

BUSINESS LAW (TC8)

TECHNICIAN DIPLOMA IN ACCOUNTING



NOT FOR SALE

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TABLE OF CONTENTS

TC 8: BUSINESS LAW - SYLLABUS.....	3
AIMS OF THE COURSE	3
LEARNING OBJECTIVES	3
FORMAT AND STANDARD OF THE EXAMINATION PAPER	3
SPECIFICATION GRID.....	3
LEARNING OUTCOMES.....	4
REFERENCES.....	6
CHAPTER 1: THE MALAWI LEGAL SYSTEM	7
CHAPTER 2 : THE LAW OF TORTS	20
CHAPTER 3: FORMATION OF A CONTRACT	31
CHAPTER 4: PRIVY OF CONTRACT AND VITIATING FACTORS	45
CHAPTER 5: DISCHARGE OF CONTRACT AND REMEDIES	53
CHAPTER 6: EMPLOYMENT LAW	61
CHAPTER 7: AGENCY	69
CHAPTER 8: SALE OF GOODS.....	80
CHAPTER 9: NEGOTIABLE INSTRUMENTS	90
CHAPTER 10: PERSONAL PROPERTY SECURITY.....	104

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TC 8: BUSINESS LAW - SYLLABUS

AIMS OF THE COURSE

To develop candidates' understanding of the broad range of basic legal principles and the ability to apply this knowledge in various business transactions.

LEARNING OBJECTIVES

On completion of this module, candidates will be able to:

- i. Explain the various sources of law in Malawi.
- ii. Explain the organization of the courts and administration of the courts in Malawi.
- iii. Distinguish between civil and criminal liability.
- iv. Explain the basic principles related to law of torts.
- v. Explain the principles of the law of contract.
- vi. Describe the law relating to labour and employment in Malawi.
- vii. Explain the principles of the law of agency.
- viii. Explain the law relating to sale of goods.
- ix. Describe the law relating to negotiable instruments
- x. Describe the law relating to personal property security

FORMAT AND STANDARD OF THE EXAMINATION PAPER

There will be a three hour examination and the question paper will have five questions each carrying equal marks. Students will be required to answer all questions. Candidates will be expected to demonstrate an understanding of a wide range of topics covered by the syllabus. Emphasis will be more on knowledge levels than application of skills. Students will nevertheless be required to show ability to use this knowledge to solve legal problems. They will also be expected to cite case law and discern the legal principles enunciated in such cases. The demonstration of basic legal logic will be a hallmark of the examination. Students must show that they understand that common sense is not law or a substitute for legal logic. Candidates will lose marks for failing to communicate clearly including grammatical errors.

SPECIFICATION GRID

This grid shows the relative weightings of subjects within this module and should guide the relative study time spent on each. Over time the marks available in the assessment will equate to the weightings below, while slight variations may occur in individual assessments to enable suitably rigorous questions to be set.

1. The Malawi Legal System	20
2. The Law of Tort	10
3. The Law of Contract	20
4. Employment Contracts	10
5. Agency	10
6. Sale of Goods	10
7. Negotiable Instruments	10
8. Personal Property Security	10
Total	100

LEARNING OUTCOMES

1. The Malawi Legal System

In the assessment, candidates may be required to:-

- a. Define a legal system
- b. Define law and its types
- c. Define judicial review
- d. Distinguish civil from criminal liability
- e. Explain the meaning of administrative justice and its advantages and disadvantages
- f. Explain the system of courts and administration of justice in Malawi
- g. Explain the doctrine of precedent and its advantages and disadvantages
- h. Explain the process of law making in the Malawi Parliament.
- i. Discuss sources of law in Malawi, including legislation, case law, custom and equity
- j. Discuss rules of Statutory Interpretation

2. The Law of Tort

In the assessment, candidates may be required to:-

- a. Define the law of tort
- b. Distinguish a tort from other wrongs
- c. Explain key concepts in the law of tort including causation, remoteness of damage, vicarious liability and strict liability
- d. Distinguish a contract of service from a contract for services
- e. Discuss examples of torts including the tort of negligence, nuisance and defamation
- f. Discuss the general defenses in tort.

3. The Law of Contract

In the assessment, candidates may be required to:-

- a. Explain the elements of a valid contract
- b. Distinguish offer from acceptance
- c. Distinguish an offer from a counter offer and an invitation to treat.
- d. Define acceptance and outline rules relating to acceptance.
- e. Define consideration and its types
- f. Explain the meaning of 'intention to create legal relations'
- g. Discuss the extent to which capacity affects the validity of a contract
- h. Distinguish a condition from a warranty
- i. Define an exclusion clause and how the same may be incorporated into a contract
- j. Define the doctrine of privity of contract and its exceptions
- k. Explain the effect of a mistake on the validity of a contract
- l. Define a misrepresentation and its types
- m. Define duress and distinguish it from undue influence
- n. Distinguish illegal contracts from unenforceable contracts, void and voidable contracts.
- o. Explain the extent to which contracts in restraint of trade are valid
- p. Discuss the circumstances under which a contract can be terminated.
- q. Explain types of injunctions
- r. Discuss the possible remedies for breach of contract

4. Employment Contracts

In the assessment, candidates may be required to:-

- a. Comment on sources of employment law
- b. Define types of employment contracts

- c. Explain how a contract of employment may be terminated
- d. Explain the meaning of probation
- e. Definition and explain the entitlement and calculation of severance allowance
- f. Explain employment law concepts including hours of work, overtime and minimum wage
- g. Outline and comment on types of leave
- h. Explain disciplinary action that an employer may take against an employee
- i. Discuss the requirements of the law for a dismissal to be fair
- j. Distinguish summary dismissal from constructive dismissal
- k. Discuss remedies for unfair dismissal
- l. Discuss the Labour Relations Act - freedom of association, dispute resolution (strikes and lock outs) and the role of the Industrial Relations Court
- m. Discuss the relevance of the Workers Compensation Act, Occupation Safety, Health and Welfare Act and International Labour Organisation Conventions.

5. Agency

In the assessment, candidates may be required to:-

- a. Define the agency relationship
- b. Relate the doctrine of privity of contract to the law of agency
- c. Explain types of agents
- d. Explain the authority that an agent may have
- e. Discuss how an agency relationship may be created
- f. Discuss respective rights and duties of both the principle and the agent
- g. Distinguish an agency contract from other types of contracts such as employment contracts
- h. Explain how an agency relationship may be discharged

6. The Contract of Sale of Goods

In the assessment, candidates may be required to:-

- a. Define a sale of goods contract
- b. Define types of goods
- c. Distinguish property from possession and risk.
- d. Discuss the rules applicable to passage of property in goods
- e. Explain the meaning of retention of title
- f. Discuss the *nemo dat rule* and its exceptions
- g. Explain how a contract of sale of goods may be discharged
- h. Define the term delivery in sale of goods contracts
- i. Discuss implied terms in relation to description and quality of goods
- j. Explain the remedies of an unpaid seller
- k. Distinguish real from personal remedies of an unpaid seller
- l. Explain remedies of a buyer

7. Negotiable Instruments

In the assessment, candidates may be required to:-

- a. Define types of negotiable instruments
- b. Define a bill of exchange and its types
- c. Explain the liability of parties on a bill of exchange
- d. Compare and contrast a bill of exchange from a cheque and a promissory note
- e. Explain crossings that may appear on a cheque
- f. Define acceptance in relation to bills of exchange
- g. Define a holder in due course
- h. Describe how a bill of exchange is discharged

- i. Explain how a bill of exchange is used in practice

8. Personal Property Security

In the assessment, candidates may be required to:-

- a. define relevant terms such as security interest, after-acquired property etc
- b. Explain the law relating to the enforceability of a security interest in personal property
- c. Explain the process of perfection of security interests
- d. Explain the process of enforcement of security interests and their priorities.
- e. Explain the objectives of the Personal Property Security Act
- f. Explain the rights and duties of a secured creditor and a debtor.
- g. Discuss the significance of the Personal Property Security Act

REFERENCE

ICAM Business Law Manual

CHAPTER 1: THE MALAWI LEGAL SYSTEM

I. INTRODUCTION

1.1 The Malawi Legal System

Legal system refers to a procedure or process for interpreting and enforcing the law. It elaborates the rights and responsibilities in a variety of ways. Three major legal systems of the world consist of civil law, common law and religious law. Malawi law is basically received law having been adopted from English law on 4th August 1902. The legal system is fashioned on the British system (Common Law) owing to the fact that Malawi was colonised by Britain. However, since 1902, the law has undergone tremendous changes culminating in the 1994 Constitution which is the supreme law of Malawi and is discussed below.

1.1.1 Definition of law

Law is a body of rules for the guidance of human conduct which is imposed upon and enforced among the members of a given state. It is enforceable in the courts when there is a breach. The basic aim of law is the attainment of justice in society. There are two main branches of law, public law and private law.

Public law

This is concerned with the legal structure of the state and the relationship between the state and individual members of the community and between one state and another. It includes constitutional law, administrative law, criminal law and public international law. **Constitutional law** is concerned with the structure of the main organs of government and their relationship to each other. The relationship between central and local government. The making of treaties with foreign states. The status, function and powers of members of parliament, the judiciary, the civil service and the armed forces. **Administrative Law** is a branch of constitutional law. It is concerned with the legal relationship between private citizens and various agencies of local and central government. **Criminal Law** deals with crimes. A crime is a wrong against the state or the public (all of us). It is concerned with offences against the state, i.e. crimes such as murder, theft. The more serious criminal cases are dealt with by the High Court presided over by a judge and sometimes with a jury. Less serious offences are dealt with by Magistrates' Courts. The two parties in a criminal trial are the prosecutor and the accused (defendant). The prosecution is conducted on behalf of the State by the Director of Public Prosecutions (DPP). The DPP may delegate his or her functions to others such as the police or private lawyers. **Public International Law** – deals with conflicts between nations such as the lake dispute between Malawi and Tanzania.

Private Law (Civil Law)

This law governs the relationship between individuals. Its branches include the law of contract, the law of torts, the law of trusts and the law of property.

1.1.2 Differences between criminal and civil liability

- i) Criminal liability involves a wrong against the state, while civil liability is one against an individual;

- ii) Criminal liability will involve prosecution brought by the state. In civil liability the injured party sues in his own name;
- iii) the standard of proof in criminal liability is higher (beyond reasonable doubt) than in civil liability (on the balance of probabilities);
- iv) Criminal liability aims at punishing the wrongdoer, to prevent him from repeating the crime and to discourage others from committing similar crimes; whereas civil liability is aimed at redressing a wrong.
- v) Proceedings involving criminal liability can be withdrawn only with the leave of the State, whereas the claimant in a civil action can settle out of court or withdraw his/her claim at any time.

1.2 SOURCES OF LAW

The major sources of law in Malawi include legislation, common law, equity, custom, international law and academic writings.

1.2.1 The Republican Constitution of Malawi (1994)

This is the supreme law of Malawi. It provides in section 5 that any act of Government or any law that is inconsistent with the provisions of the Constitution is, to the extent of such inconsistency, invalid. In section 12 it provides that all legal and political authority of the State derives from the people of Malawi and shall be exercised in accordance with the Constitution solely to serve and protect their interests. According to section 4 of the Constitution, the Constitution binds all executive, legislative and judicial organs of the State at all levels of Government and all the peoples of Malawi are entitled to the equal protection of the Constitution, and laws made under it.

1.2.2 Common Law

Refers to the law that was applicable throughout England. It was originally based on the unification of the various local customary laws of England. This law was used by Royal Judges in the Royal Courts to decide cases and is part of case law. The rules of common law were rigid and were applied strictly. Common law introduced the concept of precedent or *stare decisis* (let the decision stand)

1.2.3 Equity

Equity is a system of doctrines and procedures developed by the Court of Chancery in its attempt to remedy some of the defects of the common law. It is part of case law. It introduced the concept of *fairness* and *flexibility*. Examples of equitable remedies include rescission, specific performance, injunction and right of redemption for a mortgagor.

1.2.4 International Law

It refers to international conventions and treaties. These do not become part of Malawi law until they are incorporated by an Act of Parliament or other domestic legislation. Examples include United Nations, African Union, SADC and International Labour Organisation (ILO) treaties.

1.2.5 Academic Writings

These are legal textbooks and articles by reputable authors are occasionally accepted as persuasive evidence of the law where no precedents are available. The weight accorded such evidence will depend on the author's legal standing.

1.2.6 Custom

Custom includes rules of human actions established by usage which are adopted by the courts because they are followed by the society as a whole or in part. If an alleged custom is to be incorporated into law, it must be proved to exist in court. The following tests must be satisfied for the existence of a custom to be recognized:

- a. Local custom must have existed since time immemorial;
- b. The right to exercise the custom must not have been interrupted;
- c. It must have been exercised through common consent and not by use of force;
- d. It must be reasonable- it must conform to the general view of right and reason prevailing in the community; and
- e. It should not be in conflict with statute law.

1.2.7 Legislation

Legislation is the body of rules which have been formally enacted or made by Parliament. Parliament can enact law directly in the National Assembly or sometimes it gives powers to some other bodies to make law on its behalf. This is called delegated legislation. Laws made by parliament are referred to as *statutes*. Parliament is the only body in Malawi that can pass or change the law; Parliament may repeal earlier statutes, overrule case law developed in the courts and make law on subjects which have not been regulated by law before.

An Act of Parliament starts its life as a Bill. The Bill then goes through the following stages in Parliament:

First Reading - the bill is published and put into an agenda. It is then read to the house and copies are printed so that members of parliament and others can inspect the draft.

Second Reading - there is debate on the general merit of the Bill.

Committee Stage - the bill is examined by standing committee made up of representatives of the main political parties and includes some members who specialize in relevant subject.

Reporting Stage - the bill as amended in committee is reported to the full House for approval.

Third Reading - final approval stage where if the bill is controversial, can provide an opportunity for another debate and vote.

After this stage, the bill is presented to the president for his signature of approval (assent) after which it becomes law.

Delegated Legislation – sometimes Parliament will give power to a person or a public body to make laws on its behalf. This is delegated or subsidiary legislation. Forms of delegated legislation include statutory instruments made by ministers such as Rules or Regulations, laws made by certain professional bodies to regulate the conduct of their members such as legal practitioners or accountants, bye-laws made by local authorities, court procedures made by the Chief Justice.

Advantages of Delegated Legislation

- a. It saves the time of Parliament, allowing it to concentrate on discussing matters of general policy.
- b. In times of emergency, it allows laws to be made quickly.
- c. It enables experts to deal with technical matters.

Disadvantages of Delegated Legislation

- 1) The system is unrepresentative in that power to make law is given to civil servants or bodies who are not democratically elected.
- 2) Parliament does not have enough time to supervise delegated legislation.
- 3) The executive tends to get more power beyond the legislature thereby defeating the principal of separation of powers and checks and balances.

Considering the disadvantages there are some controls over Delegated Legislation:

- (a) **Ministerial Approval**- Where legislative power is delegated to bodies other than the Ministers, the enabling Act usually makes ministerial approval an essential part of the legislative process, e.g. laws made by local authorities under the Local Government Act require ministerial approval. The Minister in turn is answerable to Parliament for his decision to give or withhold approval.
- (b) **Parliamentary Scrutiny** - A selected committee of Members of Parliament scrutinizes statutory instruments (its draft) and gives a report to Parliament. MPs are then able to question the responsible minister about any statutory instrument that seems to be unsatisfactory in some way.
- (c) **Judicial Review** -Through the process of judicial review, the High Court has an inherent power to scrutinize delegated legislation and declare it to be invalid in whole or in part if it is illegal, irrational or procedurally improper. Legislation is invalid if it purports to go beyond the powers delegated by the enabling Act. (*Ultra vires*- beyond ones power)

1.2.7.1 Rules of statutory interpretation

1.2.7.1.1 Literal Rule Approach

The rule states that the intention of Parliament must be found in the natural literal meaning of the words used. The problem is that literal meanings may be more than one. If that's the case, the other approaches will be followed. Where the literal meaning is clear and unambiguous, the meaning will be applied even if it is unlikely, hard, unjust or absurd.

1.2.7.1.2 The Golden Rule Approach

This rule is really to be read in conjunction with the literal rule, and its effect is best explained by Lord Wensleydale in **Grey v. Pearson** (1857) 6 HL Cas 61, 106; 10ER 1216, 1234

"The grammatical and ordinary sense of the words is to be adhered to unless that would lead to an absurdity or repugnancy or inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified so as to avoid such absurdity, repugnancy or inconsistency and no further".

If the law said 'no man shall kill another'. Where a woman kills, using the literal rule she will not have committed a crime, whilst using the golden rule she will be guilty.

1.2.7.1.3 The Ejusdem Generis Rule

This literally means "of the same kind". Under this rule, if there is a series of particular words followed by a word of generality, then the category into which the particular words fall will not be extended by the words of generality. An example is the case of **Powell v. Kempton Park Racecourse Co. (1899)**. The **Betting Act 1853** prohibits the keeping of a "house, office, room or any other place for betting with persons resorting thereon". The House of Lords **held** that the words "any other place" meant a place similar to a house, office or room, and would not, therefore, apply to the racecourse.

1.2.7.1.4 The Mischief Rule Approach

This is also known as the rule in **Heydon's Case** (1836) 2m and w 195. Under the approach, a judge will look at the Act to see what was its purpose and the mischief in the existing law it was designed to prevent. The judge considers:

- What was the problem or defect for which the existing law did not provide
- What remedy had Parliament resolved and appointed to cure the problem and
- What is the true reason for the remedy

In **Gorris v. Scott** (1874) L. R. 9 Exch. 125, 43, the facts were that Gorris (P) hired Scott (D) to transport sheep. The Contagious Disease Animals Act required shippers to place animals in pens and to place their feet in footholds during shipping to prevent the spread of disease. Scott did not observe the statute and the sheep were lost overboard during the trip. Gorris sued to recover damages based on Scott's negligence in failing to tie down the animals' feet in compliance with the statute. D claimed that the statute prescribed its own penalty for violations, and that the harm suffered by P was not the sort of harm the statute was designed to prevent. The issue before the court was whether one liable for a violation of a statute if the damage complained of is separate from the purpose of the statute. The court held that one is not liable for a violation of a statute if the damage complained of is apart from the purpose of the statute. The court held that D was not liable under the statute because the purpose of the act was different from the type of harm suffered by P. The statute was designed to prevent the spread of disease, not to keep sheep from washing overboard. The court held that D's failure to obey the statute was not the proximate cause of P's injury. The rule was also illustrated in the case of **Smith v Hughes** [1960] 1 WLR 830, where under the

Street Offences Act 1959, it was a crime for prostitutes to "loiter or solicit in the street for the purposes of prostitution". The defendants were calling to men in the street from balconies and tapping on windows. They claimed they were not guilty as they were not in the "street." The judge applied the mischief rule to come to the conclusion that they were guilty as the intention of the Act was to cover the mischief of harassment from prostitutes.

The judiciary can also use certain aids to construction when interpreting statutes. These aids can be internal (intrinsic) or external (extrinsic) **Internal aids** are those found within the Act of Parliament itself such as the long title, the short title, preamble, headings, marginal notes, interpretation sections and schedules. **External Aids** include dictionaries, reports of committees such as Law Commissions and other statutes which have similar words.

1.2.7.2 Other Rules of Interpretation

1.2.7.2.1 Expressio unius est Exclusio Alterius

This means that the expression of one thing implies the exclusion of another. So where specific words are used and are not followed by general words, the Act applies only to the instances mentioned and no other.

1.2.7.2.2 Noscitur a Sociis

This means that the meaning of a word can be gathered from its context, words with doubtful meanings may take colour and shape from the nature of the words and phrases with which they are associated with.

Aids

The judiciary can also use certain aids to construction when interpreting statutes. These aids can be internal (intrinsic) or external (extrinsic)

Internal aids

These are matters contained within the statute itself, which will help the court to interpret its meaning. For instance:

i) The preamble

This consists of the introductory paragraphs, setting out in brief the purpose of the statute.

ii) The interpretation section

An interpretation section is often found within the statute. It explains the meanings of words or phrases used in the statute.

Others- such as headings, marginal notes, schedules

Headings

External aids

These are tools that are outside the statute.

- i) General Interpretation Act (Chapter 1:01 of the Laws of Malawi) - By this Act parliament consolidated a series of standard expressions, the interpretation of which is to be applied generally in the interpretation of Acts of Parliament, unless they are specifically excluded.

- ii) Dictionary - English dictionaries can be used to explain the ordinary meaning of terms used in statutes.
- iii) Hansard - Official reports of the proceedings in Parliament can be used in some circumstances.

1.3 THE COURTS

This Court System is made up of the Malawi Supreme Court of Appeal, the High Court, and Subordinate Courts which includes the Magistrates' Courts, Child Justice Courts and the Industrial Relations Court.

1.3.1 The Malawi Supreme Court of Appeal

This court is at the apex of the Court System. It is established under section 104 of the Constitution of the Republic of Malawi. The Supreme Court of Appeal is a superior court of record and has all the powers of such a court. By "Court of record" is meant a court in which all the acts and judicial proceedings are enrolled for perpetual memory and testimony and which has authority to fine and imprison for contempt of its authority.

The court is composed of the Chief Justice, any number of Justice of Appeal as may be prescribed by Parliament. When the court is hearing any matter, except in interlocutory matter, the law requires that it should be composed of an uneven number of Justices of Appeal and the number should not be less than three. By "interlocutory matter" is meant "intermediate matter". For example, an order for the inspection of documents which will help the court to arrive at a final decision in the action is an interlocutory order. For the purpose of hearing and determining appeals the court is required to be constituted of the Chief Justice or other member presiding and two other members.

The Supreme Court of Appeal has no original jurisdiction. It does not hear cases on first instance. Its jurisdiction is exclusively appellate. The Court hears appeals against final decisions in any civil or criminal proceedings in the High Court. But the determination of the High Court upon election petitions cannot be the subject of appeal to the Supreme Court.

Appeals lie from the High Court to the Supreme Court "as of right" in the following cases:-

- (a) where, in civil proceedings, the matter is dispute is of the value of K2,000,000.00 or upwards;
- (b) final decisions in any criminal proceedings but not decisions on appeal or review;
- (c) final decisions in proceedings for dissolution or nullity of marriage;
- (d) final decision regarding the interpretation of the Constitution; and in any other case that Parliament may prescribe.

Control of Court and Law to be administered - The Supreme Court of Appeal is the highest court in the Court System. From there appeals cannot go anywhere else. So that the final decisions of the court are final. Since the court hears appeals from the High Court, the law that it administers is the same as that administered by the High Court.

1.3.2 The High Court

The High Court is established by section 108 of the Constitution. It is, like the Supreme Court of Appeal, a superior court of record. The court consists of such number of judges, not being less than three, as may be prescribed by an Act of Parliament. All proceedings in the court are heard and disposed of by a single Judge except in **constitutional cases** where the minimum number is three judges. The High Court can also sit as a **Commercial Court** where the matter is commercial in nature.

The High Court has unlimited original jurisdiction in both civil and criminal matters and under any law. It has to be noted that recently the High Court has embarked on establishing specialized divisions to deal with a particular field of the law. For instance:

- Criminal Division- this deals with criminal matters.
- Commercial Division- this deals with trade and disputes of commercial nature.
- Revenue Division- this deals with taxation and revenue matters.

It also has such other jurisdiction as may be conferred on it by the Constitution or any other law. Without prejudicing the general nature of its original jurisdiction, the Courts Act also gives the High Court additional specific jurisdiction. For example, the court is given jurisdiction to appoint and control guardianship of minors, and the entire jurisdiction and powers which belong to any subordinate court.

The Constitution provides that appeals lie as of right to the High Court from final decisions of subordinate courts in any case in which, if the decision were a decision of the High Court, an appeal would lie as of right to the Supreme Court.

The Jury System - Most disputes and crimes involve two sets of investigations: deciding what are the true facts and deciding what is the law to apply to them. In some cases, these two processes are entrusted to two bodies – the determination of fact by a jury and of law by a judge.

A jury consists of a group of 12 persons, men or women, over 21 and not more than 60 years of age, chosen at random from a list maintained by the Registrar for each district. A convict is disqualified from jury service so are judges, MPs, practicing lawyers, doctors, pastors, police and church ministers. The jury has the function of hearing all the evidence and determining whether the facts lead to a finding of 'guilty.' The judge on the other hand advises the jury on the law and cannot question the jury's findings of fact. Juries are used in serious offences such as treason and murder.

1.3.3 Subordinate Courts

Subordinate Courts includes the Magistrates' Courts and the Industrial Relations Court. There are four grades of the magistrates' court. These are (a) courts of Resident Magistrates, which are higher than the rest, (b) Courts of Magistrates of the First Grade magistrate (c) Courts of Magistrates of the Second Grade, and (d) Courts of Magistrates of the Third Grade.

The Court of the Resident Magistrate consist of "a fit and proper person" who is appointed by the Chief Justice on the recommendation of the Judicial Service Commission. In practice, the persons appointed to be Resident Magistrates are those who qualify to be legal practitioners under the Legal Education and Legal Practitioners Act.

Civil Jurisdiction - Magistrate Courts have original jurisdiction over all civil actions where the amount in dispute does not exceed –

- (a) K2,000,000 in the case of a court of a Resident Magistrate
- (b) K1,500,000 in the case of a court of a First Grade Magistrate
- (c) K1,000,000 in the case of a court of a second grade Magistrate; and
- (d) K750,000 in the case of a court of a third grade Magistrate

But the courts have no jurisdiction in the following matters;

- (a) title to or ownership of land, except as provided by section 156 of the Registered Land Act;
- (b) the issue of injunctions;
- (c) guardianship or custody of infants except **Child Justice Courts**;
- (d) validity or dissolution of marriages, except as provided by any other written law;
- (e) proceedings seeking any declaratory decrees, i.e. judgments which declare pre-existing rights of the litigants.

Criminal jurisdiction of the Magistrate courts is conferred by section 58 of the Courts Act. This section provides that in the exercise of their criminal jurisdiction the powers of the courts shall be as provided by the Courts Act, the Criminal Procedure and Evidence Code, and any other written law. In pursuance of this, the code states that;

- (a) the Resident Magistrates' courts and first grade magistrates' courts can try any offence under the Penal Code but not treason, or murder, or manslaughter or attempts to commit or aid, or abet, or counsel or procure the commission of these offences.
- (b) The third grade magistrates' courts may try any offence which is specified in the Second Schedule of the Criminal Procedure and Evidence Code.
- (c) Residence Magistrates' Courts and first grade Magistrate Courts may pass any sentence authorized by law but cannot pass a sentence of death or a sentence of imprisonment which exceed fourteen years. As for imprisonment the scale of punishments which magistrates can impose is as follows:
 - (i) Resident Magistrate not exceeding 21 years.
 - (ii) First Grade Magistrate not exceeding 14 years
 - (iii) Second Grade magistrate not exceeding 10 years
 - (iv) Third grade not exceeding 3 years.

Child Justice Court is established under the Child Care, Protection and Justice Act 2010 and is presided over by a professional magistrate or a magistrate of the first grade. The court has jurisdiction over child matters such as parentage disputes, guardianship, maintenance, custody and children involved in crime. Under the Act a child is a person below the age of 16.

The Industrial Relations Court (IRC) is established under the Constitution and has original jurisdiction over labour disputes and such other issues relating to employment and its composition and procedure are specified under the Labour Relations Act 1996. Appeals from this court lie to the High Court. Thus the IRC has civil jurisdiction only and no criminal jurisdiction at all. The court comprises of a chairman and one panelist representing employees and another representing employers.

1.3.4 The Ombudsman

This is not a court of law but a Constitutional tribunal and has power to hear cases of abuse of authority by various government departments- maladministration. The Ombudsman reports to the National Assembly (Parliament). The Ombudsman is less formal than the courts and the Constitution provides that the office of the Ombudsman may investigate any and all cases where it is alleged that a person has suffered injustice and it does not appear that there is any remedy reasonably available by way of proceedings in a court. Decisions of the Ombudsman are reviewable by the High Court.

1.3.5 The Doctrine of Judicial Precedent

The doctrine means that a judge is bound to apply a decision from an earlier case to the facts of the case before him provided, among other conditions that the material facts of the two cases are similar and the previous case was decided by a superior court.

Judicial precedent is based on three elements: **Law Reports** - there must be adequate and reliable reports of earlier decisions. **Rules** - there must be rules for extracting a legal principle from a previous set of facts and applying it to current facts. **Classification** - precedents must be classified into those that are binding and those which are merely persuasive.

Four things must be considered when examining a precedent before it can be applied to a case:

1. The material facts of each case must be comparable.
2. The preceding court must have had a superior (or in some cases, equal) status to the later court, such that its decisions are binding on the later court.
3. It must form part of the *ratio decidendi* (reason for making a decision) of the case and not *obiter dicta* which are remarks said by the way.
4. A decision must be based on a proposition of law. It may not be a decision on a question of facts.

The function of judicial precedent is to develop the law, whether common law or statute law. Precedents also help in predictability of cases. A judge cannot decide, as a legislator does, as he/she pleases. Some standard must be applied, whether it be that of a previous decision, or the opinions of legal writers, or the foreign law, or equity, or some other consideration. Although in strict legal theory judges do not make law, it can be argued that they make law in the following limited ways:

1. Where there is no existing precedent.
2. Where they **overrule** an existing precedent, frequently because there are other conflicting precedents.
3. Where they **distinguish** precedents cited before them, and so limit the scope of the previous rule.

1.3.5.1 Classification of Precedents

1.3.5.1.1 Authoritative or Absolutely Binding

In these cases precedents are legal sources of law, and must be followed without question. Absolute authority is accorded to the decisions of the Malawi the Supreme Court.

1.3.5.1.2 Conditionally Binding

While a lower court cannot question the decisions of a court of superior authority, it is not bound to accept the judgment of a court of equal status. Generally speaking, however, conditional precedents will be followed by courts of equal status, unless they are clearly undesirable.

