as A1, C1, C3 and C6. The questions that presiding officers were required to answer are as follows.

C1: What is the total number of ballots issued to voters on the polling station register?

C3: What is the number of ballots issued to voters verified by the use of Form 1C (but not by the use of BVD)?

C6 asks a question that provides a formula that adds C1, C2, C3 and C4 to get an aggregate that must be equal to A1, the total number of ballots issued to the polling station. From the two interpretations placed before us, it is clear

that they each seek to protect the integrity of the electoral process. It is also plain that as the total number ballot papers issued at any polling station is based primarily on the registered list of voters both interpretations seek to ensure that no person is enabled to vote who is not on the register of voters. Although the word over vote and or over voting do not come within any of the specifications in the electoral laws, it does appear to me that as a matter of common sense, votes that come within any of the two interpretations are evidence of over votes. In support of their case, it looks to me that as the petitioners did not rely on the list of registered voters at the various polling stations, they relied mainly on the answer to C3- the total number of ballots issued to a particular polling station. I think that the exhibits in the MB-C series were offered to prove this. And in the evidence to sustain this head of irregularity, the petitioners case appears simply to be that whenever the ballots cast as found in the ballot box exceed the ballots issued then there is an over vote for which reason the results must be annulled. In this regard, great reliance was placed on the information contained in the pink sheets and in particular the space provided for ballot accounting.

In question C6 in the ballot accounting section of the pink sheets is a formula that aggregates C1, C2, C3 and C4 to reach a total that must be equal to the total number of ballots issued to a station, A1.But from the available evidence, there are matters of great weight, which render it unreliable to rely on the second interpretation of over voting on which the claim of the petitioners is planked. When one carefully peruses the ballot accounting section of the pink sheets in evidence before us, the question numbered C6 has a formula provided by which the aggregate of C1, C2, C3, and C4 is to be equal to A1, the total number of ballot papers issued to the polling station. A careful reading of the sheet reveals that C5, unused ballots has been left out of the constituent elements of C6 that is to be equal in number to A1. In the face of this obvious error that was admitted by the Chairman of the Electoral Commission in the course of his oral testimony, it is interesting if not surprising that notwithstanding the absence of C5 which had the effect of making it impossible going by the formula provided to have C6 being equal to A1, most of the pink sheets were filled for the purpose of having C1 + C2+ C3+ C4 making up C6 that should be equal to A1.

As the formula provided in C6 is incorrect it stands to reason that when the question to which it relates is answered it cannot be right. I am of the opinion that this is in an area of arithmetic, this is a classic instance of the convergence of an answer in arithmetic converging with the oft quoted statement that you cannot put something on nothing as it cannot hold. Therefore, the objective sought to be attained by way of ballot accounting cannot be achieved. This, in my view renders the interpretation of over voting that leaves out unused ballots, C5 out of the equation not worthy of the great reliance that is sought to be placed on it. Clearly, in the midst of this many presiding officers must have transferred the missing information elsewhere in order to get a healthy balance sheet regarding the ballots at the end of the polls. In this regard, I am of the opinion that utilising the portion on the pink sheets for the purpose of ballot accounting is quite unreliable. One needs to be more than a human being to be able to achieve a balance on the sheet but many attempted to do this without taking account of C5. In the circumstances the question that arises is: Can the Court rely on the answers therein to determine over votes without a process of careful tally of the ballots cast? I think that in view of the incorrect formula and the consequences flowing from it one needs evidence beyond the pink sheets to prove the allegation of irregularity to which they relate. The question of an over vote in the circumstances not being a matter that is plain from the face of the pink sheets is a matter which could be established only by evidence through a careful inquiry under the law through the process of ballot accounting to enable such ballots to be rejected.

Again from the question in C6, C1 and C3 are part of the elements to be added but as can be seen from C3 since no voter was to use form 1C at the polls, the answers filled therein must relate to persons already on the polling station register-C1. This means that at the end of the poll when they are added as the formula has provided, there would be double counting which might tend to create the impression of over votes although in fact the error is traceable to the questions posed on the pink sheets. In my view the pink sheets must if they are to be used in the 2016 election undergo a careful weeding out of the obvious errors to make it serve the purpose for which they were intended. The effect of these is that the claim to over votes cannot be made without going through the process of ballot accounting to eliminate the obvious errors that are intrinsic in the questions that are asked on the pink sheets and the answers

thereto. It is in this regard that the role of the polling agents comes up for consideration.

