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THE INSTITUTE OF CHARTERED ACCOUNTANTS IN MALAWI

2014 EXAMINATIONS

KNOWLEDGE LEVEL

PAPER 2: LEGAL FRAMEWORK

MONDAY 1 DECEMBER 2014 **TIME ALLOWED : 3 HOURS**
2.00 - 5.00 PM

SUGGESTED SOLUTIONS

SECTION A

1. (a) (iii)
   (b) (i)
   (c) (ii)
   (d) (iv)
   (e) (i)
   (f) (iv)
   (g) (ii)
   (h) (iii)
   (i) (i)
   (j) (ii)

2. (a) (i) A precedent can be overruled either by statute or by a superior court. However, judges are usually reluctant to overrule precedents because this reduces the element of certainty in the law.

   (ii) The difference between overruling and reversing a decision is that a decision is reversed when it is altered on appeal. A decision is overruled when a judge in a different case states the earlier case was wrongly decided.

   (b) The advantages and disadvantages of a precedent are:

   (1) Advantages

   Certainty – It provides a degree of uniformity upon which individuals can rely. Uniformity is essential if justice is to be achieved. The advantage of certainty by itself outweighs the several disadvantages of precedent.

   (2) Development – New rules can be established or old ones adapted to meet new circumstances and the changing needs of society.

   (3) Detail – No code of law can provide the detail found in the Malawi case law.

   (4) Practicality – The rules are laid down in the course of dealing with a case and do not attempt to deal with future hypothetical circumstances.

(5) Flexibility – A general *ratio decidendi* may be extended to a variety of factual situation. For example the "neighbour test" formulated in ***Donoghue v Stevenson (1932)*** determines whether a duty of care is owed to a particular person whatever the circumstances of the case.

Disadvantages

(1) Rigidity – Precedent is rigid in the sense that once a rule has been laid down, it is binding even if it is thought to be wrong.

(2) Bulk and complexity – There is so much law that no one can learn all of it. Even an experienced lawyer may overlook some important rule in any given case.

(3) Slowness of growth – The system depends on litigation for rules to emerge. Litigation tends to be slow and expensive. The body of case law cannot grow quickly enough to meet modern demands.

(4) Danger of illegality – this arises from the rigidity of the system of precedent. Judges who do not wish to follow a particular decision may be tempted to draw fine distinctions in order to avoid following the rule, thus introducing an element of artificiality in the law.

3. (a) Custom is still classified as a legal source of law although it is now of little importance. The word "custom" may be used in several different senses. In one sense it is the main source of law because it is the original source of common law. It is, however, wrong to equate "common law" with custom since most common law rules nowadays come from judicial decisions rather than ancient custom. In its second sense "custom" describes a conventional trade usage. Custom, in this sense, is not a source of law, but a means by which terms are implied into contracts.

(b) A person may prove custom by using the tests of "antiquity" and "continuity" as follows:

(i) Antiquity – For local custom to be proved as being valid, it must have existed since "time immemorial". This has been fixed by statute at 1189 AD. In practice, proof back to 1189 AD is never possible, so the courts will accept proof of existence within living memory. If this is shown, the person denying the existence of the custom must prove that it could not have existed in 1189 AD. In ***Simpson v Wells (1872)***, Simpson, who had been charged with obstructing a public foot-path, by setting up a refreshment stall, alleged that he had a customary right to do so deriving from "statute sessions" (ancient fairs held for the purpose of hiring servants). It was shown that statute sessions were first authorized in the 14th century, so the right could not have existed in 1189 AD.

(ii) Continuity – The right to exercise the custom must have been interrupted. This does not mean that custom itself must not have been continuously exercised. In ***Mercer v Denne(1905)*** D owned a section of a beach and wished to build on it. P, a fisherman, claimed a customary right to dry his nets on the beach and asked for an injunction to prevent the building. D's defence was that the custom was only exercised occasionally, and that before 1799, the beach ground was below the high water mark, and until recent times, it was unsuitable for use for drying nets.

Held: the custom was valid. Its existence throughout living memory was proved, and the fluctuations in use were due to variations in wind and tide. However, the fisherman had always claimed the right to use such ground as was available and so the custom extended to the additional ground now available.

4. (a) It is true that a contract is an agreement entered into between the parties. This appears to be somewhat not a very accurate definition because there are a number of situations where a contract has come to exist without prior agreement between the parties. Five of these situations are:

(i) Sometimes parties are judged by what they have said, written or done, not by what they have agreed or what is in their minds. In such cases, an objective standard is applied to imply a contract between the parties.