1.3.5.1.3 Persuasive

Persuasive precedents are those that do not intrinsically establish the law, but may be followed by courts because they are considered truly to state the law. There is no obligation to follow them. Examples of such precedents are:

- The decisions of inferior courts on superior courts.
- The decisions of other courts of the Commonwealth.
- Foreign judgments.
- Statements of law by judges, which go beyond the case in point – these are called *obiter dicta* (remarks by the way). This is opposed to *ratio decidendi* (the principle on which the decision of a judge is based)

1.3.5.1.4 Declaratory

These merely declare the existing law.

1.3.5.1.5 Original precedents

Are those which, by applying a new rule, create or make new law.

1.3.5.1.6 Extending and "Distinguishing" Precedents

You will appreciate that that the effect of "distinguishing" is that a precedent may not continue to be binding indefinitely. A precedent can also cease to be binding and a judge can refuse to follow it as a result of:

Reversal: the decision of the case is reversed on appeal because the appeal court disagrees with the principle laid down by the lower court. This means that the appellant succeeds.

Overruling: where similar facts come before the court in a later case, then the higher court may decide the case on a different legal principle, thus "overruling" the previous precedent. A precedent may also be overruled by a subsequent statutory provision which reverses its effect.

Disapproval: where a higher court in a judgment expresses doubts about the validity of a previous rule but does not expressly overrule it.

1.3.6 Advantages of Case Law (Precedent)

- a. Case law is practical and concrete; this is because it is the product of a set of facts upon which a decision must be reached. It is not the result of academic theorising, but of actual everyday difficulties.
- b. It is more flexible than legislation. Further, because of its binding nature, people can regulate their conduct with confidence in its certainty.
- c. It is more easily and quickly made than legislation, and this is particularly important where adaptation of the law to minute differences of circumstances is required.
- d. It acts as the best preparation for statute law. Codifications such as the **Sale of Goods Act** and the **Bills of Exchange Act** are the outcome of judicial decisions, and are models of statute law.
- e. Its detail is much richer than any code of law (but against this must be set its complexity).

1.4 ADMINISTRATIVE JUSTICE

The latter part of the 20th century, has seen a great increase in what is termed "**administrative justice**", i.e. the settlement of matters affecting the rights of individuals by some body other than the normal courts – usually a special tribunal or a Minister.

1.4.1 Types of Tribunal

There are three types of semi-judicial body:

1.4.1.1 Professional Councils

Most professional bodies have a council which possesses power to investigate complaints against members and punish them for misconduct in their professional capacity. The most severe punishment is expulsion from the profession. A good example is the Law Society, which has power to deal in this way with erring legal practitioners or the Institute of Chartered Accountants in Malawi (ICAM).

1.4.1.2 Tribunals

There are many tribunals which have power to investigate certain specified matters and even, in some cases, to punish offenders such as the Competition and Fair Trading Commission, the Public Partnership Commission and the Financial Services Appeals Committee.

1.4.1.3 Ministerial Decisions

A minister may also be involved in dispute settlement under some delegated legislation. For instance under the **Immigration Act** a person who has been issued with a deportation order may appeal to the minister to re-consider the deportation.

1.4.2 Advantages and Disadvantages of the Tribunal System

Administrative justice as we have described it above has many practical advantages.

- (a) The procedure is simple, without any of the complications of a court; most of the tribunals sit informally.

- (b) The arrangement is cheap. One need not be legally represented.
- (c) The procedure gets a quick decision. In many of the ordinary courts there are long waiting lists but the tribunals are specialist bodies and can hear cases at short notice.
- (d) Where necessary, the tribunal can visit the places concerned and make notes on the spot. This is important in such matters as planning cases.
- (e) The tribunals deal only with a small range of specialized decisions.

The usual criticisms of the semi-judicial tribunals are as follows:

1. The tribunals are not courts of law, and are not bound to follow closely legal procedure, e.g. the law of evidence, the right to cross-examine etc. this may breed injustice.
2. The tribunals are not bound to give their decision according to the weight of the evidence; nor, in many cases, need they state their reasons. Officially, they are not bound by the rule of precedents, although they have established a system of this nature.
3. The hearing may not be in public; practice varies.
4. The position often arises, when a Minister is concerned, where he/she acts as a judge in his/her own cause.

1.4.3 Organisation and Role of the Legal Profession

The legal profession in Malawi is not divided into **barristers** and **solicitors** as is the case in the United Kingdom (UK). In the UK Barristers also known as advocates appear in court on behalf of their clients whilst solicitors are best described as office lawyers who meet the client and prepare what a barrister is to present in court. In Malawi, the profession is fused i.e. a practicing lawyer works both as a barrister and a solicitor. The profession is governed by the Legal Education and Legal Practitioners Act which also establishes **The Malawi Law Society**. The society keeps a register of practicing lawyers and regulates their professional conduct. The disciplinary committee enforces good conduct among members of the profession and has power to refer an errant legal practitioner to the High Court for admonition, suspension or to be struck off the roll (to be disbarred).

1.5 PRACTICE QUESTIONS

1. What is a legal system?
2. Mention three types of received law in Malawi.
3. How does the system of judicial precedent work in the Malawian legal system?
4. Discuss any three rules of Statutory Interpretation?
5. Mention **three** types of received law in Malawi.
6. How does the system of judicial precedent work in the Malawian legal system?
7. Describe briefly the nature of the common law.
8. Describe briefly the nature of equity.
9. Distinguish constitutional law from criminal law.
10. Identify and comment on any **four** branches of law, applicable in the Malawi legal system.
11. Write an essay detailing the jurisdiction of the Courts in Malawi.
12. Explain what is meant by the term 'Judicial review.'
13. What is meant by administrative justice?
14. Identify and comment on any **five** sources of law in Malawi.
15. Explain the process of law making in the Malawi Parliament.

CHAPTER 2: THE LAW OF TORTS

2. INTRODUCTION

Tort is a branch of law which deals with allocation and prevention of losses which occur in society due to human interaction. This means a tort is a civil wrong between private individuals. The main function of the law of torts is compensation. Where a person will be claiming damages for the harm that she/he has suffered due to the wrongful act of a defendant. The law of torts will therefore determine when one person must pay another compensation for harm wrongfully caused.

Definition of the term Tort

There is no entirely satisfactory definition of the term 'tort'. The principle is that the law gives various **rights** to persons. When such rights are infringed, the wrongdoer is liable in tort. The principles of torts are based on rights requiring everybody to respect them and compensation for infringement. The general definition of tort is a civil wrong arising from general duty rather than from a contractual relationship or trust that results in injury to another's person, property, reputation or the like for which the injured party is entitled to compensation. A tort is also defined as **infringement** of someone else's rights.

2.1 Tort and other Wrongs Distinguished

2.1.1 Tort and Crime

Crimes are those acts and omissions which society as a whole prescribes as being completely unacceptable. Crimes are normally prosecuted by the state through the criminal courts. Whereas, a tort is a civil action which an individual prosecutes in a civil court at his discretion. There are however, torts such as assault and battery, which may also be actionable as crimes and a civil remedy may be obtained after the completion of the criminal proceedings. The result of the criminal proceedings may be used as evidence in the civil claim and so it's often admissible for the victim to wait for the outcome of the criminal proceedings before launching his civil action. However, an acquittal in a criminal case does not mean that a plaintiff will not be able to prove his civil case. The standard of proof in a civil suit case is on a balance of probabilities whilst in a crime it is beyond reasonable doubt.

2.1.2 Tort and Contract

Tort aims principally at prevention or compensation of harms, whereas the core of contract is the idea of enforcing certain promises. Further in tort the content of the duties is fixed by the law whereas the content of contractual duties is fixed by the contract itself. Therefore, in order to find out whether a person has committed a tort you look at the law while to establish a breach of contract, you look at the terms of the contract agreed by the parties. However, in any factual situation there may be overlap between the law of torts and the law of contract. For instance, a claim for damages arising from a defective product may involve a complex web of issues under the Sale of Goods Act. The other difference is that in tort, the plaintiff's claim is for unliquidated damages, while in contract it is for liquidated damages. In contract they are liquidated because they are measured by the extent of the breach of the contract, while in tort they are unliquidated because they have to be determined by law for example you cannot tell how much is to be paid for a broken leg

2.2 TYPES OF TORTS

There are basically three types of torts

- (a) Intentional or
- (b) Negligence or
- (c) The Breach of Strict Duty

a) Intentional Tort

An **intentional tort** is a civil wrong that occurs when the wrongdoer engages in **intentional conduct** that results in damages to another. Striking another person in a fight is an intentional act that would be the tort of battery. Striking a person accidentally would not be an intentional tort since there was not intent to strike the person. This may, however, be a negligent act. Careless conduct that results in damage to another is negligence.

In the law of torts, there is no clear definition of intention as is the case in criminal law, where it is said to exist where a defendant is/was aware that the harm was virtually certain to result from her act. However, in *Edgington v Fitzmaurice* (1885) 29 Ch.D 459(at) 483 Bowen L.J. stated that the state of a man's mind is as much a fact as the state of his digestion. By this he meant that in law what a person thinks must be deduced from what he **says** and **does** since no one can be perfectly certain of what passes in the mind of another person.

In cases of trespass to land, it has been said that indifference to a risk that trespass will occur by animals in the defendant's charge amount to intention.

b) Negligence

Negligence is an independent tort with a number of elements. However, here we are only concerned with negligence as the state of mind which is one element of the tort and some other torts. In this sense it usually signifies inadvertence by the defendant to the consequences of his or her behaviour, e.g. a doctor who forgets that a patient is allergic to a treatment.

c) Breach of Strict Duty (strict liability)

In some torts, the defendant is liable even though the harm to the plaintiff occurred without intention or negligence as the defendant's part. Liability can arise even when there is no intention to cause harm or negligence. For example, when a contractor uses dynamite which causes debris to be thrown onto the land of another and damages the landowner's house, the landowner may recover damages from the

contractor even if the contractor was not negligent and did not intend to cause any harm. This is called **strict liability** or absolute liability. Basically, society is saying that the activity is so dangerous to the public that there must be liability. However, society is not going so far as to outlaw the activity.

In the case of *Rylands v Fletcher* (1868) LR 3 HL 330 at 340, it was laid down that if a person brings or accumulates as his land anything which if it should escape, may cause damage to his neighbours, he does so at his peril. If it does escape and cause damage he is responsible however careful he may have been and whatever precautions he may have taken to prevent damage liability in nuisance may be strict where the defendant himself or someone for whom he or she is responsible has created a nuisance.

Other examples of absolute liability situations would be harm caused by storage of flammable gas and explosives, crop dusting when the chemical that is used is dangerous, factories which produce dangerous fumes, smoke or soot in populated areas, and the production of nuclear material.

2.2.1 THE TORT OF NEGLIGENCE

Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff. Thus stated the tort consists of three distinct elements.

- (a) The first element is that the defendant must owe to the plaintiff a duty of care.
- (b) The second element is that the defendant must breach the duty of care which he owes to the plaintiff.
- (c) The third element is that the plaintiff must suffer damages as a result of the defendant's negligence. This element has two main principles namely: that the defendant's negligence must have caused the damage to the plaintiff and the damage which the plaintiff has suffered must not be too remote a consequence of the defendant's negligence.

2.2.1.1 The Duty of Care

The modern source of duty of care requirement is found in the celebrated judgment of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562, the defendants were manufacturers of ginger beer. A friend of the plaintiff purchase a bottle of ginger beer for the plaintiff. The plaintiff took some of the ginger beers but when she poured off the remainder of the contents of the bottle a decomposed snail floated out of the bottle. The plaintiff claimed that she suffered severe shock and became very ill as a result of this incident. She was unable to proceed against the manufacturers in contract because there was no contract between the parties. So she brought an action in tort against the manufacturers. It was **held** that the defendants being manufacturers of ginger beer owed a duty of care to the plaintiff as the ultimate consumer or purchaser of the ginger bottle making sure it did not contain some substance which was likely to cause injury to health.

Thus in order to establish that a duty of care, one has to ask whether there was a sufficient relationship of 'proximity or neighbourhood' between the plaintiff and defendant such that in the defendant's reasonable contemplation carelessness on his part might cause damage to the plaintiff. If so, a *prima facie*, duty of care arises.

There are three factors which are to be employed by the courts in deciding whether or not to impose a duty of care in a novel case, namely:

- (a) That the loss must be reasonably foreseeable, In ***Bourhill v Young*** [1943]AC 92, where the House of Lords held that no duty of care was owed to the plaintiff because injury to her was not reasonably foreseeable. The plaintiff had witnessed a motor accident caused by the negligence of the defendant and in which the defendant was killed. She claimed that she heard the accident and saw the aftermath of it and that this had caused her baby to be stillborn. It was **held** that the plaintiff was so far away from the accident that she was not owed a duty of care by the defendant because it was not reasonably foreseeable that she would suffer nervous shock as a result of the accident.
- (b) That there must be a 'proximate relationship between the plaintiff and the defendant; in ordinary language means nearness'.
- (c) That it must be fair just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. Even if there is requisite degree of proximity a duty of care may still be denied if in the court's view the imposition of liability would not be fair, just and reasonable. In ***Haley v London Electricity Board*** [1965] AC 788, the defendants, with statutory authority, excavated a trench in the street. They took precautions for the protection of passersby which were sufficient for a normal-sighted person, but the plaintiff who was blind suffered injury because the precautions were not adequate for him. It was **held** that the number of blind persons who go about the streets alone was sufficient to require the defendants to have them in contemplation and to take precautions appropriate to their condition.

2.2.1.2 Breach of the Duty

In order to establish that a defendant breached a duty of care, the standard of care which is required is an objective one, i.e. that of a reasonable person.

The most famous description of this objective standard was provided by Alderson B in ***Blyth -v- Birmingham Waterworks co*** (1856) 11 EX 781 @ 784 where he said:

“Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do.”

The application of this objective reasonable man test can be seen in the case of the ***Lady Gwendolen*** [1965] P. 294. Two ships were involved in a collision in foggy conditions. The accident was caused by the negligence of the defendants, who were a firm of brewers who used the ship to carry stout from Dublin to Liverpool. The defendants argued that they should be judged by the standards of brewers who happened to hire a ship and not according to the standards of the reasonable shipowner. The court while rejecting the argument stated that the standard of care which was owed by the defendants was the same as the standard of care owed by every other shipowner.

2.2.1.3 Proof of breach

The plaintiff bears the burden of proof of showing that the defendant was negligent. He must prove his case on the balance of probabilities. There are certain cases where the legal burden of proof can be switched to the defendant. However, there will be some cases, where the facts speak for themselves, and that there will be no need to give detailed evidence, the court will make an inference of negligence from the facts. This is where the maxim *res ipsa loquitur* comes into play. The maxim means that things speak for itself. For example in *Scott –v- London & St Katherine Docks Co.* (1865) 3 H & C596, the plaintiff was passing the defendant’s warehouse when six bags of sugar, which were being hosted by the defendant’s crane, fell on the plaintiff and caused him injury. The only thing which the plaintiff could prove was that the bags fell on him and caused him injury. It was **held** that the facts were sufficient to give rise to an inference of negligence on the part of the defendant and so the maxim was applicable.

2.2.1.4 Causation

A defendant is not liable in negligence unless the plaintiff’s loss has been caused by the negligence of the defendant. *Barnett -v-Che Isaa and Kensington Hospital management Committee* [1969] 1 QB 428, the plaintiff’s husband went to a casualty department of a hospital complaining that he had been vomiting. The doctor refused to examine him and he was told to go home and consult his own doctor in the morning. The plaintiff’s husband was in fact suffering from arsenical poisoning and he died some 5 hours later. The plaintiff sued the hospital alleging that they had been negligent in the treatment given to her husband and that as a result of their negligence her husband had died. It was held however, that the defendants were not liable to the plaintiff as their negligence had not caused her husband’s death. Even if the Doctor had examined her husband and treated him her husband would still have died from the poisoning and so the doctor’s negligence was not a cause of the husband’s death.

2.2.1.5 Remoteness of Damage

Once a plaintiff has established causation, it is also necessary to establish that the damage was not too remote. In the *Wagon Maund (No. 1)* [1961]1AC 617, there was some oil leakage onto water from a ship that was loading oil at a harbour in Sydney. It mixed with debris and eventually it was ignited by sparks from welding operations on the other side of the harbour. The resulting fire caused enormous damage. It was **held** that since the particular type of oil did not easily ignite, the type of harm which occurred was not foreseeable by the officers in charge of the ship though property damage of some kind, through oil pollution was foreseeable.

2.2.2 VICARIOUS LIABILITY

This is concerned with situations where one person is rendered “liable” for the tort of another. The commonest example of this is the case where an employer is rendered liable for the tort committed by his employee in the course of employment.

2.2.2.1 The Rationale of Vicarious Liability

a) Agency

It has been argued that an employee is for all purposes, an employer’s agent. It is therefore, only reasonable for the employer as a principle to be held responsible for his agent’s actions agency being a ground for vicarious liability.

b) The benefit argument

The argument here is why the employer should only get benefits from the employee's services. He should equally get the risks.

c) Public policy

The arguments here are (a) the employer ordinarily has the capacity to absorb the liability than the employee and (b) it may not sometimes be easy to identify a particular employee by the claimant but it is quiet easy to identify the employer.

d) Contract of/for Service

The basis of vicarious liability is the contract of employment, which in general is an agreement whereby an employee agrees to provide work or a service in return for remuneration by the employer. The contract of employment is a contract of service and not for services.

- (a) Under a **contract of service** a person places his labour at the disposal of another and a relationship is constituted which in past days was called that of master and servant.
- (b) In the **contract for services**, on the other hand, a person who operates an independent business agrees to carry out a task for another and the relationship is that of employer and independent contractor. X's chauffeur is her employee, but a taxi-driver is an independent contractor. If Y wants to build a garage on his land, he has two courses open: he can employ a bricklayer and other trades-people under contracts of employment or he can entrust the work to a builder as an independent contractor (independent contractor).

Three tests for deciding between an employee and an independent contractor

- (a) **Control Test** -Control means that the employer has the right to tell the other party to the contract not only "what" to do but "how" to do it. In other words, he controls not only the "ends" but the "means". The general rule is that wherever this type of control exists, the person thus controlled is an employee. In our present society, however, the control test has been shown to have certain deficiencies. Industrial society today is totally different from the society which existed when the control test was first formulated, since nowadays the employer very rarely has the exact skill and knowledge of his employees. It is very difficult to say that the hospital authorities may control the actions of a doctor, or a local authority the actions of a surveyor. This was shown very clearly in *Cassidy v. Minister of Health* [1951] 2 KB 343 where the claimant was due to undergo a normal operation. The operation was incompetently performed and made the claimants condition much worse. He had come with one stiff finger and ended up with two stiff fingers. This case solved many of the problems relating to skilled people. Although the employer could not control the actions of the doctor in the strict sense, the doctors and nurses concerned were permanently employed and salaried members of the staff; also the employers were in a position to make rules concerning the organisation of the doctor's work. For these reasons, he was an employee, despite the lack of control in the old sense.
- (b) **Integration Test**- This suggests that the individual is "part and parcel" of the employer's organisation. This idea was to some extent suggested in *Cassidy v. Minister of Health*, where, as has already been said, the medical staff were on the permanent establishment of the hospital and subject to the

regulations of the hospital. The question is 'Did the alleged servant form part of the alleged master's organisation?' Under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it, but is only an accessory to it.

(c) Multiple or Mixed Test- in accordance with the multiple test, a contract of service exists if these three conditions are fulfilled;

- (i) The servant agrees that, in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
- (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control to a sufficient degree to make the other master;
- (iii) The other provisions of the contract are consistent with it being a contract of service.

Acting in the course of employment - The law is that an employer will only be vicariously liable where the employee was acting in the course of his employment and not where he is on a frolic of his own. In *Nakanga vs. Automotive Products Limited & Pillane*, 11 MLR, 79, the Plaintiff was injured by a motor vehicle belonging to the 1st Defendant and hired to the 2nd Defendant an employee of the 1st Defendant. The 2nd defendant hired the vehicle for his own use and had paid for it just as any other member of the public. The court dismissed the claim as the 2nd Defendant was not driving the vehicle as a servant or agent of the first defendant, and that it (first defendant) was not vicariously liable for his negligence.

The employee must be acting in the course of employment and not on a frolic of his own. In *Storey - v-Ashton* (1869) LR 4 QB 476, a driver, after completing his deliveries, went on a detour to visit his brother-in-law. It was **held** that this was a new and independent journey which had nothing to do with his employment and so was outside the cause of his employment. The employers were not liable for the tort committed on the detour.

2.2.3 NUISANCE

This tort is concerned with unreasonable interference with a person's use or enjoyment of his land or some right in connection with his land. It concerns disputes between neighbors relating to their respective uses of land, but it can also apply to environmental disputes, e.g. where large factories pollute the atmosphere. A nuisance may be private or public nuisance. A **Private nuisance** is an unlawful interference with a person's use or enjoyment of land, or some right over or in connection with it for example a neighbor who blasts music in his house causing discomfort to his neighbors. A **Public Nuisance** is primarily a crime presented by the Attorney General. It is also a tort. It has been defined as an act which materially affects the reasonable comfort and convenience of life of a class of the public/citizen such as pollution of a city.

2.2.3.1 Defences

Defences to a nuisance may include **Prescription** - Continuance of a nuisance for 20 years will by prescription, legalize, a private nuisance but not a public one and **Statutory Authority**- thus there will be a defence if it can be shown that the activities complained of by the plaintiff were authorized expressly or impliedly by a statute.

2.2.3.2 Remedies

Remedies for a nuisance include an injunction, damages and abatement (This is an ancient self-help remedy which involves the plaintiff in taking steps to prevent the nuisance by entering the defendant's property and restraining the source of the nuisance for example putting out a fire that is causing smoke).

2.2.4 DEFAMATION

Defamation is the publication of a statement by one person about the other which may tender to lower the esteem of that other person in the minds of right thinking members of the society.

Defamation may come in two forms, **libel** and **slander**. **Libel** is defamation in permanent form (e.g. printing) whilst **slander** is defamation not in permanent form (e.g. words, gesture or conduct). Libel is actionable per se whilst to maintain action in slander, one has to prove special damage. In *Munthali vs. Mwakasungula*, 14 MLR, 298, Mkandawire, J stated at 314 that Words which impute a criminal offence on the plaintiff are actionable without proof of special damage. The same with words imputing that a woman is a prostitute as was the case in *Chitalo vs. Malawi Congress Party & Another* (1996) MLR, 396.

2.2.4.1 Defences to defamation

a) Justification

The basis of defamation is that the statements tend to lower the esteem of the plaintiff in the minds of reasonable people. There can therefore, be no cause of action where the statements are true because that is the true estimation of the plaintiff. It is therefore, a defence that the statements made about the plaintiff are true in fact. That is the defence of justification. In *Namasusu vs. Wood Industries Corporation & Others* (1997)1 MLR, 162, the Plaintiff sued the Defendants for inter alia publishing an article he claimed meant that he was a thief. The article stated the missing of items from the 1st Defendant's place and the Plaintiff's abscondment. Dismissing the action, Chimasula Phiri, J stated inter alia, that the defence of justification applied as the story was true in substance and in fact.

b) Fair comment

The defence applies where a person fairly comments on matters of public interest which comment may in effect, have the resultant effect of defaming someone.

c) Privilege

The defence of privilege is based on the public policy that in certain situation, the obligation to communicate supersedes the protection of individual's privacy. Thus statements made in parliament and courts are privileged.

2.2.5 TRESPASS

2.2.5.1 Trespass to goods

This is a tort that prohibits unlawful interference with one's goods. Though trespass to goods exist as a separate tort with its distinct elements, within it, are specific torts which are usually invoked in specific situations. These are **conversion** and **detinue**. **Conversion** means dealing with another person's chattel in a manner inconsistent with that other person's ownership rights with intention to deny such owner's rights or assert a right inconsistent with them. For example a person who hires a motor vehicle and instead sales it will be liable in conversion. **Detinue** is committed where there is unlawful detention of the claimant's goods.

2.2.5.2 Trespass to land

This tort involves the "unjustifiable interference with land which is in the immediate and exclusive possession of another". It is not necessary to prove that harm was suffered to bring a claim, and is instead actionable *per se*.

2.2.5.3 Trespass to the person

This tort includes battery, assault and false imprisonment. **Battery** is the intentional and direct application of force to another person, and has three elements; force, direct application and intent. The courts have also added a requirement of "hostility" or lack of consent in many cases. As with assault, there is no need to show that damage was caused. **Assault** in criminal law, a common assault is the use of physical violence against someone. Under tort law, an assault simply means to act in such a way that the claimant believes he is about to be attacked. The key elements of the tort are therefore that the defendant acts, and does so in such a way that the claimant is put in fear of "immediate physical violence". There is no requirement that actual damage be caused. An example is raising of a fist in front of the claimant. **False imprisonment** means depriving the claimant of freedom of movement, without a lawful justification for doing so. Unlike assault and battery, false imprisonment is a tort of strict liability: no intention on the behalf of the defendant is needed, but the imprisonment must be caused by a deliberate act

2.3 GENERAL DEFENCES

2.3.1 Act of God

A defendant may defend himself by stating that the events for which the claim is based are outside human control, such as sudden floods or other natural disasters, for which no one can be held responsible.

2.3.2 Volenti Non-Fit Injuria

This is a complete defence to the plaintiff's action. The defence is said to apply when the defendant can prove that the applicant knew of the risk of harm or injury and had voluntarily submitted to that risk. It should be noted that volenti only comes into play where it has been demonstrated that the defendant has committed a tort. For example a person involved in dangerous sport such as boxing or motor racing cannot claim in tort once injured as he must be taken to have admitted to taking the risk. If anything he may insure himself.

2.3.3 Contributory Negligence

This defence operates to apportion the damages, so reducing the damages payable to plaintiff if it can be proved that they contributed in some way to the damage suffered by failing to take sufficient care for their own safety. In *Jones -v- Bayle* (1816) 1 Stork 492 the plaintiff was a passenger in a coach that went out of control through the defendant's negligence. Fearing that he would be seriously injured if he stayed in the coach until it crashed, he decided to jump out and in so doing he broke a leg. It was **held** that he was not contributory negligent but he had acted reasonably in making the decision to jump out. The chain of causation was not broken by the plaintiff's own act. But say a person who does not put on a seat belt or a helmet on a motor cycle, will have contributed to his injuries in times of accident and damages are reduced accordingly.

2.3.4 An act authorized by statute

Any damage arising out of an act that the law prescribes or the statute authorises will never become actionable even though in absence of such statutory authority it is an offence in tort. For example, Water Board officials are permitted under statute to enter premises where they supply water; the owner of the premises cannot succeed with a claim for trespass to land.

2.3.5 Private Defence

Nothing is wrong if done with regard to protecting one's own self, another person, one's property or another's property against a threat to such. Suppose someone points a loaded gun at me, I do have the right to bodily harm that person in order to save myself or someone else. However there are limitations to such rule with regard to the force being used which must be proportional to the risk presented

2.3.6 Necessity

Under dire conditions if one does something which results in a tort then one can usually claim the defence of necessity. Such condition should however be able to come under the bracket of 'general good' or 'greater good' and to prevent a bigger harm. For example, John and Ulemu are neighbours. Ulemu's house was on fire so John trespassed onto Timve's property to draw water from the latter's well to douse the fire (prevent a greater harm). Thus John is covered under the defence of necessity.

2.3.7 Inevitable or Unavoidable accident

This is a defence only if could not have been foreseen or avoided by any reasonable care of the defendant. In *Stanley v Powell 1891* a member of a shooting party fired at a pheasant. A pellet glanced off a tree and injured the Claimant. It was held that the defendant was not liable for the reason given above.

2.4 PRACTICE QUESTIONS

1. Give the main aims of a tort as distinguished from the main aims of a contract.
2. Discuss the meaning of the defence of contributory negligence.
3. Assuming police officers have taken a suspect into custody for a criminal offence, advise what remedies the prosecution is likely to achieve.
4. Distinguish a tort from a crime and a contract.
5. What are the elements of the tort of negligence?
6. Comment on the following terms:
 - (i) Vicarious liability
 - (ii) Nuisance
 - (iii) Strict liability
 - (iv) Trespass
7. Outline any **five** general defences to commission of a tort.
8. Distinguish a contract of service from a contract for services.

CHAPTER 3: FORMATION OF A CONTRACT

3. INTRODUCTION

A contract has been defined as ‘an agreement which is legally enforceable or legally recognised as creating a duty.’ Except where the law requires otherwise, a contract may be written or oral.

The Essential Elements of a Contract

There are five elements of a valid contract;

- a. There must be agreement between the parties, or a **meeting of minds**. This is called "*consensus ad idem*".
- b. Usually, there must be "**consideration**" present – that is, something of **value** must be given in exchange for a promise.
- c. There must be an intention to **create legal relations**.
- d. The parties must have **legal capacity** to contract.
- e. There must be no vitiating circumstances surrounding the contract which make it **unenforceable, void** (i.e. as if it had never existed), **voidable**, or **illegal**.

3.1. THE AGREEMENT

As we have seen, in order to have a contract there must be an agreement, a "*consensus ad idem*" – there must be an offer, and an acceptance. However simple or however complicated the contract may be, this rule is the same. For example, at one end of the scale you may say: "I will sell you this book for K1,000". The other person replies: "OK". Offer has been followed by acceptance – hence there is a contract. At the other end of the scale, a civil engineering contractor may submit tender documents for the construction of a dam for K200 million. After months of negotiation, all the details will finally be accepted. Once again, an offer has been made and accepted. A contract exists.

3.1.1 Offer

An offer is an expression of willingness to enter into a contract on certain terms with the intention of a binding contract. It is an express or implied statement of terms on which the maker is prepared to be contractually bound if it is accepted unconditionally. The rule is that an offer can be made to a particular person, a particular group of person and can even be made to the whole world.