In my opinion as agents for the petitioners who signed all the pink sheets in evidence without exception, although by Regulation 35 (4) they can withhold their signature and provide reasons therefore, their conduct in signing the declarations means that in their view that the entire process of voting was regular. These signatures bring into being the evidential attribute provided for in section 26 of the Evidence Act, NRCD 323 of 1975 which provides as follows:

"Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest."

I think that having signed the declared results that were forwarded to the presiding officer of the disputed elections, the Chairman of the Electoral Commission that was acted upon in computing the results, the said conduct creates a conclusive presumption that by the clear provisions contained in section 24(1) has the following attribute.

"Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence to the contrary to the conclusively presumed fact may be considered by the tribunal of fact."

By the rules of evidence, we are precluded from considering any other fact to the contrary. I also venture to say that issues relating to elections are intended to be quickly resolved and that the procedure laid down in Regulations 35-37 of CI 75 serves the purpose of ensuring that the votes counted satisfy the various rules laid down for the conduct of elections. It is observed that the estoppel in this case relates to a fact the occurrence on which the question of law turns and as such this pronouncement does not seek to lay down that when a question purely of a matter of law arises there can be no estoppel raised to relieve one from the consequences of for example illegality. In my view, when there is a statutory right in persons to withhold their signature from the validity of an act by objecting thereto, their unequivocal act in signing

would operate to create an estoppel in the nature of “unattackable validity” as was said in the United States decision in the case of Holmberg v Jones, 7 Idaho 752, 758-759, 65 Pac 563, 564.

See also: (1) Armstrong v King, 281 Pa. 207, 126 Atl. 263.

Further, I have no doubt that, if indeed, there were over votes in the disputed elections as the petitioners allege by resort to the elaborate procedure under the Regulations they would have been discovered and rejected in the course of ballot accounting subject to the right of appeal that is conferred on an aggrieved party under Regulation 38 of CI 75. I do not think that it is proper for us to ignore the laid down procedures provided by the electoral laws in the absence of compelling evidence to the contrary. I think it is important that we give effect to the legitimate expectations of the law in this matter.

Closely linked with the above is the category placed before us in the nature of voting without biometric verification. According to the petitioners this was deductible from the answers to question C3. But, the unchallenged evidence of the Electoral Commissioner was to the opposite effect and destroys any value that one might wish to place on entries in C3 as Form 1C was by agreement with the political parties not to be used for voting. The evidence which is not controverted was to the effect that Form 1C was originally intended to be used by registered voters who though issued with ID cards had their biometric data lost due to no fault of theirs. I accept the explanation offered by the Chairman of the Electoral Commission as a genuine attempt to prevent the disenfranchisement of registered voters. It is therefore plain that those portions of the pink sheets were filled in error and cannot be the basis of any legitimate attack on the regularity of the polls as conducted.

Again, in the course of the trial it became clear that the process of biometric verification that was provided for in regulation 30 was captured by the verification equipment and as such the primary evidence on whether or not a voter was verified before voting was recorded therein. In such a case, I am surprised that the information regarding the important process of verification is sought to be proved by reference to C3 only. I am unable to accept that piece of evidence as the primary evidence as it is in its nature secondary. In order to be able to rely on the pink sheets as evidence of what they purport to

be, the petitioners ought to have shown that the better or best evidence to which they relate are not available. See: Lucas V Williams & Sons [1892] 2 QB 113 at 116 Primary evidence, in my thinking relates to a fact from which legitimate inferences as opposed to conjecture might be made. For this purpose, even the originals of the pink sheets belong to the category of secondary evidence as the information they seek to prove is obtainable in the best form in the register of voters at polling stations and the biometric verification equipment. The record of list of voters verified by the biometric verification equipment is the primary evidence and it is the one from which the information contained in the pink sheets was made. Proof of that information to be of evidential value must satisfy section 163 of the Evidence Act, NRCD 323 of 1975. I quote hereunder the said section in its entirety.

"(1) An original of a writing is the writing itself or any copy intended to have the same effect by the persons executing or issuing it.

(2) An original of a writing which is a photograph includes the photographic film 9 including a positive, negative or photographic plate) or any print made therefrom.

(3)If information contained in writing is stored in a manner not readable by sight, as in a computer or a magnetic tape, any transcription readable by sight and proved to the satisfaction of the court to accurately reflect the stored information is an "original" of that writing."

The purpose of the above rules is to enable the court as the trier of fact and in keeping with the prime duty placed on it under section 2 of the Evidence Act to decide all questions of fact. By not placing the best or primary evidence before the court, the petitioners have sought their inferences from the information that is available elsewhere to be the basis of our decision. But that is not sanctioned by law. The rule of evidence to which reference is made here is that inferences about irregularities can be drawn from facts, but not from inferences. As the said record of the voters verified at every polling station is available and capable of proof in the manner acceptable, I am unable to fall upon information from pink sheets that are based on some other primary source as evidence of irregularity.