(ii) Mass production and nationalization have led to the standard form contract. The individual must usually take it or leave if he does not really agree to it. For example, a customer has to accept his supply of electricity on the electricity board's terms. He is not likely to succeed negotiating special terms.

(iii) Public policy sometimes requires that the freedom of contract should be modified e.g. the Unfair Contract Terms Act 1977.

(iv) The law will sometimes imply terms into contracts because the parties are expected to observe certain standard of behavior. A person is bound by these terms even though he has never agreed to them e.g. sections 14, 15, 16, 17 and 18 of the Sale of Goods Act which provide for implied terms in a contract by statute.

(v) The law of agency enables the agent to bind his principal provided the agent acts within the scope of his apparent authority, even if he goes beyond his actual authority. As a result, a principal may find himself bound by a contract that he did not intend to take.

(b) The rule is that consideration must be of some value if it is to support a contract. This means that as long as some value is given, the court will not ask whether it is proportional in value to the thing given in return. In other words, there is no remedy for someone who makes a bad bargain. In ***Thomas v Thomas (1842)*** executors agreed to convey the matrimonial home to a widow provided she paid £1 per year rent and kept the house in repair. In an action on the promise to convey, it was held that the promise of payment and doing the repairs were valuable consideration.

However, some acts, although they appear to have some value, have been held to be no consideration. For example, payment on a day that a debt is due of less than the full amount of the debt is not consideration for a promise to release the balance (***Pinnel's Case (1602)***. But if the creditor agrees to take something different from what he is entitled to, or if payment is made at his request at an earlier date, there is sufficient consideration.

In ***D.C. Builders V Rees (1965)*** D owed P £482 and knowing that they were in financial trouble, offered them £300 in full settlement of the debt. P accepted this cheque but later sued for the balance of £182. P succeeded because:

(i) D paid P a cheque and the court considered this as the same as cash to which P was entitled.

(ii) The payment was made at D's suggestion and not at P's request.

(iii) Equitable *estoppel* was not available as a defense for D because she had attempted to take advantage of P's financial difficulties and had not, therefore, come to equity with "clean hands".

SECTION B

5. (a) The five circumstances relating to an employee's status in society or other engagements which do not warrant his or her dismissal from work or from being charged with misconduct are:

(i) an employee's race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status or family responsibilities.

(ii) an employee's exercise of any of the rights specified in Part (ii) of the Labour Relations Act.

(iii) an employee's temporary absence from work because of sickness or injury.

(iv) an employee's exercise or proposed exercise of the right to remove himself from a work situation which he reasonably believes presents an imminent or serious danger to his/her life or health.

(v) an employee's participation in industrial action which takes place in conformity with the provisions of part (v) of the Labour Relations Act.

(vi) an employee's refusal to do any work normally done by an employee who is engaged in industrial action.

(vii) the filing of a complaint or the participation in proceedings against an employer involving alleged violations of laws, regulations or collective agreements.

(b) Jack Ntchito, a newly employed Registry Clerk in PXL Co. Ltd wants me to explain to him the grounds for "summary dismissal" and "constructive dismissal".

(i) Summary dismissal is a penalty which is provided for in Section 5(a)(1) of the Employment Act which states that an employer is entitled to dismiss summarily an employee on the following grounds:

- where an employee is guilty of serious misconduct inconsistent with the fulfillment of expressed or implied conditions of his contract of employment such that it would be unreasonable to require the employer to continue the employment relationship. Section 5(a)(1)(a).

- habitual or substantial neglect of his duties – Section 5(a)(1)(b).

- lack of skill that the employee expressly or by implication holds himself out to possess – Section 5(a)(1)(c).

- willful disobedience to lawful orders given by the employer – Section 5(a)(1)(d).

- absence from work without permission of the employer and without reasonable excuse – Section 5(a)(1)(e).

(ii) Unlike in summary dismissal, in constructive dismissal, it is the employee who terminates his employment relationship with his employer without notice or with less notice than that to which the employer's conduct has made it unreasonable to expect the employee to continue with the employment relationship.

6. (a) In relation to the sale of goods, the terms which may be implied in a contract if the sale is one by sample are conditions which state that:

(i) the bulk will correspond with the sample.

(ii) the buyer will have reasonable opportunity of comparing the bulk with the sample.

(iii) the goods shall be free from any defect making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

(b) A contract for the sale of Irish potatoes was between Albert and Henry. A contract binds both parties and requires each party to observe the terms of the contract agreed by the parties. There were two terms in this contract that had to be observed. The first was that Albert would pay the purchase price to Henry after he had sold the potatoes. The second was that Albert would enjoy ownership of the goods when all that was owing had been paid. In other words, ownership of the goods would pass to Albert after he had paid in full the purchase price to Henry. On the facts, we are told that Albert failed to pay the purchase price after selling the goods. Many commercial contracts now contain aretention of title clause often known as the *Romalpa Clause*. Under this clause, possession of goods may pass to a buyer but ownership (i.e. legal title) does not pass until the price is paid in full. Based on the law explained above, Henry is to be advised that he is entitled to the following remedies:

(i) To sue Albert for the price because he has breached a condition that the price will be paid after selling the goods.