In *Carlill v Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256, the defendants were proprietors of a medical preparation called "The Carbolic Smoke Ball". They inserted advertisements in various newspapers in which they offered to pay £100 to any person who contracted influenza after using the ball three times a day for two weeks. They added that they had deposited 1000 pounds at the Alliance Bank, Regent Street, 'to show our sincerity in the matter.' The Plaintiff, a lady, used the ball as advertised, and was attacked by influenza during the course of treatment, which in her case extended from 20 November, 1891 to 17 January, 1892. She now sued for £100 and the following matters arose out of the various defences raised by the company:-

- a. It was suggested that the offer was too vague since no time limit was stipulated in which the user was to contract influenza. The Court said that it must surely have been the intention that the ball would protect its user during the period of its use, and since this covered the present case it was not necessary to go further.
- b. The suggestion was made that the matter was an advertising ‘puff’ and that there was no intention to create legal relations. Here the court took the view that the deposit of £100 at the bank was clear evidence of an intention to pay claims.
- c. It was further suggested that this was an attempt to contract with the whole world and that this was impossible in English Law. The Court took the view that the advertisement was an offer to the whole world and that, by analogy with the reward cases, it was possible to make an offer of this kind.
- d. The company claimed that the plaintiff had not supplied any consideration, but the court took the view that using this inhalant three times a day for two weeks or more was sufficient consideration. It was not necessary to consider its adequacy.
- e. Finally the defendants suggested that there had been no communication of acceptance but the court, looking at the reward cases, stated that in contracts of this kind acceptance may be by conduct.

Invitations to Treat

An offer must be distinguished both from a **request for information**, and from an **invitation to make an offer**. Neither of these creates the basis of contractual relations.

(a) An example of a request for information occurred in *Harvey v. Facey (1893)*. P sent a telegram to D, saying: "*Will you sell us Bumper Hall Pen? Telegraph lowest cash price*". D replied by wire: "*Lowest cash price Bumper Hall Pen for £900*". P promptly sent another telegraph: "*We agree to buy Bumper Hall Pen for £900*". The sale never went ahead, and P sued. **Held:** The first telegram was a mere request for information. The second was information supplied as requested. The third was the only one with any contractual meaning, as it constituted an offer to buy for £900. This offer was never accepted, so no contract came into being.

(b) There are many instances of "offers/invitations to treat". A shopkeeper (or supermarket) displaying goods marked at a certain price is inviting the public to make an offer. The price tag is merely an indication of the price that is likely to be accepted. "*He does not bind himself to sell at that price, or at all*". In *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd* [1952] 2 Q.B. 795, A customer on entering a pharmacy was given a basket and, having selected from the shelves the articles he required, took them to the cash desk. Near the cash desk was a registered pharmacist who was authorised if necessary to stop a customer from removing any drug from the pharmacy. The issue was whether the pharmacy had broken an Act of Parliament which provided that it was unlawful to sell certain drugs without registered pharmacist supervision. The question was thus at what ‘time’ did the sale take place? **Held:** the display was only an invitation to treat and the customer would make the offer at the cash desk where the registered pharmacist would either accept or reject the customer’ offer therefore the pharmacy did not breach the provisions of the Act. (What happens is that, in a shop or supermarket, the act of taking goods off the shelf contractually means nothing. However, putting them down in front of the shopkeeper or cashier constitutes an offer to buy (at the named price, unless otherwise stated in the offer). Ringing up the price on the till, for example, constitutes acceptance.)

(c) In *Fisher v Bell* [1961] 1 Q.B. 394 The Defendant displayed a flick knife in the window of his shop next to a ticket bearing the words "Ejector knife – 4s." Under the Restriction of Offensive Weapons Act 1959, it was illegal to manufacture, sell, hire, or offer for sale any knife "which has a blade which opens automatically by hand pressure applied to a button. The issue for the decision of the court was whether

the defendant had offered the knife for sale. It was held that displaying the knife was merely an invitation to treat, not an offer, and thus no liability arose.

(d) At an auction, a bid constitutes an offer. As with other offers, this can be withdrawn at any time before the fall of the hammer, which constitutes acceptance (**Sale of Goods Act**).

(e) In the area of e-commerce a website display constitutes merely an invitation to treat upon which a customer can make an offer.

(f) Newspaper adverts to sale items at a specified price are usually treated as an invitation to treat according to *Partridge v Crittenden* [1968] 2 All E.R. 421, The appellants had inserted in a periodical entitled Cage and Aviary Birds a notice, 'Bramblefinch cocks and hens, 25s each'. It appeared under the general heading of 'Classified Advertisements' and the words 'offer for sale' were not used. He was charged with unlawfully offering for sale a wild bird contrary to the provisions of the Protection of Birds Act 1954, and was convicted. The divisional court quashed the conviction holding that there had been no 'offer for sale' but an invitation to treat.

Communication of Offer - In order to be effective, an offer must be communicated to the offeree. This is not quite as obvious as it sounds, because, if a person does something in ignorance of the offer, he can neither reap the benefit nor be bound by any obligations. For example if a reward is promised for a lost dog. And the dog has his owner's address on his collar, the finder who returns the dog without knowing about the offer of a reward will not be entitled to the reward.

Termination of an Offer - An offer may only be accepted while it is still open. In the absence of an acceptance, an offer may be terminated in any of the following ways: (a) Counter-offer (b) Lapse of time (c) Revocation by the offeror (d) Failure of a condition to which the offer was subject. (d) Death of one of the parties.

- a) **Revocation of an offer** - An offer can be revoked anytime before acceptance by the offeree. In *Routledge v Cerant* [1828] 4 Bing 653, the defendant offered on 18th March to buy the plaintiff's house for a certain sum, 'a definite answer to be given within six weeks from date'. It was **held** that the defendant could withdraw the offer any moment before acceptance, even though the time limit had not expired. The plaintiff could only have held the defendant to his offer throughout the period, if he had brought the option by a separate and binding contract.
- b) **Lapse of time** - An offeror may make an offer until such a specific set period after which the offer ceases to be open. If there has been no acceptance on the part of the offeree, the offer comes to an end. If no time limit has been set, the Court will look at the reasonableness and facts of the particular case. In *Ramsgate Victoria Hotel v Montefiore* [1866] L.R. 1 Exch 109, the defendant had applied in June for shares in the plaintiff's company and had paid a deposit into the company's bank. He heard nothing more until the end of November, when he was informed that the shares had been allotted to him and that she should pay the balance due upon them. The court **held** that his refusal to take them up was justified. His offer should have been accepted, if at all, within a reasonable time, and the interval between June and November was excessive.
- c) **Failure of a condition subject to which the offer was made** - If the condition fails, the offer is capable of not being accepted; in the case of *Financing Ltd v Stimson* [1962] 3 All E.R. 711, the defendant on 16 March saw at the premises of X, a dealer, a motor car advertised for £350. He wished to obtain it on hire purchase and signed a form provided by X. The form was that of the plaintiffs, a finance company and stated; 'This agreement' shall be binding on [the plaintiffs] only upon signature on behalf of the plaintiffs'. On 18 March the defendant paid the first installment of £70 and took away the car. On 20 March, dissatisfied with it, the defendant returned it to X,

saying that he was ready to forfeit his £70. On 24 March the car was stolen from X's premises, but was recovered badly damaged. On 25 March, in ignorance of these facts, the plaintiffs signed the 'agreement'. When the plaintiffs subsequently discovered what had happened, they sold the car for £240 and sued the defendant for breach of the hire-purchase contract. It was held by the court of appeal that the so-called 'agreement' was in truth an offer by the defendant to make a contract with the plaintiffs. But it was subject to the implied condition that the car remained, until the moment of acceptance, in substantially the same state as at the moment of offer.

- d) **Death of Offeror** - An offer is terminated when the offeror dies however this can only be so if before acceptance the offeree had knowledge of the death. If he accepts the offer before the knowledge, then the executors of the estate will be bound. **Death of Offeree**- The death of an offeree automatically, terminates the offer and not even his executors can accept it.
- e) **Counter-offer** - A counter-offer happens where an offeree instead of accepting the offer made by the offeror, he introduces new terms from the ones contained in the offer. Acceptance must be unqualified agreement to the terms of the offer, a purported acceptance which introduces any new terms is a counter-offer. And a counter-offer has the effect of terminating the original offer. In *Hyde V. Wrench* (1840) 3 Beav 334, the defendant offered to sell property to the claimant for \$1,000 on 6th June. Two days later, the claimant made a counter-offer of \$950 which the defendant rejected on 27th June. The claimant then informed the defendant on 29th June that he accepted the original offer of \$1,000. It was held that the original offer of \$1,000 had been terminated by the counter-offer of \$950.

3.1.2 Acceptance

Acceptance is the unconditional, final and unqualified expression of assent to all the terms of the offer – it must correspond to all the terms of the offer and not just one of them.

Acceptance may be by express words, by action or inferred from conduct. Thus acceptance can be collected from words or documents exchanged between the parties or may be inferred from their conduct.

However, it is sometimes not clear when the acceptance was made and courts have to infer when the acceptance was made especially where the negotiations between the parties covered a long period of time or are contained in protracted or desultory correspondence. In *Brogden v Metropolitan Railway Co.* [1877] 2 A.C. 666, Brogden had for years supplied the defendant's company with coal without a formal agreement. At length the parties decided to regularise their relations. The company's agent sent a draft form of agreement to Brogden, and the latter, having inserted the name of an arbitrator in a space which had been left blank for this purpose, signed it and returned it, marked 'approved'. The company's agent put it in his desk and nothing further was done to complete its execution. Both parties acted thereafter on the strength of its terms, supplying and paying for the coal in accordance with its clauses, until a dispute arose between them and Brogden denied that any binding contract existed. The difficulty then was to determine when, if ever, a mutual assent was to be found. It could not be argued that the return of the draft was an acceptance of the company's offer, since Brogden, by inserting the name of an arbitrator, had added a new term, which the company had had no opportunity of approving or rejecting. But assuming that the delivery of the document by Brogden to the company, with the addition of the arbitrator's name, was a final and definite offer to supply coal on the terms contained in it, when was that offer accepted? No further communication passed between the parties, and it was impossible to infer assent from the mere fact that the document remained without remark in the agent's desk. On the other hand, the subsequent conduct of the parties was explicable only on the assumption that they mutually approved the terms of the draft. It was **held** by the House of Lords that a contract came into existence either when the

company ordered its first load of coal from Brogden upon those terms or at least when Brogden supplied it.

Communication of acceptance - The general rule is that acceptance is not effective unless it has been communicated to the offeror. This can be done by the offeree or someone under his authority. In *Robophone Facilities Limited vs. Blank* (1960) All ER, 128, the plaintiffs agreed to let telephone answering machines to the defendants. The agreement was in a written form. The agreement provided that it would only become binding on the plaintiffs accepting it by signing it. The defendants signed the agreement and sent it to the plaintiffs for their signature. Before they received communication of acceptance from the plaintiffs; the defendants terminated the offer. It was **held** that no contract in fact existed in the first place.

Silence cannot amount to acceptance of an offer. In *Felthouse v Brindley* (1862) 11 C.B.N.S 869, the plaintiff wrote to his nephew offering to buy his horse for a stated sum, and adding, 'If I hear no more about him, I consider the horse mine at that price'. The nephew made no reply to this letter, but intimated to the defendant, an auctioneer, who was going to sell his stock, that the horse was to be kept out of the sale. The defendant inadvertently sold the horse to a third party at an auction, and the plaintiff sued him in conversion. It was **held** that the action must fail as there had been no acceptance of the plaintiff's offer.

The Postal Rule – states that where post is regarded as the proper way of acceptance, acceptance comes into effect and the offeror is deemed to have been communicated when the letter of acceptance is posted, correctly addressed and stamped. In *Adams v Lindsell [1818] 1 B & A 681*, the defendants were wool dealers in business at St. Ives, Huntingdon. By letter dated 2 September they offered to sell wool to the plaintiffs who were wool manufacturers at Bromsgrove, Worcestershire. The defendants' letter asked for a reply 'in course of post' but was misdirected, being addressed to Bromsgrove, Leicestershire. The offer did not reach the plaintiffs until 7p m on 5 September. The same evening the plaintiffs accepted the offer. This letter reached the defendants on 9 September. If the offer had not been misdirected, the defendants could have expected a reply on 7 September, and accordingly they sold the wool to a third party on 8 September. The plaintiffs now sued for breach of contract. It was held that where there is a misdirection of the offer, as in this case, the offer is made when it actually reaches the offeree, and not when it would have reached him in the ordinary course of post. The defendants' mistake must be taken against them and for the purposes of this contract the plaintiff's letter was received 'in course of post'. The acceptance was made in course of post (no time limit was imposed) and was effective when posted on 5th September.

3.2 CONTRACTUAL TERMS

When negotiating a contract various statements may be made and various other terms stipulated. These may be "express terms" and "implied terms".

3.2.1 Express Terms

These are the terms of the contract which have been specifically agreed between the parties, whether in writing or verbally. Of these, some are, plainly, of greater importance than others.

- (a) **Fundamental terms** are those on which the whole basis of the contract rests, or the "core" of the agreement. What is, or is not, fundamental can be specifically agreed but, if it is not, it is a question of fact for the court to determine.
- (b) **Collateral or ancillary terms** are those which support the fundamental terms – or, perhaps, "add flesh to the bones". They are not, in themselves, vital to the validity of the contract.

In *Joseph Chidanti Malunga vs. Fentects Consultants (A Firm) and Bua Consulting Engineers (A Firm)*, MSCA Civil Appeal No. 60 of 2008, The Supreme Court of Appeal stated:

‘Rules on documentary evidence are very clear that a document speaks for itself. One cannot introduce parol evidence to contradict a document.’

3.2.2 Implied Terms

These are terms which, for one reason or another, have been omitted from the specific agreement. These will often need to be put into the contract in order that it may make sense. The terms will be implied by custom, by statute, or by course of previous dealing.

- (a) **By the Courts** - at common law, the courts may imply a terms in a contract where i) the same is necessary to give efficacy to the transaction ii) to fill a clear gap i.e. complete an otherwise incomplete contract (the two may be argued as one) and iii) the term would emanate from the very relationship between the parties.
- (b) **By Custom** - If a certain thing is customary in the particular trade, it will readily be implied into contracts in respect of that trade. The same applies if a thing is the custom in a particular **district** or **place**. In order to be implied, the custom must be "*notorious, certain and reasonable*" and "*not offend against the intention of any legislative enactment*".

An alleged custom was not upheld for being in conflict with the clear provisions of an Act of Parliament in *Mrs. Kamfose & Another vs. Malawi Development Corporation (In Liquidation) & Another*, Civil Cause No. 1414 of 2007, where Kamwambe, J stated that:

That there is a custom within the pension fund industry to pay in monthly instalments (while in another breath they say the plaintiffs are not entitled to even this) rather than pay out the whole amount is a fact that may require full hearing. But such custom cannot override a statutory law which exists under section 1(b) (iv) of the Third Schedule to the Taxation Act that a person can be paid up to one third of the lump sum of pension benefits due.

- (c) **By Statute** - Certain statutes provide that, in the absence of specific agreement, terms will automatically be implied into contracts dealing with the subject matter of the statute. The principal ones are the **Sale of Goods Act** and the **Partnership Act**.
- (d) **By a Course of Previous Dealing** - A term can be implied into a contract as a result of previous contract dealings between the parties. This will happen where the parties have dealt in the same transactions for a long time and that there was a clear understanding that the terms in the previous transactions should apply to the present transaction.

3.2.3 Classification of Terms

3.2.3.1 Conditions

These are terms of the agreement which are of **primary importance**. They are fundamental terms of the contract they go to the root of the contract. The breach of a condition, usually, allows the injured party to rescind the contract (rescission), as well as to seek damages for loss he has suffered as a result of the breach. (Remedies for breach of contract are discussed later) *Poussard v Spiers* [1876] 1 Q.B.D. 410 Madame Poussard entered a contract to perform as an opera singer for three months. She became ill five days before the opening night and was not able to perform the first four nights. Spiers then replaced her with another opera singer. **Held:** Madame Poussard was in breach of condition and Spiers were entitled to

end the contract. She missed the opening night which was the most important performance as all the critics and publicity would be based on this night.

3.2.3.2 Warranties

These are less important term of the contract, the breach of which, normally, allows the injured party to seek only damages. However, in the case of breach of either a condition or a warranty, the "equitable" remedies of "specific performance" or "injunction" (i.e. a court order decreeing "do this" or "do not do that", respectively) may also be available to the party not in breach. These will be dealt with in a later. **Bettini v Gye** [1874] 80 All E.R. 242 Bettini agreed by contract to perform as an opera singer for a three month period. He became ill and missed 6 days of rehearsals. The employer sacked him and replaced him with another opera singer. It was held that Bettini was in breach of warranty and therefore the employer was not entitled to end the contract. Missing the rehearsals did not go to the root of the contract.

3.2.3.3 An Innominate term

This is a half-way concept between a condition and a warranty. In order for this term to apply, the terms of the contract and facts of the case have to be considered in each situation. NB; it is the function of the court to decide what a term of a contract is even where the parties refer to it as a condition, it may be held by the court that it is not and vice-versa. **Hong Kong Fir Shipping v Kawasaki Kisen Kaisha** [1962] 2 Q.B. 26, a ship was chartered to the defendants for a 2 year period. The agreement included a term that the ship would be seaworthy throughout the period of hire. The problems developed with the engine of the ship and the engine crew were incompetent. Consequently the ship was out of service for a 5 week period and then a further 15 week period. The defendants treated this as a breach of condition and ended the contract. The claimants brought an action for wrongful repudiation arguing the term relating to seaworthiness was not a condition of the contract. It was held that the defendants were liable for wrongful repudiation. The court introduced the innominate term approach. Rather than seeking to classify the term itself as a condition or warranty, the court should look to the effect of the breach and ask if the breach has substantially deprived the innocent party of the whole benefit of the contract. Only where this is answered affirmatively is it to be a breach of condition. 20 weeks out of a 2 year contract period did not substantially deprive the defendants of whole benefit and therefore they were not entitled to repudiate the contract.

3.3 Exclusion Clauses

Human nature being what it is, few people want to incur liability for anything if they don't have to. Hence parties to contracts have always tried to insert clauses into their contracts exempting or restricting their liability for breach of contract or negligence. Such clauses are referred to as exemption clauses or limitation clauses. An exclusion clause is therefore a clause which purports to exclude liability for the happening of certain events, e.g. liability for damage to property, personal injury or death due to negligence. Exemption clauses have been abused in history. These abuses of power usually took the form of standard conditions of sale, excluding the seller's liability for virtually any breach of contract or any act of negligence. They were drafted in obscure legal language, and printed in small lettering on the backs of all relevant contractual documents. The result was that most people did not read them. If they did, they did not usually understand them. The rare individual who both read and understood the conditions could do nothing about them anyway! These exception or exclusion clauses were perfectly lawful, but they

created such injustice that the courts were forced to go to extreme lengths in their endeavours to ensure fair play.

Three ways through which an exclusion clause can be incorporated into a contract at common law

(a) **By signature;** if one signs a written contract then he is bound by its terms whether the terms are read and understood or not, in the absence of misrepresentation. (confer the defence of *non est factum*). *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 Ms L'Estrange was persuaded to purchase a cigarette machine and signed a contractual document which she did not read. She was supposed to pay for the machine in installments. But after the machine was delivered it got jammed and did not work, despite mechanics coming to fix it. She refused to continue paying her installments and brought an action for sums already paid, arguing the machine was not fit for purpose. Mr Graucob contended that any warranties for fitness were expressly excluded by the agreement she signed. **Held:** the exclusion clause formed part of the contract. It was immaterial that L'Estrange had not read the clause. The fact that she signed it meant that she was bound by it. She is deemed to have read and agreed to the terms of the contract. This case can be distinguished from *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 KB 805 where Ms Curtis took a wedding dress to the laundry, and was asked to sign a contract. When asked what the contract bound her to, the company's employee said it was to disclaim liability for damage done to 'beads and sequins' on the dress. The dress came back stained. In fact, the exclusion clause was for all damage of any kind, but the court **held** that the company could not rely on it because it had been misrepresented in the shop.

(b) **By Notice;** if notice of the existence of an exclusion clause has been given to the other party before or at the time the contract is made. At common law, an exclusion clause **must be** incorporated into the contract before the contract is concluded i.e. terms cannot be added after the contract is concluded.

In *Olley v. Marlborough Court, Ltd* [1949] 1 KB 532 after a contract had been concluded at the reception of a hotel, the plaintiff found a wall-note in the hotel room to the effect that the hotel would not be liable for stolen/missing visitor's property. When the plaintiff's property was stolen the court **held** that the defendant could not rely on the exclusion clause as it was brought to the attention of the guests after the contract was already made. The hotel had therefore to compensate the guests.

In *Hollier v Rambler Motors (AMC) Ltd* [1972] 2 QB 71 Mr Hollier took his Rambler car for garage repairs. He had been to this garage on three or four occasions in the past five years before, and he had usually signed an invoice which said the "company is not responsible for damage caused by fire to customers' cars on the premises." He did not sign the form on this occasion. Unfortunately, some wiring in the garage was faulty. Rambler Motors Ltd had negligently failed to inspect or maintain it. A fire broke out and burnt down the garage, with Mr Hollier's car in it. It was **held** that a previous course of dealing did not incorporate the term, because there was neither a regular nor consistent course of dealings. Even if it were incorporated, the exclusion clause would still not have been effective to save Rambler Motors Ltd for liability, because it should be construed against the person relying on it (*contra proferentum*- see below) and this clause covered more than negligence. A reasonable person would think liability for other things beyond the garage's own control would be excluded, but not the garage's own fault!

Where a notice board is used, it must be sufficiently large and placed in a prominent position, particularly where there is potential for serious injury.

In Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163 Mr Thornton, "a free lance trumpeter of the highest quality", drove to the entrance of the multi storey car park on Shoe Lane, before attending a performance. He took a ticket from the machine and parked his car. It said "this ticket is issued subject to the conditions of issue as displayed on the premises". And on the car park pillars near the paying office there was a list, one excluding liability for "injury to the Customer... howsoever caused". Later he had an accident before getting into his car. It was **held** that the more onerous the clause, the better notice of it needed to be given. There was insufficient notice. (*contra proferentum*- see below) Moreover the contract was already concluded when the ticket came out of the machine, and so any condition on it could not be incorporated in the contract.

Under common law the fact that an injured person cannot read will not affect the exclusion clause- In *Thompson v London, Midland and Scotland Railway Co* [1930] 1 KB 41 The claimant was injured whilst stepping off a train. The railway company displayed prominent notices on the platforms excluding liability for personal injury and damage to property due to negligence. The tickets also stated they were subject to terms and conditions displayed on the platform. The claimant was illiterate and could not read the signs. She argued that the exclusion clause was not incorporated into the contract as the railway company had not brought the clause to her attention at the time the contract was made. It was held that the clause was incorporated. There is only a requirement to take reasonable steps to bring the clause to the attention of a reasonable person. There was no duty to ensure that every traveller was aware of the clause. The claimant was therefore unsuccessful in her claim for damages.

- (c) **By a previous course of dealing;** in such cases, the transaction must be frequent and regular enough to constitute a course of dealing. Alternatively a trade custom or practice may imply an exclusion clause into a contract. See *Hollier v Rambler Motors (AMC) Ltd [1972]* above.

3.3. 1 Interpretation of Exemption Clauses

The common law has evolved a variety of rules for interpreting the meaning of exemption clauses. The object of the rules is to give effect to the **manifest intention** of the parties.

(a) "*Contra proferentem*" An exclusion clause will be construed strictly against the person who **inserted it**. In other words, the other party is given the benefit of any doubt. See *Hollier v Rambler Motors (AMC) Ltd [1972]* above.

(b) **Negligence** - if a party wishes to exclude liability for negligence in the performance of his contract, he must use **very clear** words. Any looseness or ambiguity will cause the term to be rejected. See also *Hollier v Rambler Motors (AMC) Ltd [1972]* above.

(c) **Particular Duties** - If a clause exempts a party from complying with specific duties or matters, then **all other duties or matters** will remain in full force.

(d) **General Words** - The wording used must be clear, precise and unambiguous, otherwise it will be ineffective.

In short, therefore, clauses attempting totally to exclude liability are to be construed **strictly**. Clauses which merely limit the liability to an agreed amount are to be given their **natural** and **intended meaning**, and allowed to stand if **reasonably possible**.

3.4 CONSIDERATION

For any person to enforce a purported contract, he must show that he furnished some consideration for the same. In other words, any purported contract, is unenforceable at law unless supported by consideration. Consideration was defined in the case of *Currie v Misa* [1875] LR 10 Exch 153 at 162 in the following terms:

“a valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.”

Consideration may be executory or executed. **Executory consideration** is a **promise given for a promise**. This may occur when a person telephones a shop and orders a piece of furniture. The result is that there is a promise to pay for the furniture when it arrives and in return the shop agrees to supply the piece of furniture according to the type specified by the customer or "I promise to pay you £100 provided you promise to service my car". The contract comes into existence from the moment the promises are exchanged, but its performance remains in the future. To this end, executory literally means “yet to be done”. **Executed consideration** is an act done or completed in return for a promise. This means a person does not need to pay anything until the task has been done. For instance an employee is paid in arrears, i.e. after doing the work, and not before. Another example is acceptance of a unilateral offer to the world at large as in *Carlill v. Carbolic Smoke Ball Co.*

3.4.1 Rules Pertaining to Consideration

Consideration must not be past - An act or a promise cannot constitute consideration if it took place before the promise which it is sought to enforce was made. In *Roscorla v. Thomas* (1842) 3 Q.B. 234 it was **held** that the seller's guarantee that the horse sold to the buyer was "sound and free from vice" could not be enforced against him since it had been given **after** the sale had been concluded. In other words, the guarantee did not form part of the consideration for the sale of the horse. In *Re McArdle* [1951] Ch 669, a couple lived in a house and they made improvements to it at a cost of £488. It was later agreed in writing that the landlord would refund the funds. There was no money forth coming and it was held that the £488 need not be paid as the agreement was made **after** the work had been done (past consideration).

Consideration must move from the promisee - Only the person who has provided consideration in return for a promise can enforce that promise (agreement). In *Price v Easton* [1833] 4 B & AD 433, the defendant promised X that if X did certain work for him he would pay a sum of money to the plaintiff. X did the work; but the defendant did not pay the money. It was **held** that the plaintiff could not sue the defendant based on two reasons. Firstly, that the Plaintiff could not ‘show any consideration for the promise moving from him to the defendant’ and secondly that ‘no privity is shown between the plaintiff and the defendant’

In *Tweddle v Atkinson* [1861] 1 B.& S 393, two young people got married. Afterwards, their respective fathers entered into an agreement whereby they both would pay a sum of money to the husband, who should have the right to sue for the sums. Both fathers subsequently died. The husband then sued the executors of one of them for the sum due. **Held**: No consideration had **moved from the husband** – so, the promise to pay was, as far as he was concerned, gratuitous. Conversely, if the consideration is a benefit to the promisor, this does not mean that the promisee need necessarily suffer a detriment. However, because of the rule that it must move from the promisee, if the benefit to the promisor was, in fact, provided by some third party, then the promisee cannot sue upon it.

Consideration must be something of value but it need not be adequate - the law does not set out to make the bargain for the parties. So, as long as there is **some** value, the law is satisfied. It is not uncommon for, say, a property worth millions to be conveyed for a consideration of K1. It is, in reality, of course, a gift – but the K1 satisfies the requirements of the law. *Chappell & Co. Ltd v. Nestlé Co. Ltd* [1960] AC 87 Nestlé manufactured chocolate. As a promotional gimmick, the company offered to sell a gramophone record to anyone who applied, for the sum of 1s 6d **plus** three of the wrappers from its bars of chocolate. The wrappers themselves were of insignificant value and, on receipt, they were, in fact,

thrown away by Nestlé. **Held:** The wrappers formed part of the consideration for the sale of the records. Where the consideration, although of some value, is insignificant in relation to the transaction, it is called "nominal consideration".

Insufficiency of Consideration - sometimes an agreement may be reached and on the face of it may appear that all the elements have been satisfied and yet the court will hold that the consideration was insufficient. Usually it is on the ground that the other party to the agreement has promised to do something which he was already bound to do.

- (a) **Public Duty imposed by Law** - where there is a public duty on one party, that party cannot by discharging that duty be said to furnish consideration. In *Collins v Godefroy* [1831] 1 B & A.D. 950, the plaintiff had attended on subpoena to give evidence on the defendant's behalf in a case in which the defendant was a litigant, and he alleged that the defendant had promised to pay him 6 guineas for his trouble. It was **held** that there was no consideration for his promise as it is a public duty of every citizen to act as a witness in court.
- (b) **Existing Contractual Duty** - If one party is already under a duty to the other party, he is not considered to have furnished sufficient consideration by promising to perform that duty. In *Stilk v. Myrick* 170 E.R. 851 Two seamen deserted from a ship. The captain was unable to replace them – so, he promised the remaining crew that he would share out with them the wages of the deserters, if they would work the ship back to London. **Held:** There was no consideration for the promise to pay. The remaining crew were under an existing contractual obligation to do all they could under all emergencies of the voyage. However, on similar facts, the decision was otherwise where the crew did more than they were contractually bound to do, or in a different manner. *Hartley v. Ponsonby (1857)* A ship became so shorthanded that it was unsafe to continue with the voyage. The captain, therefore, discharged all the remaining crew from their contracts, and offered them new contracts at higher wages if they would continue with the voyage. **Held:** The consideration for the promise of higher wages was good.

Concept of part payment of a debt - bearing in mind that performance of an existing duty owed does not amount to consideration, if one only performs (pays) a part of the contracted sum, he is not released from the duty to pay the whole. In *Pinnels Case* [1602] 5 Co. rep. 117, the court stated that:-

Payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction of the whole, because it appears to the Judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum. But the gift of a horse, hawk or robe etc. in satisfaction is good. For it shall be intended that a horse, hawk or robe etc. might be more beneficial to the plaintiff than the money in respect of some circumstance, or otherwise the plaintiff would not have accepted it in satisfaction ...

There are three exceptions to the part payment rule;

- a) where at the creditor's request, the debtor pays a lesser sum on an earlier date.
- b) the debtor pay by a different chattel i.e. where the lesser payment has been made by cash instead of a cheque.
- c) where payment has been made at a different place than the parties agreed.
- d) Doctrine of promissory estoppel.

The Doctrine of Promissory Estoppel - Sometimes you will find that even though a promise was not supported by consideration, it will be binding because the promisor will be stopped from denying the promise. This doctrine dates backwards to the case of *Central London Property Trust Ltd. V High Trees*

House Ltd (the High Trees Case) [1947] KB 130, In September 1939, the plaintiffs leased a block of flats to the defendants at a ground rent of £2,500 per annum. In January 1940, the plaintiffs agreed in writing to reduce the rent to £1,250, plainly because of war conditions, which had caused many vacancies in the flats. No express time limit was set for the operation of this reduction. From 1940 to 1945 the defendants paid the reduced rent. In 1945, the flats were again full, and the receiver of the plaintiff company then claimed the full rent both retrospectively and for the future. He tested his claim by suing for rent at the original rate for the last two quarters of 1945. Lord Denning J opined that the agreement of January 1940 was intended as a temporary expedient only and had ceased to operate early in 1945. The rent originally fixed by the contract was therefore payable, and the plaintiffs were entitled to judgment. But he was also of the opinion that, had the plaintiffs sued for arrears for the period 1940 to 1945, the agreement made in 1940 would have operated to defeat their claim

3.5 INTENTION TO CREATE LEGAL RELATIONS

An agreement will only become a legally binding contract if the parties intend this to be. This will be strongly presumed in the case of business agreements but not presumed if so the agreement is of a friendly, social or domestic nature. The presumption is that first, social, domestic and family arrangements are not usually intended to be binding and secondly commercial agreements are usually intended by the parties involved to be legally binding – see **Carlill v Carbolic Smoke Ball**.

3.5.1 Social Agreements

Rarely, if ever, do social agreements give rise to the implication that legal consequences were intended. The winner of a golf competition had no legal right to the prize, because no one connected with the competition intended such results to flow from the entry of competitors (**Lens v. Devonshire Club** (1914)).

3.5.2 Domestic Agreements

In the case of agreements between members of a family, some are and others are not intended to have legal consequences. **Balfour v. Balfour** [1919] 2 K.B. 571 the wife of a man working in Ceylon had to remain in England for medical reasons. Her husband promised to pay her an allowance of £30 a month. **Held:** The agreement was not intended to have legal force (also, the wife had not provided any consideration for the promise).

This case must be compared with **Merritt v Merritt** [1970] 2 All E.R. 760t- Mr. Merritt and his wife jointly owned a house. Mr. Merritt left to live with another woman. They made an agreement (signed) that Mr. Merritt would pay Mrs. Merritt a £40 monthly sum, and eventually transfer the house to her, if Mrs. Merritt kept up the monthly mortgage payments. When the mortgage was paid Mr. Merritt refused to transfer the house. **Held** the nature of the dealings, and the fact that the Merritts were separated when they signed their contract, allowed the court to assume that their agreement was more than a domestic arrangement.

A similar situation also arises in the "pools syndicate" type of agreement. It is quite a widespread practice for members of a household, a group of friends, or employees in a business to participate on a regular basis in a football pools scheme or some other form of prize competition. A leading case is **Simpkins v. Pays** [1955] 3 All ER 10. The defendant owned a house in which she lived with X, her grand-daughter, and the claimant, a paying boarder. The three took part together, each week, in a competition organised

by a Sunday newspaper. The entries were made in the defendant's name but there was no regular rule as to the payment of postage and other expenses. One week, the entry was successful and the defendant obtained a prize of £750. The claimant claimed a third of this sum but the defendant refused to pay, on the ground that there was no intention to create legal relations but only a friendly adventure. Judgment was given for the claimant. The court **held** that there was an intention to create legal relations, and it was "*a joint enterprise to which each contributed in the expectation of sharing any prize that was won*".

3.6 LEGAL CAPACITY

In general, anybody over the age of 21, who, at the time, is sober and mentally unimpaired, is capable of contracting. This also applies to corporations which can contract in exactly the same way as living persons – but, of course, they must do it through the agency of a human being. A corporation can contract under its common seal or simply by its representatives signing the contract or indeed by their word of mouth. As a general rule the corporation must be in existence in order to have capacity and the acts must be within its powers (*intra vires*) and not outside its powers (*Ultra vires*).

3.6.1 Minors

A minor is a person under the age of 21 years. Most contracts with a minor are "voidable" at the option of the minor. That is to say, he – **but not the other party** – has the right not to be bound by the contract. However, contracts for "necessaries" are binding on a minor. **Necessaries** are those things a person immediately needs, such as food; drink; clothing; accommodation; medicines. Necessaries are not confined to those things which are absolutely required to keep him alive but they extend to all such things as are reasonably necessary for him in the station in life to which he belongs. They exclude luxuries, and also a surplus of necessary items (e.g. a contract to buy two shirts would, probably, be binding but one for a dozen would not be.) In *Nash v. Inman* [1908] 2 KB 1, the claimant was a West End tailor and the defendant was a minor undergraduate at Trinity College, Cambridge. The claimant sued the minor for the price of various items of clothing, including eleven fancy waistcoats (**11 fancy waistcoats case**). It was proved that the defendant was well supplied with such clothes when the claimant delivered the clothing in question. Accordingly, the claimant's action failed because he had not established that the clothes supplied were necessaries.

Other contracts binding on a minor are those which are beneficial for him/her, such as contracts of apprenticeship or service or education

3.6.2 Mentally-disordered Persons

Except for contracts for necessaries, contracts are not binding on such persons, unless they specifically ratify them during a **lucid period**.

3.6.3 Drunken Persons

Exactly the same rule as in mentally disordered persons applies to a drunken person. To be bound, he/she must ratify the contract when sober.

3.7 PRACTICE QUESTIONS

1. Distinguish an offer from a counter offer and an invitation to treat.
2. Outline any rules relating to acceptance.
3. Define consideration and its types.
4. What is meant by 'intention to create legal relations'?
5. How does capacity affect the validity of a contract?
6. Distinguish a condition from a warranty.
7. How may an exclusion clause be incorporated into a contract?
8. It is a general rule of Contract Law that performance of an existing contractual obligation is not consideration for a promise for reward. **Required:** With the aid of decided cases, explain the meaning of this rule.
9. Tidye Restaurant Services received a telephone call from a Mr Phiri. Mr Phiri told the telephone operator at Tidye Restaurant Services that he wanted fish and chips. Mr Phiri further said that he was lame and therefore the delivery man would have to open the door to his house by himself. He further said that he wanted the fish and chips in a box larger than the usual one but that the fish itself must not have any pepper in it as he was allergic to pepper. The telephonist told Mr Phiri that the company would not refund any money paid for its fish and chips and did not guarantee any quality. He however agreed to supply the fish and chips.
Required: Identify the various types of terms of the contract that Mr Phiri entered into with Tidye Restaurant Services.
10. Mr Chisale is in the business of importing second hand motor vehicles for resale in Malawi. About December 2016, Mr Chisale entered into a verbal agreement for the sale of a minibus to Mr Phiri at a price of K5 million. The agreement was that Mr Phiri would take immediate possession of the vehicle as he had secured a tender to be ferrying staff of a local university from the University Campus to their respective homes. It was part of the agreement that change of ownership would only be effected upon payment of the last installment. It was further agreed that the purchase price would be settled in 5 equal installments of K1 million each.

As a matter of fact, Mr Phiri has only paid a sum of K1 million and it is now over six months since he took possession of the vehicle. This has remained so despite regular reminders and threats from Mr Chisale.

Required:-

- (i) Advise Mr Chisale whether or not he has entered into a valid contract.
- (ii) Mr Chisale intends to report the matter to Police. Advise him on the legality of the intended course of action.

CHAPTER 4: PRIVACY OF CONTRACT AND VITIATING FACTORS

4.1 INTRODUCTION

This Chapter will discuss the doctrine of privity of contract and its exceptions. It will also discuss factors that affect the validity of a contract such as mistake, misrepresentation, duress, undue influence and illegality.

4.2 The doctrine of privity of contract

This doctrine is linked to the doctrine of consideration. Under the doctrine of consideration, we stated that the consideration must move from the promisee. i.e. only a person who has furnished consideration can enforce the contract. Thus it is a fundamental principle of law that two people cannot by a contract impose liabilities on, or bind, a third party; nor can anybody have rights or obligations imposed upon him/her by a contract, unless he/she is a party to it. This principle is called **privity of contract**. Sometimes, this rule can cause absurdities or injustice, and in appropriate cases the law has found ways around it. The application of the rule takes two forms – as follows.

4.2.1 Attempts to Confer Rights on Third Parties

The problem usually arises when third parties attempt to sue to enforce rights they think they have acquired under a contract to which they are not a party. The law will not permit them to sue. **Price v. Easton** [1833] 4 B & AD 433, a man owed Price a sum of money. He agreed with Easton that he would work for him, if Easton would pay off his debt to Price. The work was duly done but Easton failed to pay Price. Consequently, Price sued Easton. It was held that Price could not recover the money, because he was not a party to the contract for work.

4.2.2 Attempts to Impose Liabilities on Third Parties

A person cannot be bound by the terms of a contract unless he/she is a party to it. However, contracts between two people can affect the rights of third parties. Conversely, a person may commit a tort by interfering with the parties in the performance of their contract. **McGruther v. Pitcher** [1904] 2 Ch. 306 P manufactured "*revolving heel pads*" as licensee of the patent's owner. Inside the lid of each box, a notice was stuck stating that it was a condition of sale that the pads would not be resold at less than a certain price, and that "*acceptance of the goods by any purchaser will be deemed to be an acknowledgement that they are sold to him on those conditions and that he agrees with the vendors to be bound by the same*". A purchaser then resold the goods to the public at less than the specified price. P tried to sue the retailer to prevent this. **Held:** P failed. There was no privity between him and the retailer. Further, he could not rely on the printed notice, even though the ultimate purchaser might be aware of it, because "*you cannot in that way make conditions run with the goods*". Thus, the common law rule is clear – two parties to a contract cannot impose liabilities in the form of restrictions on third parties who subsequently acquire the goods.

4.2.3 Exceptions to the Privity Rule

- (a) **Under the doctrine of agency** - If there was an agreement between A and B, C can enforce it if he can prove that A was the agent and C was the principal and it is irrelevant if B did not know that A was an agent.

- (b) **Under the doctrine of trust** - This is a creation of equity – a stranger to a contract may request the assistance of equity if the contract was made on his behalf. In *Tomlinson v Gill* (1753) Amb. 330, Lord Hardwick stated If A enters into a contract with B (or owes him money) that A will pay money to C, the Court of Equity will hold that A is a Constructive Trustee to C.
- (c) **By the doctrine of assignment** - The law permits a person to assign his rights or obligations to a third entitling the third party to step into the shoes of the assigning party.
- (d) **By statute** - A statute may assign benefits of a contract to a third party and allow him to enforce the same. A good example of such provision is section 149 of the Road Traffic Act which allows a victim of an accident to sue directly an insurer of the car even though a claimant is not a party to the insurance contract.
- (e) **Collateral Contracts** - In an effort to avoid the privity rule causing either an absurdity or injustice, the courts will, sometimes, imply a "collateral" contract between a third party and one of the parties to the main contract. A collateral contract is one that is separate from, but substantially in respect of the same subject-matter as, the main contract. In *Shanklin Pier v. Detel Products Ltd* [1951] 2 KB 854 P employed contractors to paint a pier. Detel approached P and represented to him that the company's paint would last for seven years. On the strength of this representation, P instructed the contractors to buy Detel's paint for the job. In practice, it lasted only three months. **Held:** Although the contract for the supply of paint was between the contractor and Detel, a collateral contract would be implied between Detel and P, that the paint would last for seven years. As will be apparent to you, had the privity rule been strictly applied, P would have no right of action against Detel. Also, as the contract for painting the pier did not contain a warranty that it would last any particular time, P would have no rights against the contractor. Even if P did have such a right, Detel's misrepresentation was made to P. So, the contractor would have no rights against Detel in respect of it.

4.2.4 Tort and Privity of Contract

A tort is a civil wrong that results into injury to the claimant. Examples include negligence, trespass, nuisance, defamation. A tort is not based on a contract. *Donoghue v Stevenson* [1932] AC 562 On the 26 August, 1928 Donoghue and a friend were at a café in Glasgow. Donoghue's companion ordered and paid for a bottle of ginger beer for Donoghue. The ginger beer was in an opaque bottle. Donoghue drank some of the contents and her friend lifted the bottle to pour the remainder of the ginger beer into the tumbler. The remains of a snail in a state of decomposition dropped out of the bottle into the tumbler. Donoghue later complained of stomach pain and her doctor diagnosed her as having gastroenteritis and being in a state of severe shock. Donoghue sued Stevenson, the manufacturer of the drink, for negligence. She was unsuccessful at trial and appealed the decision to the House of Lords.

The **issue** was whether there was liability in negligence for injury caused by another in the absence of a contract? The House of Lords allowed the appeal stating that one (manufacturers) must take reasonable care when proceeding with actions or omissions that can reasonably be foreseen as harming their neighbour. Neighbours are persons who are reasonably foreseeable as being affected by one's actions or omissions. A duty of care is not owed to the world at large; it is owed to one's neighbours.

4.3 Vitiating Factors

These are factors that affect the validity of a contract and include (1) Mistake (2) Misrepresentation (3) Duress and undue influence (4) Illegality

4.3.1 The Doctrine of Mistake

At common law, there are three basic types of mistake which may serve to render the contract void – **common mistake** (where both parties have made the **same** error), **Mutual mistake** (where both parties have made **different** errors) and **unilateral mistake** (where only one of them has).

4.3.1.1 Common Mistake

Where the mistake is shared by both parties, it may mean that there is no true agreement or "*consensus ad idem*". There is agreement of a sort but it is based on a false assumption, hence common law may declare the contract void on the grounds that the agreement is not a true consensus. In *Couturier v. Hastie* [1856] 5 H.L. Case 673 the parties contracted for a cargo of corn which was believed to be in a ship bound from Greece to England. In fact, before the date of the sale, the corn had rapidly deteriorated, and the ship had put in to Tunis and sold the cargo for what it would fetch. **Held:** The contract was void because of mistake as to the existence of the subject-matter. In *Strickland v Turner* [1852] 7 Exch 208, X had bought and paid for an annuity upon the life of a person who unknown to the buyer and seller, was already dead. It was held that X had got nothing for his money and that the total failure of consideration entitled him to recover in full.

4.3.1.2 Mutual Mistake

In mutual mistake, the parties misunderstand each other and are at cross-purposes. A, for example, intends to offer his Toyota collora 16 valve, for sale, but B believes that the offer relates to the Toyota collora 12 valve also owned by A. The contract will be void. *Raffles v. Wichelhaus* [1864] EWHC Exch J19- the parties contracted to buy a cargo of cotton to arrive "*ex Peerless from Bombay*". Two ships, both named "Peerless" sailed from Bombay – one arriving in October and the other in December. The parties each intended that the contract should be in respect of the different ships. **Held:** The contract was avoided.

4.3.1.3 Unilateral Mistake

This occurs when only **one** party is mistaken. It is fundamental that no contract can validly be formed if offer and acceptance do not correspond. So, if one party makes an offer which is accepted in a radically different sense by the other, there is no valid agreement. Most unilateral mistake cases take the form of one party being mistaken as to the identity of the other party. In *Cundy v. Lindsay* [1873] 3 A.C. 459 A fraudulent person, called Blenkarn, wrote to Cundy, offering to buy some goods. He forged the signature of Blenkiron & Co. which was a reputable firm, trading in the same street. Cundy sent the goods under the impression that he was dealing with Blenkiron & Co. The innocent Mr Lindsay purchased them from Blenkarn. **Held:** The contract between Cundy and Blenkarn must be void for mistake. The identity of the contracting party was of material importance. In *Lake v. Simmons* [1927] AC 487 a woman, called Ellison, posing as the wife of a wealthy customer called Van der Borgh, went into a jeweller's shop. She purchased a few trivial items, to inspire confidence. As a result, she was allowed by the jeweller to take away two valuable necklaces "*on approval*", for her purported husband. That was the last that was seen of her! **Held:** The jeweller thought he was dealing with Mrs Van der Borgh, and it was for that reason alone that he allowed her to take away the necklaces. The contract was void for mistake.

Non Est Factum - The doctrine of "*non est factum*" (that is not my deed) is a form of unilateral mistake. The principle is that a person is, normally, bound by his signature to a document. If he has not bothered to read it, or he does not understand it, then that is his problem. See *L'Estrange v F Graucob Ltd* [1934].

However, if he has been misled or deceived into signing a document which is **essentially different** from that which he intended to sign, then he can claim "*non est factum*", and the document and signature are void. In *Lewis v. Clay* (1897) LJ QB 224, Clay was persuaded by a friend of long standing to "*witness the friend's signature*". A document was placed before Clay, covered up except for four openings for his signature. He duly signed in the spaces provided. In reality, however, what he had signed were two promissory notes and two authorisations to Lewis, to pay the proceeds to someone else. **Held:** The promissory notes were void.

The defence is, however, not lightly available. In *Saunders v. Anglia Building Society* [1970] 3 All ER 961 Mrs Saunders was an elderly widow whom gave the title deeds of her house to her nephew, with the intention that the house should be a gift and enable him to borrow money on the security of it. It was a condition that she should be able to live there for the rest of her life. Later, she was persuaded by a friend of the nephew, who she knew was helping him get a loan, to sign a document. The friend said it was "*to do with the gift*". The old lady, who had broken her spectacles, signed without reading the document. The document was, in fact, a conveyance of the house to the friend. **Held:** The plea of *non est factum* failed. The whole series of events had to do with the title of the house; so, the document Mrs Saunders signed was not essentially different from what she thought it was.

4.4 The Doctrine of Misrepresentation

A **representation** is a statement made by one party to the other, before or at the time of contracting, with regard to some existing fact or to some past event, which is one of the causes inducing the contract. If a person is misled into entering a contract by an untrue statement or representation, made by the other party before or at the time of making the contract, then the party who has been deceived may have a right of redress. Such an untrue statement is called a **misrepresentation**. Note that a person's actions or behaviour may amount to a misrepresentation.

There are **four rules** which decide whether a particular statement is a misrepresentation such as to allow of redress and, if it is, what that redress may be. In the first place, in order to constitute a misrepresentation, the statement must be one of **fact**, either past or present. Statements of law or of opinion cannot be misrepresentations, nor can statements of intention which are not carried out. Second, the representation must **induce** the contract. In the third place, it must be **addressed** to the party misled. Lastly, it must be **false** or **untrue**.

(a) Statement of Fact; in negotiating a contract, all sorts of statements are made. Some are "mere puffs" not intended to be taken seriously. A good example of this is "*probably the best lager in the world*". Others are expressions of opinion. In *Anderson v. Pacific Fire Marine Insurance Co. Ltd* (1872) LR 7 CP 65, a shipping company effecting an insurance policy wrote to the company and stated that in the ship's master's opinion a certain anchorage was good. The vessel was later lost at that anchorage. **Held:** The letter was not a representation of fact, but merely of opinion.

(b) The Statement Must Induce the Contract; if a false statement is made to which the other party pays no attention, or which does not in any way influence him, then this does not affect the validity of the contract. The degree of inducement does not have to be total but the party deceived must, to some material extent, have been influenced by the statement into making the contract. Where a car is advertised as 'lady driven' it will be unlikely that the buyer will buy it coz of the description 'lady driven'. This

means that if the car was in fact not driven by a lady- the buyer cannot claim a misrepresentation if he proceeded to buy it on other grounds.

(c) The Statement Must Be Addressed to the Party Misled; unless the untrue statement was either made to the other party or it was made to another person in the knowledge and with the intent that that person should pass it on to the other party, it does not affect the validity of the contract.

(c) **The Statement Must Be Untrue;** this is not quite as obvious as it sounds. In English law, there is no general duty for one party to acquaint the other of all the relevant facts. Unless the contract is one of those which are "*uberrimae fidei*" (of utmost good faith) the principle of "*caveat emptor*" (let the buyer beware) applies to contracts generally – not merely to those for sale of goods. Hence, mere silence does not constitute a misrepresentation. A positive untrue statement must have been made.

4.4.1 Types of Misrepresentation

There are **three** different types of misrepresentation that can be made, and their effects on the contract are different. Damages can always be recovered and, in certain circumstances, the contract can also be avoided by the innocent party.

4.4.1.1 Fraudulent Misrepresentation

This occurs where an untrue statement is made knowingly or without belief in its truth. The effect of a fraudulent misrepresentation is to allow the party deceived to rescind, as of right, the contract, and seek damages for loss sustained. Of course, she does not have to rescind it. She can always affirm it, and merely seek damages. However, it is important to remember that rescission is always available to her.

4.4.1.2 Negligent Misrepresentation

A false statement is made "negligently" when it is made carelessly, or without reasonable grounds for believing it to be true. A misstatement is negligent if it was merely carelessly made, but it is fraudulent if it is made with evil intent or recklessly. The innocent party has a right to claim damages.

4.4.1.3 Innocent Misrepresentation

This type of false statement is one which was made neither fraudulently nor negligently. The remedies for an innocent misrepresentation are either rescission or damages – but not both.

4.4.2 Duress

If a person is coerced into making a contract by fear for his own physical wellbeing or that of his immediate family, or for the safety of the goods, or – on rare occasions – for his economic profits, this is called "duress". The coercion may be either actual or threatened. The so-called contract is void.

(a) Duress to the Person; This consists of actual or threatened violence to the person, or imprisonment. It can be either in respect of a party to the contract or in respect of her immediate family. *Mutual Finance Co. Ltd v. John Wetton & Sons Ltd* [1937] 2 KB 389 A family company was induced to give a guarantee for a debt by threats to prosecute a member of the family for the forgery of a previous guarantee. At the

time, the coercers knew that the father of the alleged forger was in a delicate state of health. **Held:** The guarantee would be set aside.

(b) Duress of Goods - This is actual or threatened unlawful detention of goods.

(c) Economic Duress - The threat of loss of profits if a contract is not made is called "economic duress". The proposition is that if a person is induced to enter into a contract by fear of loss if he does not agree to the contract, this may constitute actionable duress.

4.4.3 Undue Influence

Undue influence is said to exist where one person has a special relationship with another and, as a result of this relationship, that other is induced to enter into a contract to his/her disadvantage. Where there is a confidential or fiduciary relationship, the stronger party must show that undue influence was **not** exerted. Examples of where such a confidential relationship is likely to exist are that of parent and child, guardian and ward, solicitor and client, doctor and patient, religious adviser and the person to whom advice is given

In *Tufton v. Sporni* [1952] 2 T.L.R. 516, P and D were both members of a committee to establish a Moslem cultural centre in London. P was going to provide funds, and D induced him to buy D's house for the centre at a grossly high price. **Held:** The contract would be set aside by reason of undue influence. There is no necessity for there to have been actual **fraud** for a contract to be set aside for undue influence. Undue influence must, however, be proved, except in cases of confidential relationships.

Note that delay may defeat a claim for undue influence. In *Alleard v. Skinner* (1887) 36 Ch D 145, a young lady, on entering a convent, made over her property to the convent. After a year she left the convent but delayed for five years before applying to the court to rescind her gift. It was **held** that she was defeated because of the unreasonable delay. Once she had left the convent, any undue influence had ceased and she should have taken prompt action in the matter.

4.5 Illegality

The general principle of law is that any contract founded on illegality, is unenforceable. A contract can be deemed illegal if it contravenes the provisions of a statute or if it contravenes public policy. Examples include:-

4.5.1 Agreements to Commit a Crime, a Tort, or to Perpetrate a Fraud

In *Allen v Rescous* (1677) 2 Lev 174 an agreement to commit an assault was held to be void.

4.5.2 Agreements Injuring the State in Relation to other States

These include an agreement to supply goods from one country to another where the two countries have prohibited trading due to a dispute.

4.5.3 Agreements which Tend to Harm the Public Service

These include for example an agreement to sell property on condition that the seller shall not enter the military service.

4.5.4 Agreements to Pervert the Course of Justice

An example of this is an agreement not to prosecute a crime is void.

4.5.5 Agreements Tending to Abuse the Legal Process

An example is where a wife agrees not to oppose a husband's application for divorce in return for a higher sum of maintenance.

4.5.6 Agreements Contrary to Good Morals

In *Pearce v. Brooks* (1866) LR 1 Ex 213, a firm of coach builders hired to a prostitute a coach with an interesting design. It was known to the firm that it would be used by her in plying her trade. She failed to pay the hire. It was held that the contract would not be enforced.

4.5.7 Contracts in Restraint of Marriage

An agreement not to marry any other person but Mis Lowe, and if not Mis Lowe, to pay her €2,000 is void- *Lowe v Peers* (1768) 4 Burr. 2225, 2230.

4.5.8 Agreements which Oust the Jurisdiction of the Courts

This does not include arbitration before going to court.

4.5.9 Agreements in Restraint of Trade

These are contracts where one party (covenantor) agrees with another (cavenantee) to restrict the liberty of the cavenantee in the future to carry on trade with other persons not parties to the contract in such manner as the covenantor chooses. Such contracts are valid but may be void if they are in **undue (unreasonable) restraint of trade**. A reasonable restraint is one that is no wider than reasonably necessary to protect an interest of the one who proposes the restraint. An example of reasonable restraint is one imposed on an ex-employee by the employer in order to protect trade secrets and business connections. *Foster & Sons Ltd v. Suggett* (1918) 35 TLR 87 a works manager was not permitted to engage in glass-making anywhere in the UK. **Held:** It was reasonable, as the employee was trained in trade secrets which were applicable throughout the country. If a restraint on an ex-employee is to be upheld by the courts, the duration and area covered must be reasonable. *Sir W C Leng & Co. Ltd v. Andrews* [1909] 1 Ch 763, a junior reporter on a provincial newspaper was required not to be connected with any other newspaper within 20 miles of Sheffield. **Held:** The constraint was unreasonably wide.

4.6 PRACTICE QUESTIONS

1. Define the doctrine of privity of contract and its exceptions.
2. How does a mistake affect the validity of a contract?
3. What is a misrepresentation?
4. What is duress and how does it differ from undue influence?
5. Distinguish the following terms – illegal contracts, unenforceable contracts, void and voidable contracts.
6. To what extent are contracts in restraint of trade valid?

NOT FOR SALE

CHAPTER 5: DISCHARGE OF CONTRACT AND REMEDIES

5.1 INTRODUCTION

There are **four ways** in which a contract may be discharged (1) Discharge by Performance (2) Discharge by Agreement (3) Discharge by Breach (4) Discharge by Frustration

5.2 DISCHARGE BY PERFORMANCE

If both parties perform their promises the contract is completely terminated. If one party only performs, he alone is discharged and he acquires a right of action against the other. There are a number of rules affecting the performance of a contract. The cardinal one is that a person must perform exactly **what he/she has promised to do**. Doing something different from that agreed to, even though it may be commercially more valuable to the other party, is not performance in law. Obviously, though, trivial claims will not be entertained by the courts.

5.2.1 Time of Performance

The general rule is that time of performance is merely a **warranty**, breach of which will give rise to a claim for damages only. It is not a **condition**, allowing the innocent party to rescind the contract. Time is however **of essence i.e. a condition** in the situations described below.

- (a) Where the parties **expressly state in the contract** that time is of the essence, or must be strictly complied with. The form of words used is not significant, provided the intention is clear.
- (b) Where the circumstances of the contract or of the subject-matter show that **strict compliance** with stipulations as to time was intended, or should necessarily be implied.
- (c) Where time was not originally of the essence but, because of undue delay, one party has given notice that the contract must be performed by a **specified reasonable date**. *Charles Rickards Ltd v. Oppenheim* [1950] 1 All ER 420. In early 1947, Oppenheim ordered a Rolls Royce chassis. In July, Rickards agreed that the body should be built for it "*within six or at most seven months*". Seven months later, it was not completed; so, Oppenheim agreed to the company taking a further three months. At the end of this time, it was still not ready. Oppenheim served notice on Rickards that, if the car was not ready in four weeks, he would cancel the order. It was not – so he cancelled. Three months later, the finished Rolls Royce was tendered but Oppenheim refused to accept it. **Held**: He was entitled to do so. Time was not, originally, of the essence, but because of Rickards' breach, the notice requiring completion in four weeks served to make time of the essence.

5.2.2 Partial Performance of an Entire Contract

The complete performance of an entire contract is, normally, a condition precedent to any liability on the other party – e.g. to make payment. The courts cannot apportion the consideration – so, unless the contract is completed, nothing is due on account of it. The classic example is *Cutter v. Powell* [1795] 10 ER 573. A seaman was engaged for a lump sum on completion of the voyage. He died part way through the voyage, and it was **held** that his executors could not claim any wages for the time prior to his death. This common law rule also referred to as the "**entire contract rule**" is now substituted with the doctrine of "**substantial performance**" which says that, if a person has completed the contract in all but an insignificant or unimportant part, he/she is entitled to payment for the whole, less any amount for the uncompleted work.

If a contract is, however, only partially completed, and the circumstances are such that the court can reasonably imply it, then it may imply a fresh contract to accept what has been performed, and pay on a "*quantum meruit*" – i.e. for what **has** been done.

5.3 DISCHARGE BY AGREEMENT

The parties may agree that their contract shall be determined, and in this case whether their respective obligations are to be totally or partially discharged depends on the terms of the agreement. There are **four** ways in which a contract can be discharged by agreement – by "release"; by "accord and satisfaction"; by "rescission"; and by some provision contained in the contract itself.