There is yet another reason that renders the evidence of voting without biometric verification unproven. It is this. Pursuant to the court's direction as to the mode of tendering evidence in the matter herein, the 3rd Respondents had filed on its behalf several affidavits by persons who voted at various polling stations in the country. The content of those depositions that were on oath and constitute evidence in this matter was that before they went through the process of voting they had been verified in accordance with the requirements of regulation 30 of CI 75. The petitioners, who bore the initial burden of proof on the allegation of absence of biometric verification, unfortunately did not file any process that has the effect of challenging those depositions. The effect of this is that in the face of the depositions by persons who actually voted at some of those polling stations and testified from their own knowledge to what actually they saw and participated in, the evidence of the 2nd Petitioner who was not at any of those polling stations cannot be preferred. I think it is a basic rule of evidence that in considering the credibility of a witness one of the factors to be taken into account is "the capacity of the witness to perceive, recollect or relate any matter about which he testifies". See: Section 80(2) d of the Evidence Act, NRCD 323 of 1975.

One question that the failure by the petitioners to make available a single affidavit from a person who was present at any of the polling stations continually brings up is why were they not called? Since the petitioners had polling agents at all the polling stations as appear from the pink sheets exhibited before us, the reasonable inference therefrom is that the said agents are available. It being so, the failures to have them testify to affidavits in support of the allegation of absence of biometric verification has a decisive evidential attribute. The circumstances of this case in as far as the positive allegation of absence of biometric verification is concerned is that those agents have a duty to speak in the face of the depositions made by witnesses for the Respondents and as such their silence has the effect of rendering the version testified to by their adversaries unchallenged and also deemed to be an admission. See: BESSELA v STERN (1877) 2 C P D 265.

Then there is the evidence that the disputed elections were postponed to a second day, 8 December 2012 at polling stations where the verification machines had broken down. A legitimate inference to be made from this

unchallenged fact is that voting at all polling stations took place after biometric verification of those entitled to vote. In so holding, I do not disregard the fact that the elections that are disputed arose out of the exercise of official acts and are presumed by section 37 of the Evidence Act, NRCD 323 of 1975 to have been regularly conducted thus requiring any person who alleges to the contrary to lead credible evidence to sustain the allegation to the contrary.

The next category that I turn my attention to arises out of the failure or absence of presiding officers to sign the results declaration forms after the holding of the polls in dispute. In support of this head of claim, the petitioners relied on article 49(1), (2) and (3) of the 1992 Constitution of the Constitution as follows:

"(1) At any public election or referendum, voting shall be by secret ballot.

(2) immediately after the close of the poll, the presiding officer shall, in the presence of such candidates or their representatives and their polling agents as are present, proceed to count, at the polling station, the ballot papers of that station and record the votes cast in favour of each candidate or question.

(3) The presiding officer, the candidates or their representatives and, in the case of a referendum, the parties contesting or their agents and the polling agents if any, shall then sign a declaration stating-

(a) the polling station; and

(b) the number of votes cast in favour of each candidate or question; and the presiding officer shall, there and then, announce the results of the voting at that polling station before communicating them to the returning officer."

A careful reading of the above provisions reveals quite clearly that the duty that it creates is not exclusive to only the presiding officer and involves not only the execution of the declaration of results but beyond that openly announcing the results and communicating them to the returning officer who is the Chairman of the Electoral Commission. In my view, the duty is collective and when an allegation turning on the absence of the signature of the presiding officer is raised in any proceedings subsequent to the declaration of the results as we are witnessing in the petition, the court must consider the nature of the irregularity in question in relation to the entire constitutional

provision as well as other provisions of the Constitution on electoral laws in order to give a meaning that advances the purpose for which those provisions were made. It is not proper for the court to look at the act in isolation as the petitioners have invited us to do in these proceedings. In fact, in presenting their addresses in the matter herein reference was made only to the requirement regarding the signature of the presiding officer without any mention of the duty that is similarly placed on the polling agents and or representatives of the candidates. Perhaps, this was due to inadvertence and I have no doubt that if learned counsel for the petitioners had considered the provision in question in its entirety, he would probably have come to the view that the meaning of the words that he pressed on us in this matter is not the true meaning. We are in this case confronted with the holding of presidential elections and it is of the utmost importance that nothing be done by this court that has the effect of disenfranchising the several voters who took part in the elections on grounds that are purely technical and administrative. The procedural approach that is urged on us by the petitioners does not commend itself to me and I prefer to adopt the substantive approach in a matter that touches and concerns no mean a right as the right to vote. Perhaps, because our electoral history has not had the experience of other jurisdictions where for several years a certain section of the population was not entitled to vote, we tend to take its conferment on us as a people lightly. The substantive approach has been adopted by many jurisdictions and indeed the majority in their judgment in the recent Canadian case of OPTIZ v WRZENEWSKYJ [2012} SCC 55-10-256 said it well and properly as follows:

“Lower courts have taken two approaches to determining whether votes should be invalidated on account of irregularities. Under the strict procedural approach, a vote is invalid if an election official fails to follow any of the procedures aimed at establishing entitlement. Under the substantive approach, an election official’s failure to follow a procedural safeguard is not determinative. Only votes cast by persons not entitled to vote are invalid. The substantive approach should be adopted, as it effectuates the underlying Charter right to vote, not merely the procedures used to facilitate that right.”

The approach adopted in the above case has also met with the approbation of courts in the United States of America where courts have held that although

election statutes are mandatory and compliance is expected not all compliance failures automatically void an election, especially if the failure is not challenged until after the election. Accordingly, courts construe acts that are not challenged until after elections as directory, which allows the court to overlook harmless compliance failures unless one of the following conditions applies:

(a) explicit statutory language states that the provisions are mandatory,

(b)explicit statutory language specifies the election is voided because of the failure,

(c)the violation affected an essential electoral component, or

(d) the violation changed the election's outcome or rendered it uncertain.

See (1) Henderson v Maley, 806 P. 2d 626, 630 (Okla. 1991); (2) Don v Mc Cuen, 797 S. W. 2d 455, 456 (Ark. 1990); (3) D'Amico v Mullen, 351 2 Ad 101, 104 (R. I. 1976).

Similarly, in the area of legislation regarding requirements of the Constitution that utilise the word " shall", Courts in the United States of America have tended to hold that the mandatory requirement means substantial and not complete and literal compliance. See: (1) Louiseville Trust Co v Morgan, 180 Ky. 609, 203 S. W. 555; (2) Commonwealth v Griest, 196 Pa. 396, 416; (3) Armstrong v King, 281 Pa. 207, 126 Atl. 263. In my view, if such an interpretation could be given regarding the exercise by the legislature of a power conferred on it under the constitution to make laws on behalf of the sovereign people of the United States of America then by parity of reasoning as regards merely administrative acts such as the failure to sign pink sheets that do not raise any issue that calls in question the totality of votes declared at a polling station such a failure cannot operate to deprive the declared results of validity. I think to accede to this urging would be subversive of the right to vote and treating its exercise as not being as important as the breach to which the absence of signatures relate. The right to vote according to one's choice is in my opinion the fundamental pillar of our constitutional democracy and should not be trivialised.

The suggested approach has been given statutory endorsement in section 20 (2) (b) of Representation of People Law, 1992 PNDC law 284 as follows:

"Despite sub-section 1, where at the hearing of an election petition the High Court finds that there has been a failure to comply with a provision of this Act or of the Regulations, and the High Court finds

(1) that the election was conducted in accordance with this Act and Regulations, and

(2) that the failure did not affect the result of the election, the election of the successful candidate shall not, because of the failure be void and the successful candidate shall not be subject to an incapacity under this Act or the Regulations".

Although the court to which reference is made above is the High Court, the amendment to the law that is contained in PNDC Law 296 makes the application of section 50 of the law to cover all public elections. The said amendment, which was just to substitute and or insert new provisions in the original law, PNDC law 284 in section 2 (c) provide thus:

"by the substitution for the meaning of "election" in section 50 of the following-

"election" means any public elections"

From the amendment, it is plain that the previous meaning in section 50 of PNDC law 284 that meant "an election to elect members of Parliament" was at an end and that word thereafter refers to all public elections including presidential elections. It being so the substantive and or purposive approach in PNDCL 284 that I have earlier on referred to in this delivery has to guide us in our decision. I think that the law maker must have been inspired by the substantive approach in jurisdictions outside Ghana, which though not binding on us but of persuasive effect only were delivered in countries with a long and established history of of constitutional democracy .In my view the approach that considers the nature of the irregularity and its likely effect on the election is quite frankly preferable to the procedural approach that looks only at the breach of a provision without more. In fact, even in the rules of court of the High Court there has been since the coming into being of the High Court (Civil