(ii) To sue David for the return of the goods. This is so because when Albert took delivery of the goods, he did not acquire title to the goods. They still belonged to Henry as the owner. Albert took the goods on condition that he would acquire ownership after paying for them. He only had possession and not title ***Aluminium Industrie BV v Romalpa (1976)*.**

(iii) Henry can repossess the goods from David under the *nemo dat quod non habet* principle, in that a person who is not the owner of the goods such as Albert cannot sell property which he does not own. Albert lawfully sold the goods to David when he, Albert had no good title to them. Henry, the owner of the goods is at liberty to get goods from the third party purchaser. It is up to David to recover the money he paid to Albert.

(c) The term, sale under a "voidable title" refers to a seller of the goods who has a voidable title, but this title has not been avoided at the time of the sale. The buyer acquires good title provided he buys in good faith without notice of the seller's defect in title. This applies to contracts which are voidable as where there was fraud or misrepresentation of facts.

7. (a) A partnership is an association which consists of a number of persons who have come together for a matter of common interest. It is an unincorporated association which does not have a separate legal entity from its members. It is formed with a view to making profit.

(b) The legal position of a partnership business is that of principal and agent relationship, each partner is an agent of the others.

(c) The liability of partners in torts and contract is as follows:

(i) Liability in torts on the usual principle of vicarious liability (since each partner is an agent of the other) all partners are liable for the torts committed by a partner in the ordinary course of business or with the authority of his co-partners. Liability in tort is joint and several. This means that a partner is liable jointly with the other partners and also individually liable. Thus a plaintiff may issue separate writs against each partner at the same time or successively and judgment against one partner does not prevent an action being brought on others.

(ii) Liability in contract: Just as in torts, every partner is liable jointly with his co-partners for all debts and obligations of the firm incurred whilst he was a partner. Previously, the law was that when liability was joint, it used to be the case that once a third party had sued one of the partners, he could not sue the others but the current law is that a partner who has paid a debt of the firm, may claim a contribution from his co-partners.

(d) The liability of a retired partner is that:

(i) he does not cease to be liable for partnership debts incurred before his retirement. These may include debts arising after his retirement from transactions done when he was a partner.

(ii) he may be discharged from liability for debts incurred while he was a partner if the debts are later discharged by the new firm or if the creditors agree to release him by notation.

(iii) he may be liable on contracts made after retirement if he continues to be an "apparent partner" by, for example, allowing his name to remain on the firm's notepaper.

8. (a) (i) Paid up capital means a sum of money paid and received by the company from shareholders. Unless some shareholders refuse to pay calls, the paid up capital will equal the called up capital. Paid-up capital is important because if a company makes a reference on its stationery to the amount of its capital, the reference must be to the paid up capital.

(ii) Uncalled capital is the difference between the amount already paid-up and the total nominal value of the issued shares. Uncalled capital is rare because it is unpopular with both companies and investors. It is unpopular with companies because of the possibility that calls will not be met, and it is unpopular with investors because of uncertainty as to when calls will be made. Where it exists, the uncalled capital is a further guarantee fund for creditors. It is an asset equivalent to debtors; the debtors in this case are the members. The creditors can only gain access to this fund in the event of liquidation since they cannot compel the directors to make calls, nor can they levy execution on uncalled capital.

(iii) Reserve capital – in order that the guarantee fund as mentioned above can be removed from the directors' control, directors may, by special resolution, determine that it shall only be called up in the event of winding up. The special resolution, creating reserve capital, is irrevocable. Reserve capital, which is also known as reserve liability must not be confused with "General Reserve" or "Reserve Fund". These terms refer to undistributable profits.

(b) The two types of securities in company law are:

(i) Fixed charge – this is a mortgage of freehold or leasehold property or a fixed plant and machinery although a fixed charge may be granted over the assets e.g. book debts or uncalled capital. It prevents the company from selling the assets charged without the consent of the debentureholders.

(ii) "Floating Charge" is an equitable charge which has the following characteristics:

(1) It is a charge on some or all of the present and future assets of the company.

(2) That class is one which, in the ordinary course of business, changes from time to time such as inventory and debtors.

(3) The charge envisages that, until some future step is taken by or on behalf of the chargeholder, the company may carry on its business in the ordinary way.

E N D