5.3.1 Release

If **one party releases another from his obligations**, there is, normally, no consideration for the act. This applies where the party releasing the other has fully performed all his obligations, while the other has not. If both of them still have obligations to perform, the consideration for each foregoing his rights is the foregoing by the other.

5.3.2 Accord and Satisfaction

Provided that consideration is present, a contract can be discharged by agreement, even though only one party has fulfilled all his obligations. This is called "accord and satisfaction". The "accord" is the agreement, the "satisfaction" is the consideration. In this context, it can, of course, be some other performance than that of the original obligation. You will remember that, earlier, we discussed the rule in *Pinnel's Case*. This states that the payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt. However, if the payment of the smaller sum is made in a different way, or at a different time from that prescribed for the larger sum, this difference constitutes adequate consideration to support the agreement for discharge of the whole debt. This is an example of discharge by accord and satisfaction. An exception to the rule requiring consideration for the discharge of a contract by agreement where one party has not fully performed, arises through the principle of what is known as **promissory estoppel**. This principle states that, if one party intimates to the other that she will not insist on her strict contractual rights and the second party, in reliance on that statement, incurs expense or obligations, then the first party will not be permitted by equity to go back on her promise. This was discussed in *Central London Property Trust Ltd v. High Trees House Ltd (1947) (The High Trees case)*.

5.3.3 Rescission

While a contract is still executory – that is, it has not been fully performed by **both** sides – it can be discharged by mutual agreement, the consideration for the agreement being the **mutual giving-up of rights** under the contract. In the **court** context, the remedy is **rescission**: it recognises and enforces the contract termination. The effect of joint repudiation is that the contract is discharged, and rights under it cannot afterwards be revived, although money paid in respect of an agreement that has proved abortive can be recovered. **(In rescission both parties mutually agree to terminate the contract whilst in release it is one party releasing the other)**

5.3.4 Provisions Contained in the Contract Itself

This is fairly obvious. If the contract itself provides for its discharge in certain circumstances, then this is an agreed contractual term. The question of consideration does not apply, as it is part of the consideration for the contract.

5.4 DISCHARGE BY BREACH

A condition is a term of the contract which is fundamental, and breach of which entitles the injured party to **rescind** the contract. The contract is, therefore, discharged by breach. What this means is that the injured party is discharged from the necessity for further performance by reason of the breach of contract by the other-see *Poussard v Spiers (1876)*. The innocent party may if he wishes treat breach of condition as breach of a warranty and therefore simply claim damages, or he can affirm the contract, and carry on with his own performance.

5.4.1 Breach may be anticipatory

This is breach occurring before performance of the contract. For example having been offered a job, the prospective employer indicates that he no longer requires your services, before you report for work. The employer will be guilty of anticipatory breach of the contract.

The guilty party may bring about the breach in **three** ways;

(a) Renunciation If one of the parties, by his words or his actions, makes it plain that he has no intention of performing or continuing to perform his side of the bargain, he is said to renounce the contract, e.g. not reporting for duties.

(b) Impossibility Created by One Party If one party, by her own actions (or lack of them) creates a situation whereby it is impossible for her to perform, she is not allowed to rely on the impossibility as being an excuse for not performing. The other party is entitled to treat the contract as discharged. For example, where a driver is disqualified from driving on account of a serious traffic offence his employer will be entitled to dismiss him.

(c) Failure of Performance In the event that one party fails to perform, whether wholly or partially, this may entitle the other to treat the contract as discharged. Whether or not he can terminate the contract depends on the extent and importance of the failure. Once again, the question is: "Did the failure to perform amount to a breach of a condition or a warranty?"

5.5 DISCHARGE BY FRUSTRATION

A contract can be discharged by operation of law, and not by any volition of either party. It is called "frustration". If some event occurs which is not the fault of either party, and which could not reasonably have been foreseen, which so alters the whole character of the bargain as to make it a **totally different thing** from that intended, the contract may be discharged by frustration. The fact that a contract will be performed at a loss is not enough ground for the termination of the contract through frustration; in *The Eugenia* [1964] 2 Q.B. 226 the fact that the Suez Canal had been closed therefore rendering the shipping contract expensive to perform via the Cape of Good Hope did not amount to frustration. The length of the voyage would be extended by a month only therefore there was no such high degree of impracticability. Indeed the fact that one can only perform the contract at a loss is not a ground for frustration.

Taylor v. Caldwell (1863) 3 B & S 826 -The parties agreed that Caldwell should hire a music hall on four specified nights for concerts. After the contract was made, but before the first night, the hall was burnt

down. **Held:** Caldwell was not liable to damages. A term must be implied into the contract that the parties would be excused if performance became impossible, without the fault of the contractor, through the destruction of the subject-matter.

5.5.1 Test of Frustration

Various tests have been put forward for deciding when a contract is frustrated. Probably the most helpful is that given by the House of Lords in *Davis Contractors Ltd v. Fareham UDC* [1956] UKHL 3. Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. "*It was not this that I promised to do. There must be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.*"

Frustration may occur as a result of war, destruction by fire of the subject-matter (*Taylor v. Caldwell* - above) stranding or sinking of ships, flooding, earthquake and other acts of God, requisition of the subject-matter by the government, seizure of a ship by a foreign government, death or some incapacity, such as illness, which is sufficiently severe that personal performance is impossible.

5.5.2 Legal Consequences of Frustration

At common law, if a contract is frustrated, it is not thereby made void *ab initio*. All that **frustration does is forthwith to release both parties from any further performance.** *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* (1943) A.C. 47, In July 1939, a contract was made to deliver machinery to Poland. A deposit of £1,000 was paid. In September, England went to war with Germany, and in the same month Poland was occupied by Germany. The contract was frustrated. **Held:** The advance consideration of £1,000 must be repaid as the consideration had wholly failed.

Force Majeure- The term "*force majeure*" is commonly applied, especially in building and engineering contracts. The parties agree in their contract to have what is known as a "*force majeure*" clause. All this means is that they agree that, in the event of either or both of certain specified events occurring, and any circumstances beyond the control of either party arising, they will act in a specified manner. It is, therefore, a contractual term and should one of the frustrating events occur, the remedy is agreed upon beforehand. The question, therefore, of frustration arising by operation of law does not occur.

5.6 REMEDIES FOR BREACH OF CONTRACT

There are at least **four** remedies for breach of contract (a) Rescission i.e. the innocent party has the option to rescind (terminate) the contract if the guilty party breaches a condition of the contract. (b) Damages (c) Injunction (d) Specific performance.

5.6.1 Damages

The principal remedy for breach of contract is an award of damages. The essential point is that damages are **compensation** to the injured party for the loss she has suffered as a result of the other party's breach of contract – the object being to place her in the same position as she would have been in had the contract been properly performed. Damages are not a punishment.

Mitigation of loss a duty to mitigate or minimise the loss is often presumed by the courts, although the burden of proving that the claimant has not done so is placed on the defendant. The emphasis, however, is on what is "**reasonable**" in the circumstances. If, for example, a claimant in reasonably attempting to

mitigate her loss actually makes it worse, she will not be penalized for her actions. She will be able to recover her actual loss even though she herself has increased it. If an employee is unfairly dismissed he must make reasonable efforts to obtain alternative employment, if he fails to do so he may be entitled to a smaller sum of compensation. In *Tucker v Linger (1882)* a landlord failed to supply materials under a contract with his tenant to repair the premises. The tenant failed to recover for damage caused to his crops in the barn by bad weather because the barn was out of repair, since he ought to have provided himself with the necessary materials and done the repair, and charged the landlord with the price of the materials.

There are various terms used to describe the different categories of damages.

(a) General and Special Damages - Loss has to be proved in order that damages may be assessed. However, it is not always possible precisely to calculate the exact amount of the loss. How do you exactly quantify loss resulting from pain and suffering"? You cannot – so, the law presumes that loss results from the infringement of certain legal rights or duties. The fact that loss has been sustained must be proved – but not the precise amount. **These are called "general" damages. It is the job of the court to put a monetary figure to them. "Special" damages are those which can be precisely calculated.**

(b) Nominal Damages - These are awarded where a claimant's legal rights have been infringed, and he is entitled to damages, but he has, in fact, suffered no actual loss. They are, often, really only to establish the fact that a right has been infringed, and they can be as little as 1p.

(c) Liquidated and Unliquidated Damages - If the parties have made no mention of the subject in their contract, then, in the event of any breach, the injured party must prove his loss. The resulting award is called "unliquidated" damages. However, for a variety of reasons, the parties may decide beforehand that, in the event of a specific breach, the loss suffered will be assumed to be a certain figure, or in accordance with a certain scale. It may be difficult or expensive and time-consuming to have to calculate the exact figure – so, the parties make a **pre-estimate** of the likely loss, and insert this in the contract as the sum payable if that breach does occur. These are called "liquidated" damages.

Damages and Causation - It is essential that the loss suffered must have been caused by the breach of contract. There must be a direct **chain of causation** between the breach of contract and the loss suffered. If something or someone intervenes to break this chain, it cannot be said that the breach caused the loss. The intervention can be by a third party. In *Monarch Steamship Co. Ltd v. Karlshamns Oljefabriker A/B* [1949] HL AC196, a ship was chartered, in 1939, to carry a cargo from Manchuria to Sweden. It was a contractual term that the ship should be seaworthy. She should have reached Sweden in July. Owing to breach of the condition of seaworthiness, she was delayed until September, by which time war between England and Germany had broken out. By order of the British Admiralty, she was unloaded at Glasgow. A claim was made for the cost of trans-shipping the cargo in a neutral vessel from Glasgow to Sweden. **Held:** Reasonable businessmen, knowing of the possibility of war, would have foreseen that delay would lead to diversion. Hence, the breach of contract was the direct cause of the loss, which was, therefore, recoverable.

Damages – Remoteness of Damage - It is all very well to say that the guilty party is responsible for all the damage caused by his breach of contract but how far down the line do you carry this? Say, a contractor builds a dam for the water authority. In breach of contract, the dam is damaged, and millions of tons of water disappear in the direction of the Atlantic Ocean. Obviously, the cost of rebuilding the dam is one head of damage. Another is the cost of damage to the people and houses in the village downstream which has been swept away. However, say, a local carrier makes her living by carrying produce from the village to the market town. There is, therefore, no produce to carry – so, she has lost his livelihood. Should the contractors have to pay for that?

The classic decision on this question of how far you go, or "remoteness of damage", was given in **Hadley v. Baxendale** (1854) 9 Ex 341. Here a mill was brought to a standstill when a crankshaft broke. A carrier failed to deliver the broken shaft to the manufacturers when he had promised to. He was sued for loss of profit owing to the unnecessary delay. The court **held** that it was not in the contemplation of the defendant that the delay in the delivery of the broken shaft would entail loss of profit therefore the claim was dismissed. In the judgment, the following **important** statement was made.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it".

This means that the rule in **Hadley v. Baxendale (1854)** has two parts;

- (a) In the first place, a party in the wrong will pay the innocent party damages such as may fairly and reasonably be considered as arising naturally, i.e. according to the usual course of things, from such breach of contract itself; for example if a garage owner unnecessarily delays the repair of a minibus, he may be sued for loss of profit by the owner of the minibus but that may not happen with a private car. (Revisit the facts and holding of **Hadley v. Baxendale (1854)**)
- (b) In the second place, a party in the wrong will pay the innocent party damages such as may fairly and reasonably be considered as reasonably to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. For instance in **"The Wagon Mound" (No. 1)** [1961]1AC 617, a vessel took oil in Sydney Harbour. Owing to the negligence of the crew, a quantity spilled in the water. The wind carried the resulting oil slick across a creek to a ship repair yard opposite. A welder happened to be working there on a ship under repair, and a spark from the welding operation fell on to some cotton waste floating on the water below. A serious fire resulted. It was **held** that it was not reasonably foreseeable that a spark could ignite heavy fuel oil floating on the water. Hence, although the ship owners were liable for the foreseeable damage caused by oil fouling slipways, etc., they were not liable for the damage caused by fire.

5.6.2 Specific Performance and Injunction

These two orders are equitable remedies which can be sought if damages would not provide an adequate remedy. "Specific performance" is an order by the court compelling one party to perform the contract in accordance with its terms. It is a **positive** remedy. An injunction is **negative**. It commands a party not to commit a threatened breach of contract. Both of these are discretionary, whereas damages are an absolute right. Neither will be granted if the claimant is himself at fault for the breach of contract, or if it would be unfair to grant them.

Some types of injunctions

- (a) **Mandatory injunction** which requires the defendant to do a particular act instead of prohibiting an act. For instance requiring the registrar of companies to register a company.

- (b) **Prohibitory injunction** which prevents the defendant from doing a particular act. For instance preventing a rival company from producing similar products to yours.
- (c) **Permanent injunction** which is an injunction actively sought by a party to a trial and issued at its conclusion. Unlike a temporary injunction, a permanent injunction is perpetual provided that the condition that produced it remains permanent. It may be obtained, for example, against pollution of a river.
- (d) **Temporary/interim/interlocutory injunction** which is an injunction issued as a preliminary preventive measure, pending trial. It lasts for shorter periods such as 7 or 14 days.
- (e) **Mareva injunction** (now known as a **Freeze Order**), which is granted to prevent defendants in proceedings before the High Court from removing assets out of the jurisdiction with the aim of avoiding or frustrating the enforcement of any judgment against them. In "*The Mareva*" case [1980] 1 All ER 213 the Court of Appeal upheld an injunction to restrain the defendants from removing or disposing out of the jurisdiction money standing to the credit of the defendants in a London bank. The claimants were shipowners and the defendants were charterers under a voyage charter. The defendants had received payments for the freight in that bank account, but they had failed to pay the hire charges due to the claimants. (The term Mareva injunction derives from the name of the ship in this case.)
- (f) **Anton Piller Order (Search Order)** Like the Mareva injunction, it is a preemptive remedy designed to prevent a defendant from disposing of or dealing with material, property or assets in such a way as to frustrate enforcement of a judgment. A court has an inherent power to make an order requiring the defendant to permit access to his/her premises with the object of searching for illicit materials and documents. The order also has the effect of permitting such property to be taken away, detained and kept in safe custody until the full trial of the action. Such an order was made originally in the case of *Anton Piller KG v. Manufacturing Processes Ltd* [1976] Ch 55.

5.7 PRACTICE QUESTIONS

1. How may a contract be discharged?
2. Under the law of contract, a contract will be discharged by frustration where the obligations under it have become subsequently impossible to perform due to the fault of neither party.

Required: Apply the relevant law to the following two situations in order to determine whether or not the contracts have been frustrated:

- (i) A contract involving the letting out of a large house for a wedding reception and the house is destroyed by fire a week before the wedding.
 - (ii) A contract involving the carriage of cargo from one city to another and due to damage to the road the carriage can only be completed at a loss using an alternative route.
3. A claimant can only make a claim for losses which were in the reasonable contemplation of both parties at the time the contract was made.

Required: Comment on this proposition of the law.

4. What remedies does the law provide for breach of contract?

5. List and comment on any **two** types of injunction that the High Court may issue.

CHAPTER 6: EMPLOYMENT LAW

6.1 INTRODUCTION

Employment and labour rights emanate from the 1994 Republican Constitution of Malawi which provides in section 29 for the right to economic activity, to work and to pursue a livelihood anywhere in Malawi and Section 31 provides for the right to fair and safe labour practices and to fair remuneration; the right to form and join trade unions or not to form or join trade unions; the right to fair wages and equal remuneration for work of equal value without distinction or discrimination of any kind, in particular on basis of gender, disability or race and the right to withdraw labour.

These rights are further expounded in various Acts of Parliament and we shall look at the following key Acts; Employment Act 2000, The Labour Relations Act, Worker's Compensation Act and the Occupational Safety welfare and Health Act

6.2 EMPLOYMENT ACT 2000

This Act regulates minimum standards of employment with the purpose of ensuring equity necessary for enhancing industrial peace, accelerated economic growth and social justice. The Act prohibits forced labour; child labour and discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth, marital or other status.

6.2.1 Types of Contracts

There are three types of contracts that one may go into; (i) a contract for unspecified period of time (ii) a contract for specified period of time (fixed contract) and (iii) a contract for specific task.

6.2.2 Termination of Contracts

Either party to a contract may terminate a contract of employment for an unspecified period by giving notice. If the termination is at the initiative of the employer, the termination must be accompanied with **valid reasons** connected with the capacity or conduct of the employee or operational requirements. However, a contract for a specified period of time automatically terminates on the date specified for its termination. A contract of employment to perform a specific task terminates on the completion of the task and no notice of termination is required.

6.2.3 Probationary Period

In a contract of employment in respect of a skilled worker, the parties may agree on the duration of the probationary period provided that the period shall not exceed twelve months. During the probationary period either party to the contract may terminate the contract without notice.

6.2.4 Particulars of Employment

Where an employer has at least five employees, he is required to give to each of his employees a written statement of particulars of employment containing names of the parties, date of commencement of contract, the rate and intervals of remuneration and the nature of work.

6.2.5 Severance Allowance

It was defined by the High Court in *Chimpeni and others v Chibuku Products Ltd* HC Civil Cause No. 3225 of 2002 that it is money paid by an employer to an employee beyond the employee's wages on termination of his employment through no fault of his own. Such pay represents a form of compensation for the termination of the employment, for reasons other than the displaced employee's misconduct, primarily to alleviate the consequent need for economic re-adjustment but also to recompense the employee for certain losses attributable to the dismissal.

Section 35(1) provides as follows:-

“On the termination of a contract as a result of redundancy or retrenchment, or due to economic difficulties, technical, structural or operational requirements of the employer, or on the unfair dismissal of an employee by the employer, and not in any other circumstance, an employee shall be entitled to be paid by the employer, at the time of termination, a severance allowance to be calculated in accordance with the First Schedule.”

Severance allowance is therefore paid in the following circumstances:-

- i. On termination of contract as a result of redundancy or retrenchment, or due to economic difficulties, or technical, structural or operational requirements of the employer;
- ii. As a result of an unfair dismissal; and
- iii. Where a female employee returning from maternity leave refuses the offer of a suitable alternative job.

6.2.5.1 Calculation of severance allowance

Calculation is done in accordance with the First Schedule Part I which provides as follows:-

Length of service	Severance allowance
Not less than one year, but not exceeding five years	Two weeks' wages for each completed year of service up to and including the fifth year
Not exceeding five years, but not	Two weeks' wages for each completed year of

exceeding ten years	service for the first five years, plus three weeks' wages for each completed year of service from the sixth year of service from the sixth year to and including the tenth year
Exceeding ten years	Two weeks' wages for each completed year of service for the first five years, plus three weeks' wages for each completed year of service from the sixth year up to and including the tenth year plus four weeks' wages for each completed year of service from the eleventh year onwards.

6.2.6 Hours of Work

Normal working hours are set out in the employment contract provided that the hours do not exceed 48 in a week without overtime.

6.2.7 Overtime

It is divided into **three** classes as follows;

- (a) **Ordinary overtime** which is time worked on a working day in excess of the hours normally worked. For each hour of ordinary overtime an employee is paid at an hourly rate of not less than one and one half of his wage for one hour.
- (b) **Day off overtime** is time worked on a day on which the employee would otherwise be off duty. The payment is twice the normal pay.
- (c) **Holiday overtime** is time worked on a public holiday. The payment is not less than twice the normal pay.

6.2.8 Annual Leave

Every employee is entitled to annual leave with pay. An employee who works **six days** a week is entitled to **not less than eighteen working days** as annual leave while an employee who works **five days** a week is entitled to **not less than fifteen working days**.

6.2.9 Sick Leave

An employee is entitled to sick leave after completing a year of continuous service. The minimum period of leave is **four weeks with full pay** and **eight weeks sick leave on half pay** during each year. An employer is not bound to grant the sick leave unless the employee produces a certificate from a registered medical practitioner stating the nature of the employee's incapacity.

6.2.10 Maternity Leave

A female employee is entitled, within every three years, to at least **eight weeks (2 months)** maternity leave on full pay. The right to maternity leave was found breached in *Jumbo v Banja La Mtsogolo* [2008] MLLR 409. The plaintiff was a temporary employee of the respondent and upon falling pregnant she sought maternity leave but was refused by the respondent and she was subsequently dismissed. The IRC held that the dismissal was unfair and unlawful. Re-instatement was ordered.

6.2.11. Minimum Wage

The Minister responsible for labour is given the discretion to fix the minimum wages of any group of wage earners in consultation with relevant workers' and employers' organisations. This is partial fulfillment of the Constitutional right to fair remuneration seen above and it becomes most relevant in situations where a group of unskilled workers are engaged in employment by an employer seeking cheap labour, for instance in tea and tobacco estates. As of 31st October 2013 the minimum wage was at K317 a day. In *Chibaya and Another v Kulupando*, IRC Matter No. ZA 4 of 2008 among other awards, the Court ordered the respondent to pay the applicants the difference between their salaries and minimum wages for the period of their employment.

To provide protection for such vulnerable groups of employees, the law provides for tough penalties. Thus, where the minimum wages are fixed by publication in a gazette, any employer contravening the requirement by paying less, is guilty of an offence and liable to a fine of K50,000 and to imprisonment for ten years.

6.2.12 Disciplinary Action

Includes a **written warning; suspension; and demotion**. The Act prohibits a fine or other monetary penalty on an employee as disciplinary action. An employer may however deduct an amount of money from an employer's wages as restitution for property damaged by the employee.

6.2.13 Dismissal

An employer has a right to dismiss an employee. In all such circumstances, the dismissal must be fair. Section 57(1) provides as follows:-

“The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.”

Section 57(2) provides as follows:-

“The employment of an employee shall not be terminated for reasons connected with his capacity or conduct before the employee is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.”

There are therefore **two conditions** that must be satisfied if a dismissal is to be fair;

- (a) A fair dismissal must be accompanied by a **valid reason** connected with the employee's capacity or conduct or operational requirements of the employer; Section 57(3) provides for some of the invalid reasons for dismissal. They include discriminatory termination of employment on such grounds as the employee's race, colour, sex, language, religion and political or other opinion.
- (b) The employee must be given **an opportunity to be heard (disciplinary hearing)**.

For example in *Mlangali v Nico Holdings Ltd* IRC Matter No. IRC PR 290 of 2010 the applicant who was working as a driver suffered from cancer which prevented him from driving. The respondent dismissed him without a hearing or an examination whether the applicant could be assigned to other duties. The Court held that the dismissal was unfair as the respondent did not act with justice and equity, on the facts presented in Court.

The procedure for the disciplinary hearing is as follows:

- i. Investigations must be conducted to establish a preliminary case against the employee
- ii. Sufficient notice must be given to the employee to attend the hearing;
- iii. A charge must accompany the notice such that the employee should well know what offence he is being accused of.
- iv. The hearing is usually oral but it may be done by exchange of written statements. The employee must be allowed to challenge evidence presented against him through for example cross examination.
- v. As a general rule lawyers are not allowed in disciplinary hearings but union or fellow employees are readily allowed to represent the employee.
- vi. The panel must make a decision based on the evidence presented and the punishment must fit the offence.
- vii. Where possible records of the hearing must be kept.
- viii. Internal appeals may also be provided for.

6.2.14 Summary Dismissal

Section 59 provides for termination of the contract of employment by the employer without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. There are five grounds for summary dismissal:

- a. Where an employee is guilty of serious misconduct such that it would be unreasonable to require him to continue the employment relationship;
- b. Habitual or substantial neglect of his duties;
- c. Lack of skill that the employee holds out to have;
- d. Willful disobedience to lawful orders given by the employer; or
- e. Absence from work without permission of the employer and without reasonable excuse.

6.2.15 Constructive Dismissal

Section 60 is a form of unfair dismissal; an employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship. Constructive dismissal was proved in *Banda v Dimon (Mw) Ltd* [2008] MLLR 92 where the defendant

forced the plaintiff, a computer programmer, out of his job by taking away his office, accommodation, computer hardware and files.

6.2.16 Remedies for Unfair Dismissal

They are three-fold. **Reinstatement** may be ordered whereby the employee is to be treated in all respects as if he had not been dismissed. **Re-engagement** may be ordered whereby the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal or other reasonably suitable work from such date and on such terms of employment as may be specified in the order or agreed by the parties. An award of **compensation Award** is the most popular. It is a lump sum of money assessed by the court considering immediate loss of wages; manner of dismissal and future loss.

6.3 LABOUR RELATIONS ACT (LRA)

The LRA aims at promoting sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and the promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development.

6.3.1 Freedom of Association

The LRA regulates the formation and registration of Trade Unions and employers' organisations. Trade Unions are important in collective bargaining and amicable resolution of disputes. In *Mhango v Attorney General*, Civil Cause No. 980 of 1998, the plaintiff was the president of the Malawi Congress of Trade Unions. By virtue of his position, he was required to go to National Seed Company of Malawi premises in Blantyre to quell a strike by the company's employees. Upon his arrival at the company's premises, he was arrested by the police and detained for about six hours. He was released without reason for his arrest being given. Not even a statement was recorded from him. The Court found that the plaintiff's liberty was infringed on when he was simply properly exercising his freedom of association under the Constitution. He was awarded damages.

6.3.2 Dispute Resolution

Disputes or differences in the workplace are inevitable. Any dispute whether existing or imminent may be reported to the Principal Secretary responsible for labour for resolution. There are at least two consequences that may result from the fact that a dispute is unresolved. First, either party to the dispute, or the Principal Secretary responsible for labour may apply to the Industrial Relations Court for determination of the dispute.

Secondly, either party or both parties may give a seven days' notice that they intend to strike or lockout providing that the matter is not in the IRC and the employer or employee is not engaged in the provision of essential service.

A strike is defined as:-

“concerted action resulting in a cessation of work, a refusal to work or to continue to work by employees, or a slowdown or other concerted activity of employees that is designed to or does limit production or services, but does not include an act or omission required for the safety or health of employees, or a refusal to work under section 52.”

A lockout is defined in section 2 of the LRA as:-

“closing a place of employment, a suspension of work by an employer, or a refusal by an employer to continue to employ or re-engage any number of his or her employees, done to compel his or her employees, or to aid another employer to compel his or her employees, to agree to terms or conditions of, or affecting employment.”

Essential services are defined as those services by whomsoever rendered, and whether rendered by government or any other person, the interruption of which would endanger life, health or personal safety of the whole or part of the population. It can be said that doctors and nurses are engaged in essential services.

6.3.3 The Industrial Relations Court (IRC)

The court is established by section 110(2) of the Constitution and is a specialized court which hears labour disputes and other issues related to employment. Appeals from the IRC go to the High Court. The sitting of the IRC is constituted by the presence of the Chairperson or the Deputy Chairperson and one member from the employees' panel and one member from the employers' panel. Its procedures are informal to encourage a friendly climate; there is no requirement for legal representation or payment of legal costs.

6.4 WORKERS COMPENSATION ACT

This Act provides for compensation for injuries suffered or diseases contracted by workers in the course of their employment or for death resulting from such injuries or diseases. Labour offices across the country assist workers with the procedure under this Act.

6.5 OCCUPATION SAFETY, HEALTH AND WELFARE ACT

The Occupational Safety, Health and Welfare Act makes provision for the regulation of the conditions of employment in workplaces as regards the safety, health and welfare of persons employed therein; for the inspection of certain plant and machinery, and the prevention and regulation of accidents occurring to persons employed or to go into the workplaces. The Act provides for the registration of workplaces; health and welfare; machinery safety; health and safety; notification and investigation of accidents, dangerous occurrences and industrial diseases.

6.6 INTERNATIONAL LABOUR ORGANISATION CONVENTIONS

Malawi is a member of the United Nations and also the International Labour Organisation (ILO). The ILO passes international conventions (agreements) on labour issues. Malawi has signed some of these conventions and is therefore legally bound to follow them. These conventions are enforced in Malawian courts. Some of the most relevant International Labour Organisation Conventions (ILOC) are:-

- (a) Termination of Employment Convention (1983) No. 158;
- (b) Tripartite Consultation (International Labour Standards) Convention (1977);

- (c) Right to Organize and Collective Bargaining Convention (1949) No. 98;
- (d) Right of Association (Agriculture) Convention (1921) No.11 and
- (e) Freedom of Association and Protection of the Right to Organize (1948) No. 87.

6.7 PRACTICE QUESTIONS

1. In relation to severance allowance in Employment Law,
 - (i) Define the term 'severance allowance'.
 - (ii) Explain the circumstances under which severance allowance is paid.
 - (iii) How is severance allowance calculated?

2. Titus owns a nursery for children under the age of five called 'Titus Little Rocking Horse'. He has an employee, Sarah, who has worked there for 18 months. Sarah is popular with both parents and the children, who think she is brilliant. However, Titus has received a number of complaints from other staff at the nursery. They have complained to him that Sarah does not do her share of the work and she is always on her mobile phone. The other staff believe that sometimes the children are neglected by Sarah.

Last week, a child fell over and broke her finger when Sarah was supposed to be supervising her. The parents were not concerned as they like Sarah. Titus has now received a complaint in writing from the nursery manager, Emily, who has threatened to resign if he does not 'do something' about Sarah. Emily has told Sarah that her work and attitude are unacceptable, but Sarah has ignored her.

Yesterday, Emily found a pile of dirty nappies that had been put under the windscreen wipers of her new car. Emily had only just collected her new car and she is very upset. She suspects Sarah had put the nappies on her car as Emily had made Sarah empty the nappy disposal units that afternoon.

Required: State any **four** rules that Titus would have to comply with, if he decided to start disciplinary proceedings against Sarah.

3. Identify and comment on any **five** sources of Employment Law in Malawi.

4. Comment on the following forms of disciplinary action that an employer is entitled to, against an employee under the Employment Act.
 - i. Written warning
 - ii. Demotion
 - iii. Suspension.

5. With the aid of decided cases explain how courts determine the difference between an employee and an independent contractor.

6. How relevant is the Labour Relations Act to employment law in Malawi.

CHAPTER 7: AGENCY

7.1 INTRODUCTION

"He who does an act through another is deemed in law to do it himself." This is a maxim of the common law, and it is the basis of the law of agency. Under the normal rule of privity of contract, if one person contracts with another, a third party can derive no benefit, nor incur any obligations, under that contract. However, if one person authorises another to do an act on his behalf, that other becomes the **agent** of the first. The act of the agent, then, under the maxim quoted above, becomes the act of the first person – who, therefore, "steps into the shoes" of the agent, and becomes liable for the act (and able to enjoy its benefits) **as if he himself had done it in the first place**. The agent has no personal liability; he "drops out" of the transaction. In commercial matters, the relationship of agency usually arises as a result of a contract between **two** people, for one (the agent) to effect a contract on behalf of the other. However, this is by no means the only way in which the relationship can arise, nor is the effecting of a contract the only duty an agent can perform. The fundamental principle is that, by the agreement of both parties, the agent is enabled directly to affect the legal relations of another person.

7.2 DEFINITIONS

- (a) **Principal**--The "principal" is the person who agrees, expressly or by implication, that another shall do an act for and on his behalf, and that he shall be **legally bound** by that act. (Note the spelling: it should be a principle to spell "principal" correctly!)
- (b) **Agent**--The agent is the person who acts on behalf of her principal, and **binds** her principal **in law**.
- (c) **Authority**-- The authority of an agent is the act(s) and thing(s) which he is permitted or is authorised to do by his principal, and which will bind the principal. There are several different types of authority – some express, some implied – but, in general the principal will be bound by an act only if that act is **within the authority** of the agent to do on the principal's behalf.

7.3 CREATION OF AGENCY RELATIONSHIP

7.3.1 By Express Agreement

By far the commonest way is by **agreement** between principal and agent. Such agreement can be contractual or not. If contractual, the normal rules of contract apply – that is, there must be **offer, acceptance** and **consideration**. However, an express agency agreement need not be contractual. There may be no consideration, or one or both parties may lack contractual capacity. As we have seen, minors can be both principals and agents, so an express agency agreement between two young people is perfectly valid as between themselves. Alternatively, if it is not intended that legal relations between principal and agent shall subsist, the relationship cannot be contractual. For instance, a husband may agree to be the agent of his wife, or a son agent of his mother and so on. Relations between such parties would rarely have a legally intended basis. Nevertheless, such an agent can effectively bind his principal to a contract, or act in some other way on his behalf. The principal is legally bound by the act of the agent, regardless of whether the relationship *inter se* is contractual or not.

7.3.2 By Implied Agreement

An implied agency arises where both principal and agent have behaved towards each other in such a way that it is reasonable to **infer** from their conduct that they have both agreed to the relationship. The consent of the principal is likely to be implied where he has put another person in such a position that, in accordance with ordinary principles and practice, that person could be understood to be his agent. Consent of an agent to act as such is perhaps easier to imply. It usually arises where he acts on behalf of the principal, although merely doing something that a person requires done does not, of itself, mean that that thing was done on behalf of the requester.

7.3.3 By Estoppel

This arises where the **principal holds out a person as his agent** for the purpose of making a contract with the third party, and the third party relies on that fact. By virtue of having held out the agent as his agent the principal cannot later claim that the agent had no authority to act or had exceeded his authority.

7.3.4 Agency of Necessity

Agency of necessity arises where it is necessary for a person to act on his own initiative to protect the property or interests of another which are in imminent jeopardy as a result of that emergency. If, as a result of such an emergency, a person does of necessity act without any authority to protect another's interest, that person is by operation of law vested with all the rights and immunities of a properly constituted agent. However, the emergency must be **genuine**, and the action taken **necessary**. Such a situation could arise from any number of causes, but most of the reported cases are those of shipmasters before the days of wireless or radio, or carriers of goods who could not contact the owners. Now with modern systems of communication, agency of necessity has become a rare and very limited class of agency. The following three rules have been developed as to what constitutes necessity.

- (a) It must be practically impossible – or, at least, impracticable – for the agent of necessity to **contact** the principal.
- (b) The action taken must be necessary and for the **benefit** of the principal. What is necessary is objective – what a reasonable person would consider necessary, not necessarily what the agent thought to be necessary.
- (c) The agent must have acted *bona fide* in the **interests** of the principal.

7.3.5 Ratification

As we have said, the agent must be authorised by a principal to act on the principal's behalf. Such authorisation may be express or implied. However, if an agent does an act without authorisation, the principal can always "ratify" the act afterwards. If he does so, the act then **binds** him to exactly the same effect as if it had been properly authorised in the first place.

7.3.5.1 What Can Be Ratified?

- (a) Any lawful act which can be done by an agent can be ratified by the principal.
- (b) The principle is that, if an act which is unlawful or voidable when done by an agent can be made lawful (or no longer voidable) by ratification, then that ratification will be valid, whereas if the act

was initially totally void or of no legal effect then no purported ratification can cure what is incurable.

- (c) Example; an agent sells goods belonging to the principal which he has no authority or right to sell. This amounts to the tort of conversion. However, plainly, the principal can ratify the transaction and, by so doing, exonerate the agent from liability.
- (d) Equally, a forgery cannot be ratified. A principal cannot ratify a document which is null and void from its inception.

7.3.5.2 Who Can Ratify an Act?

- (a) Only the person **on whose behalf** an act was purported to be done can ratify that act. That person – the principal – must be in existence and capable of being ascertained at the time the act was done, and must – both at the time of the act and at the time of ratification – be competent to ratify.
- (b) The fact of being in existence normally refers to companies. An agent (promoter) cannot do an act on behalf of a company which has not yet been formed, and subsequently have that act ratified by the company after its incorporation. The agent in that case, as a general rule will be personally liable.
- (c) The principal must also be competent to ratify **at the time of ratification**. A mentally disordered person, for example, cannot ratify while still mentally disordered.

7.3.5.3 Rules and Conditions of Ratification

- (a) Ratification by a principal can have a **retrospective** effect – that is, the principal is, in effect, bound by the contract from the time when it was made by the agent, even though it was ratified only later. This is known as the rule in *Bolton Partners v. Lambert* (1889) 41 Ch D 295 it was **held** in this case that a ratification was effective notwithstanding the fact that a third party had given notice to the principal (between the time when the contract was made by the agent and the time it was ratified) that he was withdrawing from it. The rule does not apply to contracts "subject to ratification".
- (b) Even if the principal initially refuses to recognise a contract purported to be made on his behalf by an agent, and then subsequently changes his mind, this latter ratification will be as effective as if made in the first place – provided, however, that any third party could not be **unfairly prejudiced** by the principal's change of mind.
- (c) However, ratification is not allowed in any case where a third party would be unfairly prejudiced by it.
- (d) A principal must have full knowledge of all **relevant circumstances** relating to the contract before he can properly ratify it – unless, that is, it can be shown that he intended to ratify the agent's act regardless of the surrounding circumstances.

7.3.5.4 What Constitutes Ratification?

There are a number of rules as to what constitutes ratification.

- (a) It may be either **express** or **implied**. Ratification by implication will occur if the principal, by his conduct, shows that he has adopted all or part of the contract. The receipt and retention of money derived from the contract with knowledge of the circumstances will count as adoption.
- (b) If an agent exceeds his authority, mere **silence** by the principal after knowledge of the act will amount to ratification.
- (c) If the principal adopts part of a contract, this will serve to ratify the **whole**.

- (d) Oral ratification of a written contract is valid. However, if the contract is under seal, it can be ratified only by a document in writing and under seal.

7.3.5.5 Effect of Ratification

- (a) As we have seen, ratification is the adoption of the act of an agent who was not previously authorised to do that act, by the principal, so as to bind the principal. Ratification serves to place all the parties involved in the transaction in the same position as they would have been in had the agent been properly authorised from the outset – that is, with the same rights, duties and liabilities.
- (b) In *Cornwall v. Wilson* T. 1750. 1 Ves. 509 an agent contracted to buy goods on his principal's behalf. The contract price exceeded the limit of authority of the factor as agent. The principal subsequently took the goods and disposed of them. **Held:** By disposing of the goods, the principal had effectively ratified the contract, and he was, therefore, bound to pay the factor the full contractual price.

7.4 Categories of agents

The scope for agency relationships is, of course, infinitely wide. Wherever one person acts in matters of contract for or on behalf of another, he is an agent. An agent can act for profit or reward, or can act gratuitously. However, there are various categories of **commercial agent**;

7.4.1 Factors and Brokers

A **factor** is a person who is entrusted with the goods of another – with both their possession and their control – for the purpose of **sale**. A **broker (Stockbroker)**, on the other hand, buys and sells goods, or "things in action", such as stocks and shares, but he does not, normally, have **physical possession** or **control** over the items in which he deals.

7.4.2 Estate Agents

A person employed by the seller of a house to effect a sale is commonly called an estate agent and he is only a **limited** agent. Of course, by express agreement she can be invested with full agency powers, but her implied authority is far less. She has implied authority to **describe the property**, and to bind the vendor in respect of **statements** as to its value, but she does not have implied authority to conclude a **contract of sale** on behalf of the vendor. Nor does she have implied power to receive a **deposit**. In the event that the vendor instructs an estate agent to sell, the agent has implied power only to sign a standard contract of sale, and not one containing special conditions. The agent has a duty to inform her principal of the highest offer received at all times before a binding contract has been entered into.

7.4.3 Auctioneers

An auctioneer is the agent of the seller. (See **Sale of Goods Act**) An auctioneer has implied authority to accept **deposits** and he has a **lien** on the goods he sells for the purchase price.

7.4.4 Bankers

Bankers are good examples of people who act as agents for their customers in respect of certain transactions, while acting in the capacity of debtor and creditor in other aspects of their duties.

7.4.5 Masters of Ships

These are, in many respects, the agents of the owners. They can, in certain circumstances, also act as agent for the cargo owners.

7.4.6 Solicitors

These have implied authority as agents to appear for a client, and accept service of writs, etc. Clients are bound by the actions of solicitors done on their behalf, carried out in the ordinary course of the practice. Both solicitors and barristers have an implied authority as agents to effect compromises on behalf of their clients on matters connected with litigation.

7.4.7 Travel Agents

These are, generally, agents of the client for the purchase of travel tickets and the making of travel arrangements. They may also be the authorised agents of the carriers (e.g. airlines, rail companies) to sell tickets.

7.4.8 Insurance Brokers

These are, *prima facie*, the agents of the client to effect insurance. The fact that the broker's commission is paid by the insurance company does not affect this presumption, nor does the fact that he may solicit business on behalf of an insurance company – provided, that is, he is acting on his own initiative and not under instructions from the insurance company.

7.4.9 Shipbrokers

These are agents who are employed by shipowners to negotiate ships' charters and to carry out all the transactions connected with the vessels while they are in port. The shipbroker attends to the entering and clearing of the ships, and to the collection of freights from the charterers.

7.4.10 Patent Agents

As a general rule, an inventor who wishes to patent an invention employs a patent agent on his behalf. This is, no doubt, owing to the fact that the law and procedure in connection with patents are extremely complicated. All patent agents must be registered.

7.4.11 Commission Agents

These are, generally, employed by foreign principals to buy and sell goods for a fixed commission. For instance a car manufacturer in Japan can have a commission agent to be selling the cars in Malawi on his behalf at a commission.

7.4.12 Del Credere Agents

These are special agents who (for an additional commission) are responsible to their principal for the solvency of and payment of the price by the buyer. The normal agency rule, as we shall see later, is that an agent who effects a sale on behalf of a principal is not liable to the principal if the buyer fails to pay. A *del credere* agent assumes this liability towards his principal. If the buyer fails to pay, the *del credere* agent must do so out of his own pocket.

7.5 Duties of Agents to their Principals

7.5.1 Duty to perform

The fundamental duty of an agent appointed under a contract is to carry out the agency contract in accordance with its terms, express or implied, and not exceed his authority. In *Ferrers v. Robins (1835)* 4 Law J. (n.s.) Exch. 178, an auctioneer was instructed to sell goods for cash only. Instead, he sold them, and accepted a cheque in payment. The cheque was later dishonoured. It was held that the agent was liable for the price.

7.5.2 Duty to obey instructions

An agent is required to comply with all reasonable and lawful instructions given by the principal in connection with the subject-matter of the agency, or the manner of carrying out his duties.

7.5.3 Duty to follow trade or professional custom

The custom or usages of the particular trade or profession often serve to imply terms into a relevant agency contract. (see notes on custom as a source of English law). Before a custom will be inferred into an agency contract, the party who asserts it must provide evidence that it is:

- (a) Reasonable
- (b) Universally accepted in the trade or profession, or in the locality concerned
- (c) Certain, i.e. not ambiguous or vague
- (d) Not unlawful.
- (e) Nor must the custom be **inconsistent** with **other terms** of the contract.

7.5.4 Duty to perform the contract with diligence

It will, normally, be implied in every agency contract that the agent will carry out his duties with reasonable diligence. If he is unable to carry them out within a reasonable time, or is not prepared to, then he has a duty to notify his principal of this fact. In *Barber v. Taylor* (1839) 5 M. & W. 527 an agent was instructed to purchase goods from abroad, and send the bill of lading (document of title in relation to goods being shipped) to his principal. He failed to release the bill of lading until several days after the vessel had arrived in the UK. **Held:** The agent was in breach of contract by failing to deliver the bill of lading within a reasonable time; 24 hours after arrival was considered a reasonable time.

7.5.5 Duty to exercise due skill and care

An agent acting for reward is to exercise such skill and care in performing his duties as is reasonable and normal in the trade, profession or business in which he is engaged. It is that degree that is expected of the **ordinary competent practitioner** in the business or profession concerned, for example a doctor is not judged by the standards of the top Harley Street specialist doctor but by those of the average qualified doctor, and so on.

7.5.6 Fiduciary Duties

An agent is said to be in a fiduciary relationship towards a principal – she is, loosely speaking, in a position of **trust**. An agent must behave honourably and loyally in all her dealings with her principal. Examples;

(a) **Duty to Make Full Disclosure** An agent is required to act in the best interests of his principal; or, at least, in what he reasonably considers to be his principal's best interests. If, as often happens, his principal's interests conflict with his own, he is not automatically barred from acting but he must first make a full disclosure to the principal of his own personal interests in the matter. If full disclosure is made, the principal is then in a position to decide whether to proceed with the matter or whether to find another agent. Examples of where an agent's interests are likely to conflict with those of the principal are if the agent: buys the principal's property, or sells his own property to the principal; receives commission from both parties to a transaction; stands to receive a benefit or a profit from some person other than the principal; is in a position to exploit his/her personal interest as a result of the agency.

(c) **Secret Profits and Bribes** A contractual agent receives an agreed fee or commission for his services. He is **not** allowed to make any additional profits as a result of the agency, unless he discloses them (these are called "secret profits"). Should he do so, the principal can require the secret profits to be handed over to him. A **bribe** falls into the category of secret profits. Where an agent accepts any bribe or secret commission, the principal may exercise any or all of the following remedies, according to the circumstances.

- Dismiss the agent without notice.
- Recover the secret commission from the agent, if it has been paid over or, if it has not been paid over, then from the person who has promised it.
- Bring an action for damages against the person who gave or promised the bribe.

- Refuse to pay the agent any commission or remuneration in connection with the transaction; he/she may recover any commission which has been paid.
 - Repudiate the whole transaction.
- (c) **Using the position as agent to acquire personal benefit** If an agent uses his position to acquire a benefit or secret profit from a third party, he/she is required to account for it to his/her principal.
- (d) **Accounting requirements** Agents are required to keep property or money belonging to the principal separate from their own. It is also their duty to keep proper and accurate accounts of all transactions carried out in the course of their agency. They must produce such accounts and supporting books and documents to the principal or his/her agent on demand. For example law firms are by law required to maintain separate accounts for business funds and clients' (principal's) funds.

7.6 Contracts between a Principal and a Third Party

The general rule – which is of the very essence of the relationship of principal and agent – is that an agent is not liable on contracts which he makes, in his capacity as agent, between his principal and a third party. Although the agent actually makes the contract with the third party, he does so on behalf of the principal, and it is the **principal's** contract. Having made it, the agent, in effect, drops out. We consider exceptions later.

7.6.1 Rights of Agents Against Principals

An agent has got **three** basic rights against his principal; the right to **payment**; the right to **indemnity** and the right to a **lien**.

- (a) **Payment** Where the agency is contractual, and the agent is in the course of a business as such, then remuneration will be payable to him but a non-contractual agent has no entitlement to be paid, and is truly a "gratuitous agent".
- (b) **Indemnity-** An agent is entitled to be reimbursed all expenses **properly incurred** on the principal's behalf, and to be indemnified against all losses and liabilities incurred in the **execution** of the agency. However, an agent is not entitled to indemnity, nor reimbursement:
- (c) Incurred as a result of his/her own negligence or default;
- (d) For any unauthorised act which is not, subsequently, ratified by the principal;
- (e) In respect of any knowingly unlawful act.
- (f) **Lien-** All agents, *prima facie*, have a lien on the goods or chattels of their principals in respect of lawful claims they may have against them for remuneration, charges, loss, or liabilities incurred in the course of the agency. Normally, the lien of an agent is a "**particular**" **lien** – that is, it applies only to goods or chattels being retained by the agent as security against debts or liabilities arising in respect of those particular goods or chattels. In other words, if an agent has in his possession goods in connection with one transaction, he cannot exercise his lien over those goods in respect of debts which arise in connection with a separate transaction. A **general lien** applies to all goods or chattels of the principal which are in the agent's possession, irrespective of how (or in respect of which transaction) the debt or liability arose. For a lien to operate, the agent must be **lawfully in possession** of the principal's goods or chattels. Or possession must be held by a third party for or on behalf of the agent. (See notes on unpaid sellers remedies- lien)

7.6.2 **Authority of Agents** - There are a number of different types of authority, derived from different sources, which an agent may possess as follows;

- (a) **Actual Authority**-- This is the actual authority given by the principal to the agent. It may be **express** or **implied**.
- (b) **Apparent Authority, or Ostensible Authority**-- These are two terms for the same thing. Apparent authority is the authority the agent has **as it appears to others**. An agent can plainly appear to have a certain authority which he does not actually possess.
- (c) **Incidental Authority**--The authority given to an agent will normally be in respect of his primary tasks. However, it is implied that he also has authority to do all such things as are **necessarily incidental** to the performance of the duties given by his actual authority.
- (d) **Usual Authority**--Agents in particular trades or professions usually carry out certain set duties (e.g. insurance brokers, stockbrokers, solicitors). Hence, if a person in one of these trades or professions is employed in respect of that business as an agent, then he is presumed to have the authority to do whatever is usually done by agents in that particular business.
- (e) **Customary Authority**--This is similar to usual authority but it is applied to the customs or usages of a particular **place**, as opposed to a particular business.
- (f) **Presumed Authority**--Certain relationships inevitably involve one person acting as agent for another (e.g. husband and wife or parent and child). In such cases, the agent is presumed to have a certain authority.

7.6.3 Rights and Liabilities of the Principal to Third Parties

- (a) **In Respect of Contracts** - The general rule is that a contract made by an agent on behalf of a named principal is the contract of the **principal**. **The agent steps out once a contract is made**. Hence, the principal can both sue and be sued in respect of it. The agent assumes no personal liability on the contract.
- (b) **Undisclosed Principal** - It sometimes happens that an agent will negotiate or contract with a third party, disclosing that he is an agent but not stating the name of his principal. He may also not even disclose the fact that he is acting as an agent at all. In that case, the third party cannot be expected to be bound by a contract if he does not know with whom he is contracting; even more so if he does not realise that the person with whom he is dealing is not, in fact, the principal at all but acting for some unknown principal.

7.6.4 Liability of the Principal for the Wrongs of the Agent

- (a) **Fraud**-- Fraud by an agent while acting within the scope of his actual or apparent authority does not affect the liability of the principal. The principal is still bound by the act of the agent, even though the agent was acting fraudulently and to further his own interests. However, this rule does not apply unless the agent was actually authorised (whether expressly or by implication), or apparently authorised, to do the act in question. Nor does it, probably, apply if the principal is undisclosed.
- (b) **Torts Committed by the Agent**-- The liability of a principal for torts committed by an agent depends, to an extent, on the **status** of the agent. For example, if the agent is an **employee** of the principal, then the normal law of master and servant applies – this is, the employer is liable for damage or loss caused by the wrongful act of the employee while **acting in the course of his employment**. This is called **vicarious liability**. Thus a driver's act of hitting a pedestrian in the

course of employment will be the liability of his employer (i.e. the employer will be vicariously liable) whilst if the driver was on an unauthorized trip, he will be personally liable.

- (c) **Money Misappropriated by the Agent**-- Where an agent receives money on behalf of his principal and he misappropriates it, he is liable to refund it and may after all be liable to criminal prosecution on an offence of theft by an agent.
- (d) **Notice Given to the Agent**-- A notice given to an agent within the scope of her actual or apparent authority is deemed to be notice duly given to the **principal**. So, if the agent fails to communicate the notice to his principal, the principal will still be liable as if he had actually received it.
- (e) **Bribery of the Agent**-- Any contract made by an agent while under the influence of bribery is voidable by the principal i.e. the principal can chose either to affirm it or terminate the contract.

7.7 Termination of Agency

- (a) **Agreement**- Like any other contract, an agency can be terminated by agreement between principal and agent. This is self-evident.
- (b) **Completion**- If the agency is for a specific task, the authority of the agent automatically ends when that task is **completed**. For example, in *Gillow & Co. v. Lord Aberdare* (1892), an estate agent was commissioned either to sell or to lease a house. He succeeded in letting it but then later negotiated the sale of it. It was **held** that, having let it, his job was done, and he had no authority to sell. He was not entitled to commission on the sale.
- (c) **Expiration**- If the agency is for a specific period of time, it is determined when that time has **expired**.
- (d) **Specified Event**- It may have been agreed, or be inferred, that the agency will cease if a certain event occurs. Then, it will terminate if and when that event **does occur**.
- (e) **Frustration**- The frustration of the contract of agency will serve to terminate the authority of the agent. This is likely to occur if the subject-matter of the agency is destroyed (e.g. if an estate agent is commissioned to sell a house and, before sale, it is burnt down). (See contract notes on frustration).
- (f) **Death/Winding-up**- The authority of an agent, is, normally, terminated by the **death** or **insanity** of either the principal or the agent, or the **bankruptcy** of either. In the case where either party is a limited company, the **winding-up** of the company has the same effect.
- (g) **Revocation**- Lastly, if either the principal or the agent **revokes** the agency or **renounces** it (whether or not the act of so doing is in breach of the contract), the agent's authority will be revoked. If it is done in breach of contract, then the innocent party – principal or agent – will have the right to seek damages for breach of contract. However, this will not affect the fact that the authority of the agent is terminated.

7.8 PRACTICE QUESTIONS

1. Mention the difference between **factors** and **brokers** as agents.

2. How is an agency created?
3. Discuss respective rights and duties of both the principle and the agent.
4. Mention **two** similarities and **two** differences between an employment contract and an agency relationship.
5. When is an agent deemed to have apparent authority?
6. How does an agency arise through ratification?
7. In what circumstances would an agency contract be discharged?
8. Identify and comment on any **five** types of commercial agents.'
9. 'Agency is an exception to the doctrine of privity' discuss.
10. Peter deposited several bales of cloth in a warehouse. Jude, the owner of the warehouse, moved these bales of cloth, based on a reasonable belief that they were at risk of being damaged when a local river flooded. Jude claims that she was an agent of necessity. Advise Jude as to whether an agency of necessity has been created in respect of these bales of cloth.

CHAPTER 8: SALE OF GOODS

8.1 INTRODUCTION

The law of contract applies to any contract. However, various special types of contract have additional rules superimposed on the general ones, which are applicable only to those particular contracts, namely such as sale of goods which is governed by the *Sale of Goods Act*.

It is important to appreciate just what a **contract of sale of goods** is. Section 3 provides as follows: "*A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price*".

It is fairly obvious that the contract must be in respect of "goods". But what are goods? Section 2 defines them as follows: "*Goods includes all personal chattels other than things in action and money; and in particular 'goods' includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale*".

"**Things (or choses) in action**" are intangible rights that cannot physically be handled – such as patents, copyrights, shares, securities, etc. – and "emblements" are products created by annual industry, or the profits of a crop which has been sown. Wheat is an emblement, but grass is not. So, in other words, "goods" covers not only those things which are normally associated with the word, but also agricultural produce, cut timber and so forth.

8.2 Classes of Goods

(a) **Existing Goods** - These present few difficulties. They are goods which are actually in existence – that is, substantially in a state in which the possession of them is capable of being transferred, at the time the contract of sale is made.

(b) **Future Goods** - These are goods which are **not in existence** at the time of the contract. Therefore, there cannot be a sale of them at that time, but only **an agreement to sell** when the goods are actually in existence. Goods that fall into this category may have to be manufactured before they become specific, or they may have to be grown.

(c) **Specific Goods** - Specific goods are not only existing goods but are essentially the actual goods **which will pass under the contract**. If you want to buy 10 sweets the seller takes off from the shelf a packet containing 100 sweets and puts aside 10 sweets- these are the specific goods.

(d) **Ascertained Goods** - Ascertained goods are goods identified by both parties, e.g. "two of those bottles of wine".

(e) **Unascertained Goods** - Goods which are in existence (usually), but which have not been specifically identified as the goods forming the subject-matter of the sale, are "unascertained". When they have been so identified, they become "ascertained".

Formalities - There are no particular formalities required for a sale of goods. Section 4 provides that "*subject to any other Act, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties*".

Price - It is stated in section 10 of the Act that the parties may fix the price or leave it to be fixed in a manner agreed in the contract, or determined by a course of dealing between the parties. But where it is not fixed or agreed in any of these ways, then the buyer must pay a reasonable price.

8.3 PASSING OF PROPERTY

Goods – at least specific goods – are **tangible** things which you can physically handle. But the mere fact that I can handle something does not necessarily mean that I own it. I may have found it abandoned, or have been lent it, or have stolen it. In none of these instances am I the **rightful owner**. There are then four definitions which are fundamental, and which occur throughout the subject. The **Property** in goods is the **ownership** of them – the highest right to those goods that a person can have. **Title** to goods is often used as being synonymous with "property". But strictly means **evidence of ownership** e.g. title deeds as evidence that one has property (ownership) in a piece of land; bill of lading for proof of ownership of goods being transported by a ship (or Motor Vehicle Registration Certificate popularly known as the blue book for proof of ownership of a motor vehicle) . **Possession** is the **physical control** of the goods, or possession of them. It has no necessary connection with the property in them. If I steal something, I have possession of it, but I do not have the property in it, nor any title to it. Indeed, I do not even have a **right** to possess, and the right to possess may be vested in X, neither in me nor in the owner. **Risk** in goods is the responsibility for loss, damage or destruction of those goods. It is not necessarily coincident with either property in or possession of those goods.

The seller of goods must have title to them. Breach of this condition permits the injured party – in this case, the buyer – to rescind the contract, and not merely rely on damages. By the same token, as the seller has no right to sell the goods, the buyer acquires no title to them.

The Effect of Passing of Property - The effect of passing the property in goods to the buyer is to transfer to him the title and full legal interest in the goods, subject only to any rights in the goods retained by the seller or by any third parties. It is a condition of the contract that any such retained rights are first disclosed to the buyer. Before the property has passed, the seller can dispose of the goods to a third party, albeit in breach of contract with the buyer, and the third party will thereby acquire a good title to them. The reason is that the title is still vested in the seller until the property passes, hence he/she is at liberty to pass that title to someone other than the buyer. The disappointed buyer is, of course, entitled to damages for breach of contract, but not to the goods themselves. The **exact point in time** when the property **passes** is most important in the event that either buyer or seller goes bankrupt (or, in the case of a company, into liquidation or receivership). In the event of the seller becoming insolvent while still in possession of the goods:

- (a) If the property **has passed** to the buyer, he/she can, on tendering the price, demand the goods themselves from the liquidator or trustee in bankruptcy.
- (b) If the property **has not passed**, all the buyer can do is to seek damages for breach of contract. If the seller is hopelessly insolvent, this right may be worthless.

The **Sale of Goods Act section 20**, provides rules as to when the property in goods sold passes.

8.4 Specific Goods

The cardinal principle is that the property passes when the parties to the contract **intend it to pass**. Rules as to when property passes;

(a) Rule 1

"Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed." So, under this Rule property passes **when the contract is made**. In *Kinsell v. Timber Operators and Contractors Ltd* [1927] 1 K. B.928, it was agreed that all timber of a given height in a specific Latvian forest be sold. The buyer had 15 years in which to cut the timber. Shortly after the contract was made, the forest was expropriated by the state. **Held**: The timber sold was not "*specific goods*" as some of it had not at the time reached the minimum height, so

could not be identified at the date of the contract. As a result, the property in the timber had not passed under Rule 1. This case shows the difference between ascertained and specific goods.

(b) Rule 2

"Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done."

(c) Rule 3

"Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done." The essential point of this Rule is that the thing to be done must be for the purposes of ascertaining the **price**, and it must be an **obligation of the seller** to do it.

(d) Rule 4

"Where goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:

(i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(ii) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection then, if a time has been fixed for the return of the goods, on the expiration of that time, and if no time has been fixed, on the expiration of a reasonable time."

In **Elphick v. Barnes** (1880) 5 C.P.D. 321, a potential buyer took possession of a horse on condition that he could try it for eight days, and if it was not suitable, he could return it. On the third day, the horse died through no fault of the buyer. **Held:** He was not liable for the price. But if the buyer is unable to return goods held on approval or sale or return because they have been lost or destroyed through some act or default of his own, or of those for whom he is responsible, then he will be liable for the price.

Unascertained Goods

The last categories of goods to which the rules for the passing of property apply (in the event that the intention of the parties is not expressed or implied) are unascertained and future goods.

Rule 5

"Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made..." A contract for the sale of unascertained goods or future goods is not in reality a contract of sale, but an "agreement to sell". Hence, obviously, no property in such goods can pass until (in the first instance) the goods have become specific, or (in the second), they have been produced and also become specific.

Reservation of the Right of Disposal, Commonly Called "Retention of Title" – Section 21 of the Act permits the seller of specific goods, or of goods which are subsequently appropriated to the contract, to reserve the right of disposal of the goods until specified conditions are met. Notwithstanding delivery, the property in goods does not then pass until those conditions have been met. **"Reserving the right of disposal"** means that the seller has the right to prevent the buyer from dealing with the goods as if they

were his/her own, notwithstanding that he/she has possession of them. The usual condition is payment of the price. If the seller does this, then as between buyer and seller, if the buyer in breach of the contract does dispose of the goods by, say, selling them to a third party, then he will be liable to the seller for "conversion". But as between the buyer and the third party, if the third party takes the goods without knowledge of the original seller's reservation of lien, then he, the third party, acquires a good title.

In *Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd (1976)*, now always referred to as "*Romalpa*", the facts were as follows. A sold Romalpa aluminium foil, reserving the right of disposal with these conditions:

- (a) Property was to pass only when **all** sums owing to A had been paid.
- (b) Romalpa was to store the foil so that it was shown to be the property of A.
- (c) Articles manufactured from the foil were to become the property of A as surety for full payment.
- (d) Romalpa were to hold such articles for A in their capacity as "fiduciary owners", i.e. as it were, as trustees for A, their equitable owner.
- (e) Romalpa were entitled to sell such articles, but only on condition that they would hand over to A such rights as they possessed against sub-purchasers.

Romalpa duly manufactured articles from the foil, and sold them. Sub-purchasers paid Romalpa, but Romalpa went into receivership owing A money. A sought to recover unused foil, and claimed they had a charge over money received from sub-purchasers. **Held:** By reason of the relationship of bailor and bailee, a fiduciary relationship arose, and A were entitled to claim the proceeds of the sub-sales in priority to general creditors.

8.5 TRANSFER OF TITLE BY NON-OWNERS

"Nemo dat quod non habet" Literally translated this means "no one may give what he does not have". It is a general maxim of English law that no one can transfer a better title than he possesses himself. There are, however, exceptions. In *Bishopsgate Motor Finance Corporation Ltd v. Transport Brakes Ltd* [1949] 1 KB 332, Denning LJ expressed it thus: *"In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."*

Exceptions to the 'Nemo dat' rule

- (a) **Estoppel** - The Act recognizes the nemo dat rule but goes further to provide that if a person leads someone to believe a certain fact, and that person reasonably acts on that belief, and suffers loss as a consequence, then the representor will be estopped from denying its truth.
- (b) **Sale under a Voidable Title** - A "voidable title" is one whereby a person who is in possession of goods and is the apparent owner of them in fact does not possess a good title. The true owner can assert his better right to goods, and "avoid" the possessor's title. Section 24 of the Act gives protection to a person who buys in good faith and without notice of the seller's defective title, by providing that the buyer in such circumstances acquires a good title to the goods, provided the true owner has not at the time of sale avoided the seller's title.

(c) **Seller in Possession of Goods** Section 26 of the Act provides another exception to the "nemo dat" rule. This section reads as follows:

"Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same".

As we have seen, the usual rule is that the property in goods passes to the buyer when the contract is made. He/she is therefore the owner of them. But if **after** the contract of sale is made, but before delivery to the buyer, the seller, inadvertently or otherwise, sells the goods a second time, and delivers them to the new buyer, then that new buyer gets a good title to them. The seller has no title which he/she can pass, but, notwithstanding, the second buyer acquires a good title. The original buyer is, of course, left with a remedy of damages against the seller for breach of contract.

The essential things to remember are that the seller must remain in **possession** of the goods or documents of title to the goods (e.g. a bill of lading), **and** he/she must actually **transfer** the goods or the documents of title to the second buyer. Only then does the second buyer get a good title.

(d) **Buyer in Possession of Goods** - Exactly the same result obtains if a **buyer** has possession of goods with the seller's consent, and before the property has passed the buyer sells or disposes of them, or of documents of title, to a sub-buyer. Provided the sub-buyer acts in good faith without knowledge of any lien of the original seller, or lack of title of the buyer, then he acquires a good title if the goods, or documents of title to them, are actually transferred to him.

8.6 RISK

The "risk" in goods is the responsibility for loss, damage or destruction of those goods. It is not necessarily coincident with either property in or possession of those goods. Risk must always be borne by a party to the sale of goods contract or his insurer; it cannot be in limbo! The general rule is that risk passes with property unless agreed otherwise. The **SOGA section 22** provides as follows;

"Unless otherwise agreed, the goods remain at the seller's risk until property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not"

This means that risk passes with property and not possession. So far the normal rule is that property passes when the contract is made. The goods will be at the buyers risk from that time, notwithstanding that he has not got possession. Should the goods be accidentally damaged or destroyed while still at the seller's premises, in circumstances which are not due to the fault of the seller, then it will be the buyer's loss. His insurance policy may as well not cover such an eventuality. The Act provides that if delivery of goods is delayed through the fault of either party, then the **party at fault** bears the risk of any loss which might not have occurred but for such fault.

8.7 FRUSTRATION

(Recall the concept of frustration in contract law- *Taylor v Caldwell* Frustration of a contract occurs by **operation of law**, and not by agreement between the parties, when some outside event occurs without the fault of either party, and which could not reasonably have been foreseen, which renders the contract something totally different from what the parties had bargained for. The principles of frustration apply to contracts for the sale of goods exactly as they apply to any other contracts. The **Sale of Goods Act** provides as follows;

*"Where there is an agreement to sell **specific goods** and subsequently the goods, without fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided "*

Note that frustration applies to specific goods that perish and not unascertained goods that perish. In the case of unascertained goods that perish the seller will normally be in a position to obtain alternative supplies from elsewhere. This is probably the reason why the Act makes no mention of the matter. (*See the Chapter on frustration under the law of contract*)

8.8 DELIVERY

The Act states: *"It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale"*. At first reading, this may well appear to be a particularly unnecessary statement of the obvious. But there is more to it than meets the eye. In the first place, "delivery" in ordinary speech implies **transportation** – the physical act of moving the goods from seller to buyer. In law, this is not necessarily the case. Section 2 defines "delivery" as the "voluntary transfer of possession from one person to another". So there is no need for any **physical movement** at all. If you buy something in a shop, it is "delivered" when it is handed to you after payment. Equally, goods lying in a warehouse are "delivered" when the seller signifies to the warehouse that they are to be held for or to the order of the buyer. If a document of title (e.g. a bill of lading) is transferred, it constitutes "delivery" of the goods.

Secondly, as we have already seen, the property in and possession of goods are not the same thing. Property may well have passed, but in order for the buyer to get physical possession, the act of **delivery** is necessary to complete the transaction. Further, the delivery must be **voluntary**. If the buyer just walks in and takes the goods that is not delivery. At best it is "conversion", at worst theft!

Thirdly, the seller must deliver the **particular goods** contracted for, if the contract is one for the sale of specific goods. He/she cannot deliver other goods which are similar.

Fourthly, the buyer has a duty to **accept** the goods. The seller may be ready and willing to deliver, but if the buyer refuses to accept, the sale remains incomplete.

Fifthly, the buyer must **pay** for the goods. The **time of payment** depends on what has been agreed in the contract, or has become the usual time through a course of dealing. The Act provides that

"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods".

This is, of course, the normal arrangement when buying something from a shop. Lastly, the expenses of putting the goods into a **deliverable state**, and expenses incidental to this, are, unless otherwise agreed, the responsibility of the **seller**.

Method of Delivery - Goods can be delivered in any way the parties agree. It may be direct from seller to buyer, or they may be delivered to a third party nominated by the buyer. Alternatively, delivery may be **constructive**; for example, handing the buyer the keys of a room in which the goods are stored, or the keys of a car that he/she has bought. The delivery of **shipping documents**, such as a bill of lading, is also constructive delivery of the goods.

Time of Delivery - If a time is stated in the contract for the delivery of goods, it may be a **condition** of the contract, breach of which entitles the buyer to rescind the contract and refuse to take delivery; or it may be a **warranty**, which entitles the buyer only to seek damages for any loss entailed by reason of late delivery. If the contract does not expressly state that time shall be of the essence, or make any other statement to the same effect, the common law looks to the **nature** of the contract and the **character** of the goods dealt with to resolve the question.

Quality of Goods Delivered

The Act makes provision for the buyer's rights should the seller deliver the wrong quality of goods. The seller has a strict duty to deliver the precise quantity stipulated in the contract, and if he/she fails to do so the buyer is entitled to reject them. Section 30 sets out the buyer's options:

- (a) Where the seller delivers **less** than the correct quantity, the buyer may reject them all. But if he does accept what has been delivered, he must pay pro rata at the contract rate (e.g. if the contract was for ten articles at K1 each, and eight are delivered, then if the buyer accepts them he must pay K8).
- (b) Where the seller delivers **more** than the contract quantity, the buyer has **three** options— she can reject them all; or she can accept the correct quantity and reject the rest; or she can accept the whole lot, and pay at the contract rate for all.
- (c) Where the seller delivers the correct type of quality of goods **mixed with others of a different description** not included in the contract, the buyer can reject the whole, or he can accept the correct goods and reject the incorrect ones. Although the Act does not in this instance specify, it must be implied that if the buyer adopts the latter option, he must pay at the contract rate for the goods he **accepts**.
- (d) Finally there is a let-out, in that the section is "*subject to any usage of trade, special agreement, or course of dealing between the parties*".

Delivery by Instalments -S.32(1) states that: "*unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments*". That is quite straightforward. However, if the contract does provide for delivery by instalments, various things can go wrong. So in the event of a breach of contract by either one or more instalments not being delivered, or being incorrectly delivered, or the buyer failing or refusing to accept one or more instalments, then the court must look at the whole circumstances. If the contract can properly be "**severed**" so as to treat each individual instalment as if it were a separate contract, then the innocent party will be bound in respect of the correct instalments. He will, of course, be able to seek damages for any loss, but will not be allowed to rescind the whole contract. If, on the other hand, the contract cannot be severed, and is in reality one entire entity, albeit being performed at different times, then the innocent party will be entitled to rescind the whole.

8.9 ACCEPTANCE AND PAYMENT

Like many words in law, "acceptance" of goods is not necessarily used in its literal sense. It is not always the same as taking delivery. For instance, a carrier drops a consignment of goods at your premises. You move them into the warehouse pending examination. Later you inspect them, find they are not what you ordered, and promptly inform the supplier that you reject them. **You have physically taken temporary possession of those goods, but you have not "accepted" them.**

The SOGA, section 36, provides that the buyer is deemed to have accepted the goods:

- (a) when he **intimates** to the seller that he has accepted them, or
- (b) when the goods have been delivered to him and he does any act in relation to them which is **inconsistent with the ownership** of the seller; the buyer must be given a reasonable opportunity of examining the goods
- (b) If after **lapse of a reasonable time** the buyer retains the goods without intimating that he has rejected them. If the buyer intends to reject the goods, he must therefore inform the seller promptly. If he fails to do so, he will be deemed to have accepted them. What constitutes a "reasonable time" depends on the circumstances.

Payment - It is the **buyer's duty** to pay for the goods in accordance with the contract of sale. According to the Act, delivery of the goods and payment of the price are concurrent conditions, unless agreed otherwise. Now a term as to payment should include not only the **amount**, but also the **method** (e.g. **cash, cheque, credit transfer e.t.c.**), the **time**, and the **place** of payment.

8.10 STATUTORY IMPLIED TERMS AS TO DESCRIPTION AND QUALITY

(a) Correspondence with Description The Act states that: "*Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description*". "sale ... by description" falls into two types:

- (i) A sale of unascertained or future goods will almost invariably be such. If a seller purports to sell, say, 500 tons of "*best Welsh steam coal*", that is a sale of unascertained goods, and it is a sale by description. Likewise an agreement to sell "*the whole crop of 20-20 Hybrid Maize to be grown at Byumbwe Farm*" is a sale of future goods by description.
 - (ii) Where specific goods are sold, and the seller either describes them, or a description can be inferred as having been given from the circumstances, it is a sale by description. **Beale v. Taylor [1967]** 3 All ER 253, a car was advertised for sale as a "*Herald Convertible 1961*". Actually the car consisted of two parts welded together, only one of which was from a 1961 model. **Held:** The description "*1961*" was a contractual condition.
- (c) Fitness for the Purpose** -Goods must be fit for their purpose. In **Priest v. Last** (1903)2K.B.148, a customer in a shop asked for "*a hot water bottle*". When it burst it was **held** to be unfit for the purpose. It often happens that goods can be suitable for a number of different purposes, in which case the buyer must indicate, expressly or by implication, **which particular purpose** he requires, in order for the seller to be liable. The Act does not require goods to be perfect; merely reasonably fit for the purpose. In **Griffiths v. Peter Conway Ltd** [1939] 1 All ER 685, a thread coat was bought by a lady with unusually sensitive skin. She subsequently got dermatitis from wearing it. **Held:** The coat would not have harmed a normal person, so the seller was not liable.
- (d) Sale by Sample** -Goods are, of course, frequently sold by sample. A small piece or quantity is brought by the seller for the buyer's inspection. The bulk is then sold on the strength of an examination of the sample.

(i) The first point to notice is that the Act provides that a sale is by sample only if the contract says so, or it can be implied. The mere exhibition of a sample during negotiations does not of itself make the subsequent sale one by sample.

(ii) The word "*bulk*" can include both unascertained and specific goods. It can also include future goods which have to be manufactured.

(iii) The bulk must correspond with the sample in **quality**. The degree of correspondence is somewhat subjective, and depends to an extent on the type of goods and the intentions of the parties.

(iv) The buyer must have a reasonable opportunity of comparing the bulk with the sample. (v) The goods must be free from any defect, rendering them unsatisfactory, which would not be apparent on reasonable examination.

(vi) The condition applies to **any sale by sample** and is not confined to sales 'in the course of business' as is the case with 'fitness for purpose'.

8.11 REMEDIES OF THE SELLER

(a) Remedies Affecting the Goods (called 'real' remedies)

(i) **Lien** A lien is the right of a person such as a bailee, in possession of goods, to retain (keep) those goods until any claim he has on or in respect of them has been satisfied. Example; If you leave your car with a garage for repairs or servicing, the garage has a lien on it, and a right to retain it until you have paid the bill. The "**waiver**" of lien can arise in a number of ways. It can be express, as a term of the contract, or more commonly waiver can be implied from the **seller's conduct**. The granting of credit at the time of the contract amounts to a waiver for the period of credit. Should the seller deal with the goods in a manner inconsistent with the right of retention, she will be deemed to have waived her lien. For instance, if she wrongfully sells the goods to a third party.

(ii) **Stoppage in Transit** The principle is that normally once a seller delivers goods to a carrier for transmission to the buyer, he loses his right of lien. Hence if the seller is unpaid, and during the course of transit the buyer becomes insolvent, then the unpaid seller can reassert his lien by instructing the carrier not to deliver the goods to the buyer and instead hold them to the seller's order. It is important to note that the right of stoppage in transit arises only if the buyer becomes **insolvent**. It cannot be exercised merely because he does not pay. Exercise of this right does not automatically terminate the contract. It is merely a right to repossession of the goods until such time as the buyer pays or until the contract is rescinded and a right to resale by the seller arises. The essential thing is that during transit the goods must be in the **possession of a third party or "intermediary/ middleman"** who is neither the buyer, the seller, nor the exclusive agent of either. When notice of stoppage in transit is given, by the seller to the middleman, he is under a duty to redeliver the goods to the seller, or deal with them in accordance with the directions of the seller. Note that stoppage in transit is appropriate where property has not passed. You cannot have a lien over your own goods!

(iii) **Resale** A lien on goods, or a right of stoppage in transit, would be of only limited value to an unpaid seller if he did not also have a right to resell the goods. The difficulty is that the contract of sale is not rescinded by the exercise of a lien or stoppage in transit by the seller. Hence, unless a power of resale is given, the unpaid seller would be in breach of contract if the **property** in the goods had passed to the buyer. If it had, he could not pass a good title to the sub-buyer. Section 48(2) therefore provides that on a resale after exercise of lien or stoppage in transit, a sub-buyer acquires a good title as against the original buyer. If the resale is wrongful, the original buyer can claim damages.

(b) Other Remedies of the Seller (also called 'personal' remedies)

The other remedies are "personal" because they are applicable to the defaulting **buyer himself**, and are quite irrespective of the actual goods. Personal remedies can be sought either in addition to, or in substitution for, the real remedies.

(i) **Claim for the Price** An action for the price is distinct from a claim for damages. The price is an amount fixed by the contract, and is a **debt** owing from the buyer to the seller. Damages, on the other hand, are the **loss** suffered by the seller in respect of the buyer's breach of contract. The amount of loss has to be **proved**, and it may be more or less than the price. (See contract notes on damages)

(ii) **Damages**--The alternative remedy where the buyer wrongfully neglects or refuses to accept the goods, or wrongfully rejects them, is an action for damages for "non-acceptance". By the nature of it, the seller is necessarily repossessed of the goods, and if they are of a type for which there is a market he/she can resell them The Act says that "*the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract*". (See contract notes on damages)

(c) Miscellaneous Remedies

There are various additional remedies which may be available to the seller for instance:

- (i) Recovery of possession of the goods under a specific term of the contract;
- (ii) Damages for the tort of "conversion" for wrongful interference with goods;
- (iii) Forfeiture by the buyer of deposits or pre-payments;
- (iv) An order for specific performance of the contract.

8.12 REMEDIES OF THE BUYER

Damages - For obvious reasons, the "real" remedies of lien and stoppage in transit (remedies attached to the **thing**) are not possible for a buyer in the event of breach of contract by the seller. His principal remedies are **damages** for the various types of breach which the seller may make.

(a) **Damages for Non-delivery**

(b) **Damages for Delay in Delivery**

(c) **Damages for Defective Quality**-(See *Priest -v- Last* above)

Other Remedies

The principal additional remedy in the case only of specific or ascertained goods is an order for **specific performance** i.e. an order that the goods be sold to the original buyer and not anyone else.

8.1 PRACTICE QUESTIONS

- 1) How is a contract of sale of goods defined under the SOGA?
- 2) Identify and explain any five types of goods.
- 3) Distinguish **property** from **possession** and **risk**.
- 4) How does property pass in goods under section 20 of the SOGA?
- 5) Discuss the relevance of the *Romalpa Case* (1976) in sale of goods contracts.
- 6) Write an essay discussing the *nemo dat rule* and its exceptions.
- 7) How may a contract of sale of goods be discharged?
- 8) What is meant by delivery in sale of goods contracts?
- 9) To what extent does the SOGA protect the buyer?
- 10) Explain implied terms in relation to description and quality of goods.
- 11) What remedies does an unpaid seller have?
- 12) Distinguish **real** from **personal** remedies of an unpaid seller.

CHAPTER 9: NEGOTIABLE INSTRUMENTS

(Bills of Exchange, Cheques and Promissory Notes)

9.1 BILLS OF EXCHANGE

The term "negotiable instrument" encompasses a wide variety of documents, e.g. bank notes, promissory notes, debentures and exchequer bills (treasury bills). Much of the law relating to bills of exchange applies equally to such instruments. Note that any document is capable of being called a "negotiable instrument" as long as the following conditions are met:

- (a) The holder of the instrument may **sue in his/her own name**.
- (b) **Title** to the instrument must pass on delivery, or on delivery and endorsement.
- (c) A "holder in due course" takes the instrument **free from the defects in title of his/her predecessors**.

Negotiable instruments are an essential part of a business-orientated society because of the ease with which they can be transferred from one person to another.

9.1.1 Definition

Section 3 of the **Bills of Exchange Act** defines a bill of exchange as: *"An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer."*

The following example of a bill of exchange will be useful to you.

K10 million	Blantyre, 30 April 2014
ACCEPTED W. W. HAPUWANA	
Sixty days after date, pay to the order of James Chipeta the sum of Ten Million Kwacha for value received.	
J Phiri	
To: W. W. Hapuwana, Mulanje.	

Note the various parties:

- (a) J Phiri is the **drawer** of the bill.
- (b) W. W. Hapuwana is the **drawee** of the bill, and he has also become the **acceptor** by writing his name across it.
- (c) James Chipeta is the **payee** of the bill.

Endorsement of Bills Of Exchange

Bills of exchange can be endorsed in blank, restrictively, specially, conditionally and with qualification:

- (a) **Endorsement in blank** refers to the situation where a segment of the bill is left unfilled e.g. on the amount or payee section. Such bills are normally made payable to bearer e.g. pay cash. A use for this type of endorsement can be where an accountant signatory has left the office for say a holiday but payments still need to be

made in his absence. He just signs the cheques and they will be filled by his assistant to the amount of present needs.

(b) **Restrictive endorsement** refers to situations where a bill has been barred from further negotiation once it has been negotiated over to the payee e.g. pay James only. A use for this can be where a parent is sending pocket money to a spendthrift child and wants to make sure the money from the bill gets in his hand instead of being pledged over to say a gambling debt.

(c) **Special endorsement** is similar to restrictive endorsement in that the payee is specified. However the payee has the liberty to negotiate the bill to a person of his choice e.g. pay James. This can be used in normal salary payments at work. It allows for the employees payment to be secured to his use alone while giving him room to deal with his pay as he wishes.

(d) **Conditional endorsement** is where a condition is attached to the payment of a bill e.g. pay James if he tenders in the shipping documents. This can be useful where parties are contracting from far off places. The drawee can be used as an agent for the payor to ensure that the payee receives his payment only upon proof that he has fulfilled his part of a contract e.g. like in Banker's Commercial Credits.

(e) **Qualified endorsement** is where payment is qualified to be made either at a specific place, to specific people, at a specific time etc e.g. pay James on 20 December. This type of endorsement can be used where you are paying off installments on a hire purchase contract. Several bills can be written qualified to different dates in future months on which each installment falls due.

9.1.2 Important Terms

- (a) The order to pay must be **unconditional**. For example, if the drawer stipulates "provided the balance in my account amounts to K100,000", this is not a bill of exchange since there is a condition imposed. If the bill orders payment to be made out of a particular fund, this is invalid as it is conditional on the fund being adequate to meet the bill, but if the drawee says "pay the bill and debit" a particular fund, this is in order since the acceptor can allow an overdraft.
- (b) The instrument must be in the form of an **order**. To say "I shall be pleased if you will pay ..." is not an order but a mere request, but the expression "please pay ..." is a polite order.
- (c) The instrument must be **in writing**. This includes print and typewriting.
- (d) The instrument must be **signed** by the drawer, i.e. the person who makes out the bill of exchange.
- (e) The instrument must be an order **to pay**. If the instrument orders any act to be done in addition to the payment of money, it is not a bill of exchange.
- (f) It must be to pay a **sum certain in money**. An order to pay "all moneys due" is not a bill of exchange, but if the bill is drawn for a certain amount "plus interest" this will be a valid bill. If the rate of interest is not otherwise stated, it will be taken as 5%.

- (g) Payments may be expressed to be made **on demand**. This means that the bill must be met when the holder presents it for payment, whenever that might be. Note that, where no time for payment is expressed in the bill, it will be treated as **payable on demand**.
- (h) Instead of being payable on demand, it may be payable **at a fixed or determinable future time**, e.g. "three months after date".
- (i) Payment may be expressed to be made **to bearer**, which means that the acceptor must pay the sum stated to whoever is the holder of the bill when it is duly presented for payment, i.e. the bill specifies no particular payee.
- (j) It may be payable **to, or to the order of, a named payee**, in which case the drawer will have named the payee in the bill; but she can pass on the bill to someone else if she endorses it to this effect.

9.1.2.1 Note the following points concerning **payees**:

- (a) A bill not payable to "bearer" must indicate the payee with **reasonable certainty** or it will be inoperative.
- (b) Where the payee is a fictitious or non-existent person, the bill may be treated as **payable to bearer**; (later).
- (c) A bill may be drawn payable to two or more payees **jointly**, or it may be drawn payable to one of two (or several) payees **in the alternative**.
- (d) A bill drawn in favour of the **drawer himself** will be a valid bill, e.g. making a cheque out to "Cash" or "Self".
- (e) A bill may be drawn payable to the holder for the time being of a **particular office** e.g. the president of Malawi.
- (f) A bill drawn for "Cash" (usually a cheque) will generally be treated as **payable to bearer**.

9.1.2.2 The following points about **drawees** should be noted also:

- (a) Where the drawer is a fictitious person, or a holder not having the capacity to contract, the holder may treat it there and then as **dishonoured**.
- (b) Where the drawer and drawee are the same person, again the bill may be treated as either a **bill of exchange** or a promissory note.
- (c) Where the drawee is not indicated with reasonable certainty, but someone "accepts" it, the instrument may be treated as a promissory note.
- (d) A bill may be addressed to two or more drawees jointly, but an order to **alternative drawees** will not constitute a valid bill and will be of no effect

9.1.3 Acceptance (section 17)

The term "acceptance" used in relation to bills of exchange has a special meaning. In common parlance, a person to whom something is given takes or accepts that thing, but you should be careful to avoid this use of the word when talking about bills of exchange. Acceptance of a bill of exchange is the signification by the drawee that he accepts **the order of the drawer to pay over the sum stated to the payee**. A bill of exchange is used by a debtor to settle his account with a creditor, but, it being an **order** to someone else to pay the sum stated (as opposed to a **promise** by the drawer to pay), the creditor is not normally going to take the bill of exchange in settlement unless the drawee acknowledges that he will meet the bill (and, in addition, is a person of substance); until he does make such acknowledgement, the drawee is under no liability on the bill.

In practice, the bill is normally handed to the payee to present it to the drawee for acceptance. If the drawee agrees to pay the bill, he will sign his name across it, and by that act he accepts the liability to meet the bill when it is duly presented for payment. You may, at this stage, ask why a third party should

undertake to pay a bill of exchange drawn by a debtor to settle an account with a creditor. The answer is simply that the person drawing the bill will have an arrangement with the drawee to reimburse the cost of any bills met. This, of course, leads one to the question, why go through this procedure of drawing a bill of exchange instead of the creditor just waiting for the debtor to pay? The answer to this is that, by using a bill of exchange, the supplier can send the debtor goods on credit even if he is not sure of the latter's credit status, because before he releases the goods he receives this document, accepted by a person on whose credit he knows he can rely.

Nowadays, bills of exchange are most commonly used in international trade and are drawn on bankers. You will appreciate how useful an arrangement that allows goods to be sold on credit to someone whom the seller has never heard of, and against whom he would have great difficulty in bringing an action for recovery of the debt.

9.1.4 Presentment for acceptance

Although a bill must be presented for acceptance and accepted by the drawee in order to render the latter liable on the bill, it is not in fact **necessary**, as a general rule, for the holder of a bill to present it for acceptance. He can hold on to it, unaccepted, until maturity, or negotiate it to a third party, although a bill that has not been accepted will in practice be much harder to pass on for value.

9.1.5 Requirements of valid presentment

The Act lays down the following requirements for a valid presentment for acceptance:

- (a) The presentment must be made **by or on behalf of the holder to the drawee** or some person authorised to accept or refuse acceptance on his behalf.
- (b) Presentment must be at **reasonable hour**, on a business day, and before the bill is overdue.
- (c) Where the bill is addressed to two or more drawees, who are not partners, presentment must be made to **them all**, unless one has authority to accept for all, in which case presentment may be made to him alone.
- (d) Where the drawee is dead, presentment may be made to his **personal representative**.
- (e) Where the drawee is bankrupt, presentment may be made to **him or to his trustee**.
- (f) Where authorised by agreement or usage, a presentment through the **post office** is sufficient.

9.1.6 Requirements of Valid Acceptance

For an acceptance to be valid, it must:

- (a) Be written on the bill and be signed by the drawee.
- (b) Not express that the drawee will perform his promise by any other means than the payment of money.
- (c) Acceptance is incomplete and revocable and does not bind the acceptor until the bill has been delivered – that is to say, handed back to the person presenting it, with the signature of acceptance on it.

9.1.7 Dishonour by Non-acceptance

If the drawee is not prepared to meet the bill, he will return it to the holder with a note to this effect, and the bill is then said to be **dishonoured by non-acceptance**. The holder then knows that the debtor has

given him a valueless scrap of paper, and will commence proceedings against him (the debtor, the drawer of the bill, not the drawee) to recover his **debt**. (The position of the holder of a dishonoured bill is dealt with later). In certain circumstances, the bill can be treated as dishonoured by non-acceptance without ever having been presented for acceptance; these circumstances are where:

- (a) The drawee is dead or bankrupt
- (b) The drawee is a fictitious person
- (c) The drawee is a person not having the capacity to contract.

Qualified Acceptance- Any acceptance that varies the effect of a bill as originally drawn is termed a qualified acceptance. A qualified acceptance may be any of the following:

(i) Partial-- An acceptance to pay only part of a bill, e.g. a bill drawn for the amount of K10 Million may be accepted for K8 million only.

(ii) Local-- An acceptance to pay the bill only at a certain place; the acceptor stipulates that he will pay the bill at this place only, and nowhere else.

(iii) Conditional-- An acceptance to pay the bill only on fulfilment of a certain condition (e.g. an acceptance to pay the bill on delivery of the bills of lading).

(iv) Qualified as to Time-- An acceptance say to pay a bill drawn payable after one month, only after six months.

If the holder of the bill takes such a qualified acceptance, this has the effect in most cases of discharging from liability all prior parties to the bill except in so far as any prior party consents to the holder taking such qualified acceptance. The holder of a bill who is offered only a qualified acceptance is entitled to reject it and to treat the bill as dishonoured by non-acceptance.

9.1.8 Manner of Transfer of a Bill of Exchange

One of the features of bills of exchange is that where A gives B a bill accepted by X in settlement of her debt, this same instrument may be passed on by B to C in settlement of a debt between them – both B and C relying on the credit of X. A number of formalities are laid down for the legal assignment of rights under a contract for example, transfer of land can only be effected by a written contract **BUT** in the case of bills of exchange and other negotiable instruments, no such formalities are necessary and the debtor need not even be informed. The transfer of a negotiable instrument is termed "negotiation", and S.31 of the Act provides as follows.

(a) A bill is negotiated when it is transferred from one person to another in such a manner as to make **the transferee the holder of the bill.**

(b) A bill payable to bearer is negotiated **by delivery.**

(c) A bill payable to order is negotiated by the **endorsement of the holder completed by delivery.**

Transfer of the instrument in this way is enough to vest the property represented thereby in the transferee, and no further formality is required.

9.1.9 Transferee's Title: "Holder in Due Course" (section 29)

Section 29 defines a **Holder in Due Course** as “*a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely: (i) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact. (ii) That he took the bill in good faith and for value and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.*”

Let us now examine the definition in detail:

- (a) **Holder**: the Act defines a holder as "*the payee or endorsee of a bill who is in possession of it, or the bearer thereof*".
- (b) **Complete bill**: a person who takes an inchoate bill before it is completed cannot be a holder in due course.
- (c) **Regular bill**: a bill must meet the requirements of the statutory definition, and all endorsements must be there.
- (d) **Before it is overdue**: a person taking a bill of exchange after maturity cannot be a holder in due course.
- (e) **In good faith and without notice ... of dishonour ... or defects of title**. If there was any suspicion when the holder took the bill, he will not be a holder in due course unless he took reasonable steps to allay these suspicions.
- (f) **For value**: to be a holder in due course, the holder must have given consideration for the bill.
- (g) Subsequent to a **forged endorsement** being put to a bill, no one taking the bill thereafter can be a holder in due course.
- (h) If a **restrictive endorsement** is put to a bill, no one taking the bill subsequent thereto can be a holder in due course.
- (i) **The original payee** of a bill cannot be a holder in due course as the bill has not been negotiated to him.

9.1.10 Three Rights of a Holder in Due Course

- (a) **Right to Hold Free of Prior Defect**- the general rule of English law is expressed in the maxim *nemo dat quod non habet* (no one may give that which he does not have)- See notes on sale of goods. However, bills of exchange (and in fact, all negotiable instruments) constitute an **exception** to this rule, provided the circumstances of the transfer are such that the transferee qualifies as a holder in due course, in which case he holds the bills free from prior defects of title affecting the transferor. Note, however, that where an endorsement has been forged, no one taking the bill subsequently can be a holder in due course, so a perfect title cannot be passed on.
- (b) **Right to Pass on this Perfect Title**- Once a bill of exchange has come into the hands of a holder in due course, not only does that person hold the bill free of prior defects of title but any such defects of title are in effect "wiped off" the instrument. Any subsequent transferee will also hold the bill free of equities, even if he himself did not give value or receive notice of the defects of title when taking the bill.
- (c) **Right to Sue in his own Name**- In the event of a bill of exchange being dishonoured, the holder of the bill will seek redress. In taking action on the bill, the holder is entitled to sue on the bill in his own name.

9.1.11 Holder other than Holder in Due Course

The holder of a bill of exchange who does not come within the statutory definition of a holder in due course holds the bill subject to prior equities (rights), and his title may be upset if the title of a prior holder was defective. He does have remedies against intervening parties, but the general rule of "*nemo dat quod non habet*" applies.

Illustration

A draws a bearer cheque on B (bank) and gives it to C as part of a transaction. The bill is stolen by D. D then gives it to E as a birthday gift. E gives it to F as part of a transaction in which F has provided consideration. **Analysis** A- Drawer, B- Drawee, C- Holder for value, D- Holder (bearer cheque), E- Holder, F- Holder in due course.

C was holder for value because he provided value. D became holder because the bill was a bearer bill (no payee specified), C is however the true owner of the cheque. E is not a holder in due course because he did not provide value (consideration is one of the conditions for one to be a holder in due course). E therefore takes the bill with prior defects and subject to C claiming it back. F has satisfied all the conditions of a holder in due course and therefore C cannot claim the cheque from F. C can sue D, the thief, if available!

9.1.12 In land and foreign bills (section 4)

An inland bill is a bill which is or on the face of it purports to be both drawn and payable within Malawi, or drawn within Malawi upon some person resident therein. Any other bill is a foreign bill. Unless the contrary appear on the face of the bill the holder may treat it as an inland bill.

Thus a bill drawn in Blantyre on a person resident abroad, but payable at a bank in Malawi, will be an inland bill, as too a bill drawn in Blantyre on a person resident in Malawi, wherever the bill may be payable. But a bill drawn in Blantyre on a person resident abroad and payable at a foreign bank, or a bill drawn abroad though payable in Malawi to a person resident in Malawi, will be foreign. Where an inland bill is dishonored, **noting** must follow whereas dishonor of a foreign bill must be followed by **protesting**.

9.1.13 Methods of Discharge

A bill will be discharged as follows:

- (a) By **payment in due course**.
To be "in due course", payment must be:
 - (i) To the holder.
 - (ii) Bona fide, and without notice of any defect in the title of the holder.
 - (iii) On, or after, maturity.
- (b) By the **acceptor becoming the holder** thereof, provided he does so after maturity and in his own right.
- (c) By **waiver by the holder of his rights against the acceptor**, provided such waiver is absolute and unconditional, made on, or after, maturity, and made in writing or else accompanied by delivery of the bill to the acceptor. Note that no consideration is required for such waiver.
- (d) By **cancellation of the bill by the holder**, such cancellation being intentional and apparent on the face of the bill.
- (v) By **no notice of dishonour** (below) - upon dishonour, notice of dishonour must be given to the drawer, otherwise he is discharged.

9.1.13 .1 Liability of parties on the bill

Statutory Responsibilities - Every person who has put his name to a bill of exchange, whether as drawer, acceptor or endorser, is a "party" to the bill, and as such will be liable on the bill in the event of its being dishonoured. The holder of the bill in whose hands the bill is dishonoured, can claim on the bill against any prior party, who in turn can sue any other prior party.

- (f) **Capacity**- to incur liability under a bill of exchange is the same as capacity under the law of contract such that for instance minors can never be liable on a bill.

(g) **Consideration-** The liability of a party to a bill is contractual in nature and this depends on whether a party has provided consideration or not.

(h) **Release from liability-** As we have said, any person who has put his name to a bill, in whatever capacity, will be liable to any subsequent holder in whose hands it is dishonoured or who has had to meet the bill. In certain circumstances, however, a person who has put his name to a bill may be released from liability.

Cancellation of Endorsement -Where the holder of a bill intentionally cancels the endorsement of any prior party, provided such cancellation is apparent on the face of a bill, that party and all intervening parties will be absolutely discharged from liability. It is not necessary that consideration should be given for such cancellation for it to be effective.

Failure to Present Bill for Acceptance or Payment - Where the holder of a bill payable after sight fails either to present it for acceptance or to negotiate it within a reasonable time, the drawer and any prior endorsers are discharged from liability. Where the holder of a bill fails to present it for payment on the date it falls due, the drawer and any prior endorsers are discharged from liability.

Holder Taking Qualified Acceptance - Where the holder of a bill takes a qualified acceptance, any prior party who does not assent thereto is discharged from liability on the bill.

Failure to Give Notice of Dishonour - Where a bill is dishonoured, either by non-acceptance or non-payment, any person (other than the acceptor) to whom notice is not given will be discharged from liability. An exception is that, in the case of dishonour by non-acceptance, the rights of a subsequent holder in due course (and any person claiming through him) will not be affected.

Renunciation of Rights by Holder - The holder of the bill may, absolutely and in writing, renounce his rights against any party to the bill. Such renunciation will be effective, but the party in question will remain liable on the bill to any subsequent holder in due course without notice of the renunciation.

Alteration of Bill - Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is discharged except as against

- (i) the party who has himself made, authorised, or assented to the alteration; and
- (ii) subsequent endorsers.

The alteration must be intentional and not accidental.

9.1.14 Effect of Forged Signature

Where an endorsement on a bill of exchange has been forged, no person taking the bill thereafter can acquire a good title to it. Thus there can be no holder in due course after a forged endorsement and the bill cannot be discharged (Section .24). The person holding the bill, including the acceptor if he has "met" the bill, must surrender it to the person whose endorsement was forged. The person who took the bill immediately after the forgery will be left with no redress, except against the person responsible for the forgery, if he can be found.

9.1.15 Dishonour of a bill

A bill may be dishonoured either by non-acceptance or by non-payment. We have already examined the question of acceptance and have seen that if the holder of a bill presents it to the drawee for acceptance and is refused, then he may treat the bill there and then as dishonoured.

9.1.16 Requirements for Valid Presentment

- (a) The presentment must be made by the **holder** or by some person authorised to receive payment on his behalf.
- (b) Presentment must be at a **reasonable hour**, on a business day, and before the bill is overdue.
- (c) Presentment must be made to the person designated by the bill as **payer**, or to some person authorised to pay or refuse payment on his behalf.
- (d) Presentment must be made at the **place specified** or at the address of the acceptor.
- (e) Where the acceptor is dead, and no place of payment is specified, presentment should be made to the acceptor's **personal representative**.

9.1.17 Excuses for Non-presentment for Payment

In certain circumstances, the bill can be treated as dishonoured by non-payment;

- (a) Where, after the exercise of reasonable diligence, **presentment cannot be effected**.
- (b) Where the drawee is a **fictitious person**.

9.1.18 Notice of Dishonour

On a bill being dishonoured, either by non-acceptance or by non-payment, the holder must at once give notice of the dishonour to all prior parties if he is to have any rights against them.

Consequences of dishonour

Noting and Protesting- (section 51) "Noting" and "protesting" of a bill occur in the event of a bill of exchange being dishonoured. **Noting** (usually applicable to inland bills) of the bill is the making of a minute by a Notary Public who has to present the bill either at the acceptor's office, if it is made payable there, or, if made payable at a bank, to that bank, and obtains the answer given for non-payment of the bill. Then she affixes to the bill a slip of paper which has briefly typed (or written) on it the fact that she presented this bill to "...” and that it was dishonoured by non-payment with answer (specified). She then appends her signature and affixes a stamp, this being the stamp required on a notarial document.

1.9.19 Protest (usually applicable to foreign bills)

Is more formal than noting; in fact, it is a more elaborate execution of noting procedure. A protest must contain the following:

- (a) An **exact copy** of the bill.
- (b) A **statement of the parties** for whom and against whom the bill is protested.
- (c) The **date and place** of the protest.
- (d) A statement that **acceptance of payment was demanded** by the notary, the terms, if any, of the answer, or a statement that no answer was given or that the drawee or acceptor could not be found.
- (e) A **reservation of rights** against parties liable
- (f) The **subscription and seal** of the notary.

The process of noting or protesting preserves recourse against the drawer and endorsers. The bill must be noted on the actual day of dishonour, but the protest may be completed subsequently.

1.1.20 Measure of Damages

In the event of a bill being dishonoured, the holders and, in turn, every other party to the bill who is compelled to pay it, may recover from any preceding party liable: the **amount** of the bill, **interest**, the **expenses of noting or protesting** the bill.

1.1.21 Incomplete (Inchoate) Bills

It is possible for a bill to be drawn incomplete, leaving the holder to fill in the amount payable. So long as he does so within the terms agreed, there is no problem, but the holder may fraudulently complete the bill by inserting an excessive amount. In such a case, the holder will not be able to enforce the bill in any amount against anyone who became a party to it prior to its completion, except that if the bill is negotiated to a holder in due course after completion he can enforce the bill **in the full amount shown** against any prior party (Section 20). A blank, stamped piece of paper may be signed and given to someone for it to be completed as a bill. So long as the intention is there, the holder can fill in all the particulars of the complete bill and the position is as described above. Where a bill expressed to be payable a fixed period after date is issued undated, or where the acceptance of a bill payable a fixed period after sight is undated, the bill is similarly incomplete. The bill is not, however, invalid and the holder has authority to insert the true date of issue or acceptance himself. Where the sum payable is expressed both in words and in figures and there is a discrepancy between the two, the sum denoted by the **words** is the amount payable.

1.1.22 Altered Bills

When a bill is materially altered, all prior parties are at once discharged from any liability whatsoever on the bill (even the original amount) unless they assent to the alteration. However, exception is made where the alteration is not apparent on the face of it and the bill is in the hands of a holder in due course, who may enforce it against those persons who became parties to the bill before the alteration, **according to the original tenor of the bill**. An example of this would be where a bill is altered in a non-apparent manner from K50 to K500 and then comes into the hands of a holder in due course; the latter would be able to enforce payment of the original amount of K50. Persons who become parties to the bill after the alteration will be liable for the full amount of the bill.

9.2 CHEQUES

Section 73 of the **Bills of Exchange Act**, defines a cheque as: "*A bill of exchange drawn on a banker, payable on demand.*" (Recall the all important **section 3 of the Bills of Exchange Act** on definition of a bill of exchange)

Note the two special requirements for a cheque:

- (a) It must be drawn on a banker.
- (b) It must be payable on demand.

9.2.1 Differences between bills of exchange and cheques

- (a) Because of the contractual relationship between banker and customer, there are a number of **special obligations** on these parties.
- (b) The **rules relating to acceptance do not apply to cheques**; the banker on whom the cheque is drawn never "accepts" it, so that the drawer is the party primarily liable on the instrument.
- (c) There are special provisions for the **crossing** of cheques which do not apply to ordinary bills of exchange.
- (d) Special statutory protection is given to bankers in relation to **forged endorsements**.
- (e) In practice the vast majority of cheques are presented for payment by the person to whom they are initially given, and negotiation of a cheque is comparatively rare.

Illustration

If A draws a cheque in favour of B, B may either take it to A's bank and obtain payment, or he can pay it into his own bank who will, on his behalf, collect payment from A's bank. A's bank (the paying bank) will

debit A's account as they meet the cheque and B's bank (the collecting bank) will credit B's account with the money collected.

9.2.2 Post-dated Cheques

The **Bills of Exchange Act** allows bills to be dated as at a date subsequent to that on which they are actually drawn. In the case of cheques such a practice should strictly invalidate the instruments as they cannot be said really to be payable on demand, but in fact such cheques are held to be valid as payable on demand as from the date entered.

If a cheque is post-dated and a bank pays it, the customer's mandate is **not** being followed, i.e the bank will have breached its duty. The bank may suffer the following dangers:

- (a) The customer may refuse to be debited with the cheque;
- (b) The customer may stop payment of the cheque before its due date;
- (c) If the cheque is held by the bank pending its due date, the customer may die, or go insane or become bankrupt in the meantime.

9.2.3 Overdue Cheques

A bill payable on demand must be presented for payment within a reasonable time of the bill's date and if this is not done the drawer and prior endorsers are discharged from liability. In the case of cheques, however, the drawer cannot escape liability in this way and he will remain liable on the cheque for the normal limitation period of **six years**. In practice, a cheque presented more than **six months** after date will be returned as "stale", but the holder can obtain a fresh cheque from the drawer.

9.2.4 Banker/Customer Relationship

The relationship between banker and customer is a contractual one whereby the customer deposits money with the bank on the understanding that the bank will meet cheques drawn by the customer on the account up to the amount of the balance standing therein or of any agreed overdraft.

9.2.5 Bank's Duties

The duties of the banker under this contract are two-sided:

- (a) to honour cheques duly drawn up to the amount available, and not to pay without proper authority.
- (b) to credit a customer's account with dividends received on the customer's behalf and it owes a duty to take care in doing so.

9.2.6 Liability of the bank

- (a) If the bank fails to meet a cheque that is duly drawn where there are funds available to meet it, it will be liable for damages to the drawer. Where the drawer is a trader, damages will be awarded without proof of actual loss, but in other cases loss must be established.
- (b) On the other hand, the bank will be liable if it pays a cheque on which the drawer's signature is forged, or if it pays a cheque not properly drawn (e.g. if a company's cheques require the signature of two directors and only one signature is present).
- (c) The bank will also be liable if it meets a cheque after the customer has countermanded payment.
- (d) The bank's authority to meet cheques will also be terminated in the following circumstances:
 - Notice of the customer's death or insanity.
 - Notice of an act of bankruptcy by the customer
 - Receipt of a garnishee order (an order awarded to a judgment creditor which "freezes" the balance then standing in the customer's account).

9.2.7 Customer's Duties- The customer owes the bank a duty of care in the way a cheque is drawn. Where the amount of a cheque is altered and the cheque is met by the bank, the position will be as follows:

- (a) If the alteration was **apparent**, the bank must bear the loss.
- (b) If the alteration was **not apparent** but was not facilitated by negligence on the part of the customer in drawing the cheque, then the customer will be chargeable with the original amount but the bank must bear the excess.
- (c) If the alteration was not apparent and was made possible through the **careless way in which the customer drew the cheque**, then the loss will fall on the customer. In *London Joint Stock Bank v. Macmillan & Arthur* [1918] AC 777, a bearer cheque was drawn for £2 in figures, but with sufficient space for this to be changed to £120 without the alteration being apparent, and without the amount being written in words at all, so that a fraudulent clerk was able to write in "*one hundred and twenty pounds*". It was **held** that the customer had to accept the full charge of £120 when the cheque was met. *Greenwood v. Martins Bank Ltd* [1933] AC 51 illustrates how the bank will be protected in the event of the customer's negligence. Greenwood's wife had been drawing money from his account by forging his signature on his cheques. In order to protect his wife, he did not inform the bank. The wife later committed suicide and he then decided to sue the bank for the return of the money. **It was held that** the husband was under a duty to disclose what had happened, and as he had failed to do so his conduct precluded him from alleging the forgery.

9.2.8 Crossing a Cheque

The **Bills of Exchange Act** (Section 80) makes provision for the "crossing" of cheques, and this provision does not apply to any other type of bill of exchange. The effect of a crossing is that the cheque may be met only by payment to a banker, and cannot be cashed over the counter of the paying bank. There are basically two reasons for this

- (a) Since a crossed cheque can only be paid through a bank account, it is thus possible for the drawer of the cheque to trace it after it has been paid to a known holder.
- (b) It gives more time to countermand payment (stop payment).

9.2.9 General and Special Crossings

There are two types of crossing – "special" and "general".

- (a) **Special Crossing-** the name of a particular bank is written between the lines of the crossing, e.g. Barclays; a cheque bearing a special crossing must be met only by payment to that particular bank, i.e. Barclays. **In short the cheque is payable to a bank named on it.**
- (b) **General Crossing-** is made by drawing across the face of the cheque two parallel lines with or without the words "and company", or any abbreviation thereof, e.g. "& Co.". The original intention was that the payee could insert the name of his bank, making it a special crossing, but the bank usually does this by stamping its name on the crossing. **In short the cheque is payable to any bank.**

9.2.10 "Not Negotiable"

The Act also provides for the addition of the words "*Not negotiable*" to the crossing. The effect of these words is to take away the attributes of negotiability from the instrument, so that no person taking a cheque bearing such a crossing can obtain a better title than that of the transferor. Let us consider a cheque which has been crossed "not negotiable" and which has been stolen. Obviously, the thief's title to the cheque is a bad one and henceforth all successive holders of that cheque, no matter how innocently they may have acted or how great has been their good faith, have defective titles to the cheque. If the drawer has succeeded in stopping the cheque, the holder with defective titles acquired through the thief cannot compel the drawer to remove his/her stop. Moreover, the holder with a defective title who succeeds in

cashing such a cheque (paid in through his account) is liable to refund the proceeds to the true owner. This liability extends for the statutory period of six years.

9.2.11 "A/c Payee Only"

Where a cheque is crossed and bears across its face the words "account payee" or "a/c payee", either with or without the word "only", the cheque shall not be transferable, but shall only be valid as between the **parties thereto i.e drawer and payee**. This means that account payee cheques are **non-transferable**, and it seems clear that a bank collecting such a cheque for a person other than the payee will lose its statutory defence (see below).

Let us now consider the position of the paying bank in relation to crossed cheques. Quite simply, it is bound to pay in accordance with the crossing. The **Bills of Exchange Act** provides that a banker who pays a crossed cheque otherwise than in accordance with the crossing will be liable to the true owner of the cheque for any loss the latter may incur by reason of the banker's default.

Where, however, a crossing has been obliterated or altered without this being apparent, a banker who **pays in good faith and without negligence** within the apparent terms of the cheque will not incur any liability (this is referred to as the bankers statutory defence).

9.2.12 Special protection of paying banker

The general rule is that the bank will be liable for effecting a payment where the cheque bears forged endorsement. However section 60 of the **Bills of Exchange Act**, affords special protection to bankers if the cheque with a forged endorsement is paid by a banker in **good faith and in the ordinary course of business**. The cheque will be deemed to have been discharged, notwithstanding the forgery.

9.2.13 Special protection of collecting banker

If the customer presenting the cheque has no title thereto, the collecting banker would normally be liable to the drawer for the tort of conversion (disposal of property [including cheques] owned by someone else) if the latter suffered loss. However, section 79 of the **Bills of Exchange Act**, provides that the bank collecting a cheque for a person who has no title thereto (including the holder of a cheque that bears a forged endorsement) will not itself incur any liability for this action when acting in **good faith and without negligence**.

9.3 PROMISSORY NOTES

Section 89 of the **Bills of Exchange Act** states that "*A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of, a specified person or to bearer...*"

A specimen of a promissory note (note that a bank note is a form of a promissory note)

Blantyre, 30 April 2014

K10 million

On demand I promise to pay at the Mzuzu Bank Limited, to Mr A. Gondwe or order, the sum of Ten Million Kwacha for value received.

Signed JJ Phiri
J Brown

9.4 PRACTICE QUESTIONS

1. Define a bill of exchange.
2. Compare and contrast a bill of exchange from a cheque and a promissory note.
3. In terms of the Bills of Exchange Act, how is a cheque defined?
4. Describe the various types of acceptance that one can make on the bill.
5. What are the characteristics of a holder in due course?
6. What is an inchoate instrument?
7. Describe how a bill of exchange is discharged.
8. Mention three general duties of a holder of a bill of exchange.
9. How may a bill of exchange be used in practice?
10. Describe the types of endorsement that may be made on a bill of exchange.
11. Who may have capacity to incur liability as a party to a bill?
12. Define the term 'Bill of Exchange' and outline its main characteristics.
13. Comment on the following types of Bills of Exchange:-
 - i. Accommodation Bill.
 - ii. An Inland Bill and a Foreign Bill.
14. Maggie signed a cheque without any crossings. She instructed her accounts assistant to fill in a sum of K100,000 on the cheque and fill in Osman's name as payee. The assistant owed a personal debt to Paul in the sum of K200,000 and so filled in the sum of K200,000 and made the cheque payable to Paul. Paul cashed the said sum of K200,000 at Maggie's Bank.

Required: - Advise Maggie on the liability of the parties, if any.

CHAPTER 10: PERSONAL PROPERTY SECURITY

10. INTRODUCTION

In a situation where a financial institution or indeed an individual advances financial credit to some party, they may do so without demanding any security for the repayment of the loan. However, a prudent lender will more often than not demand some security. The security may be in the form of real property (land) and a mortgage or a charge will be created over the piece of land. Where the property pledged is personal property such as a motor vehicle or machinery, then the same will be covered by the Personal Property Security Act 2013 (PPSA) which is the concern of this Chapter.

The PPSA has at least **four** primary objectives as follows:-

- (a) the enforceability of a security interest in personal property created or provided for by a transaction that secures payment of money or performance of an obligation, and the interest is called a security interest;
- (b) perfection of security interests by registration, possession or control;
- (c) the priority between security and other interests in the same personal property; and
- (d) the enforcement of security interests.

10.1 KEY DEFINITIONS

(a) After-acquired property means personal property that is acquired by a debtor after the security agreement is made. For example, the security agreement may be in respect of goods being shipped or yet to be manufactured and will therefore qualify as after-acquired goods on the part of the debtor.

(b) Financing statement means forms in writing or their electronic equivalent as provided in the Registry Regulations on which information is provided in order to effect, amend, terminate or continue a registration. A financing statement must provide for the following-

- (i) the identification of a debtor;
- (ii) the identification of a secured party or his representative;
- (iii) a description of a collateral serial number e.t.c.;
- (iv) the date of prior registration, if applicable;
- (v) the maximum amount of a secured obligation; and
- (vi) any other data as required by this Act or the Registry Regulations.

(c) Goods means tangible personal property and include farm products, inventory, equipment, consumer goods, trees that have been severed, and petroleum or minerals that have been extracted but does not include chattel paper, a document of title, a negotiable instrument, an investment security or money;

(d) Perfected security interest means the security interest that has been created and becomes effective against third parties by control, possession, registration or temporarily, as the case may be;

(e) Personal property includes chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments;

(f) Security agreement means an agreement between a debtor and a secured party that creates or provides for a security interest;

(g) Security interest means a property right in personal property that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security interest, but does not include a personal right against a guarantor or other person liable for the payment of the secured obligation;

10.2 THE PERSONAL PROPERTY SECURITY REGISTRY

The PPSA establishes an electronic Personal Property Security Registry. This means that previous filing of hard copies is no longer acceptable. Ideally, one should now be able to perfect security in personal property on-line without the need to physically visit the office of the Registrar General.

The Act also provides for the appointment of the Registrar of the Registry who is responsible for the overall functioning of the Registry.

The duration of registrations is covered in section 68 of the PPSA. A registration of a financing statement under this Act shall be effective until—

- (a) the expiration of a term specified in the financing statement;
- (b) the expiration of five (5) years from date of registration; or
- (c) the time when the financing statement is discharged.

The Act also provides for the amendment of financing statements and searching of the Registry upon payment of a fee. A prudent lender will search the Registry before advancing any sums to the intended borrower, as doing so without a search will risk the lender ranking after an earlier secured lender.

10.3 CREATION OF SECURITY INTEREST

According to section 6 of the PPSA, a security agreement is enforceable and a security interest created in respect of collateral only if the security agreement contains an adequate description of the collateral that may be generic or specific. A description of collateral is adequate if the collateral is described by –

- (a) item, kind, type or category e.g. Toyota Collora 16 valve Engine number XLD 20587
- (b) a statement that a security interest is taken in all of the debtor's present and after-acquired property; or
- (c) a statement that a security interest is taken in all of the debtor's present and after-acquired property, except for specified items or kinds of personal property.

10.4 PERFECTION OF SECURITY

According to section 9 of the PPSA, there are at least **three** ways through which created security may be perfected (i.e. enforceable against the whole world):-

- (a) **By registration** - when a financing statement has been registered in respect of the security interest;

- (b) **By possession** - a secured party, or another person on behalf of the secured party, has possession of a collateral, except where the possession is a result of seizure or repossession; or
- (c) **By control** - the secured party, or the other person on behalf of the secured party, has control of the collateral that is a deposit account or investment security.

10.5 THE PRIORITY BETWEEN SECURITY INTERESTS

Some of the key rules on priority of security interests include the following:-

- (a) Perfected security interest has priority over a security interest that is not perfected;
- (b) In relation to a particular security interest, priority between perfected security interests is determined in accordance with the following order-
 - (i) registration of a financing statement;
 - (ii) possession of a collateral by a secured party or any person on behalf of the secured party, except where the possession is a result of seizure or repossession; or
 - (iii) acquisition of control of the collateral by the secured party or any person on behalf of the secured party; and
- (c) Priority between unperfected security interests in the same collateral shall be determined by the order of creation of the security interests.
- (d) A security interest that is transferred has the same priority which it had at the time of the transfer.
- (e) A secured party may agree, in a security agreement or otherwise, to subordinate its security interest to any other interest. This means that, if, for example, Bank A lent money to Mr X in the year 2017 and Mr X obtains another loan from Bank B in 2018, Bank A, for its own reasons (for instance that the loan balance is now so insignificant), may agree that it will rank after Bank B, even if Bank A had initial priority.
- (f) A security interest in goods that becomes an accession continues in the accession.
- (g) If more than one security interest is perfected in the goods before they become part of a product or mass, the security interests rank equally in proportion to the value of the goods at the time they became part of the product or mass.

10.6 THE ENFORCEMENT OF SECURITY INTERESTS.

The PPSA provides for a secured party's remedies when a debtor is in default as well as rights of the debtor which will be discussed below.

10.6.1 Rights of a Secured Party

- (a) To take possession after default;

- (b) To render the collateral unusable, without removal;
- (c) To dispose of the collateral;

10.6.2 Duties of the Secured Party

- (a) When removing the goods, the secured party must not cause damage to attachments;
- (b) When selling the collateral, the secured party has a duty to obtain the best price reasonably obtainable on the market;
- (c) To give statement of account to the debtor, 15 working days after sale;
- (d) To give other information to the debtor upon request;
- (e) To give notice of the sale of the collateral, not less than 10 working days;
- (f) To pay prior secured ranking secured parties;
- (g) To pat surplus to subordinate debtors.

Note that, where appropriate, the duties of the secured party may constitute the rights of the debtor.

The PPSA also entitles an injured party to claim damages for breach of any obligation imposed by the Act.

10.7 PRACTICE QUESTIONS

1. Discuss the significance of the PPSA
2. Discuss how the law provides for perfection of security in land and personal property?
3. Explain any two primary objectives of the PPSA.
4. Define the following in relation to the PPSA:-
 - After-acquired property
 - Financing statement
 - Goods
5. What is meant by 'Security interest'?
6. What are the salient features of the Personal Property Security Registry?
7. In what three ways may perfection of security be achieved under the PPSA?
8. Discuss the priority between security interests under the PPSA.
9. Outline the rights and duties of a secured creditor and a debtor.

NOT FOR SALE

BUSINESS LAW (TC8)

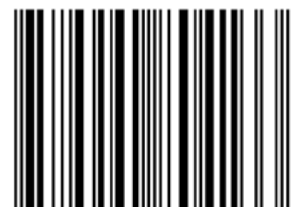
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