Procedure Rules), 2005, CI 47 a legislative shift from the purely technical approach to the substantive approach that is embodied in Order 81 of the Rules. This approach is purposive as it attempts to unravel the objective that the law was intended to achieve and to effectuate same. In the case of Ex parte Yalley [2007-2008] SCGLR 512 at 519, Georgina Wood JSC (as she then was) observed as follows:

"It is well established, that as a general rule, the correct approach to construing statutes is to move away from the literalist, dictionary, mechanical or grammatical to the purposive mode. Admittedly, there may be instances where the ordinary or dictionary or grammatical meaning of the words or phrases yield just results and there remains little one can do about that. Even so, it can be said that the purposive rule is embedded in the grammatical rule. In other words, the ordinary meaning projects the purpose of the statutory provision and so readily provides the correct purpose-oriented solution. Indeed, the purposive rule of construction is meant to assist unearth or discover the real meaning of the statutory provision, where an application of the ordinary grammatical meaning, produces or yields some ambiguous, absurd, irrational unworkable or unjust result or the like."

Several decisions of our courts have over the years adopted the purposive and or substantive approach to construction of statutes in our jurisdiction. Reference is made to a few such instances. (1) Tuffuor v Attorney-General [1980] GLR 367; (2) Asare v Attorney- General [2003-2004] 2 SCGLR 823; (3) Ampiah- Ampofo v Commission on Human Rights and Administrative Justice [2003-2004] 1 SCGLR 227; (4) Republic v Fast Track High Court; Ex parte Commission on Human Rights and Administrative Justice [2007-2008] SCGLR 213 .

These developments are not accidental but intended to emphasise the substantive approach in our jurisdiction. Therefore, in my thinking a mere breach of a constitutional provision does not by itself result in invalidating an election but it must be proved of the said non-compliance that it has materially affected the declared result at the election. The failure to sign the results sheets in question not having been proved in the slightest manner to have tainted the election or the results declared should be held to be directory and not mandatory. I do not think that we can adopt an approach to the

interpretation of election laws that is not informed by the experience of jurisdictions that have a considerable jurisprudence that has facilitated the growth of strong and enduring democracies that we aspire to achieve. Democracy is an evolving phenomenon and elections cannot be perfect so when we are faced with the consideration of irregularities that are alleged to have occurred in an election, we should exercise a reluctance in striking down every single vote just by reference to a provision of the law. On the contrary, the irregularity must have affected the integrity of the elections. The substantive approach serves the same purpose as the purposive approach to the interpretation of statutes that our courts have come to embrace in several decisions in this country. See: Fitch v Stephenson [2008] EWHC 501, Para 40

The interpretation of article 49 of the constitution that has been urged on us in these proceedings does not commend itself to me. That interpretation seeks to constitute presiding officers into a special class of actors in the electoral process. I am unable to understand that although they actually presided over the elections and the counting of the ballots and caused polling agents to sign the declaration of the results, which they thereafter openly announced to the public and had a copy thereof posted at the polling station by merely not signing the results sheets, the entire process that but for this singular act omission complied with the law should be invalidated. I think that such an approach is not rooted in shared common sense and undermines the entire process of elections by having innocent voters disenfranchised on purely technical grounds. It is observed that election statutes are to be construed liberally in order to give effect to the expressed wish of the electorate. It being so, rules that are provided to effectuate constitutional rights should not be applied purely technically as though they were mathematical formula. I am of the opinion that the evidence placed before us clearly points in the direction of a substantive approach unblinded by strict adherence to technicalities. After all, the presiding officers are known and available within the jurisdiction so if one may ask the question why they were not called to testify? Within the context of the entire role to be played by the presiding officers, the requirement to sign the results is directory and not mandatory; to hold otherwise would enable a purely administrative act that does not detract from the basic principles of an election to supersede the substantive exercise of the right to vote in the manner circumscribed by law.

Then there is the claim, which concerns voting at undesignated polling stations. The uncontroverted evidence before us is that the petitioners assigned poling agents to those polling stations. It being the case, I think that the elections held at those locations not having been proved to have suffered in the slightest degree from any breach of the rules and regulations by which the presidential elections were held, there appears to be no substance in this ground. In my thinking, this ground like that turning on duplicate polling station code numbers raise no point of relevance for our consideration in these proceedings.

For these reasons, I am unable to yield to the reliefs set out in the petitioners' demands before us and proceed to dismiss same. In the result, the declaration under the hand and signature of the Chairman of the Electoral Commission dated 9 December 2012 and numbered as CI 80 is hereby declared valid.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT