

The law we are concerned with covers a wide variety of human behaviour from murder and rape to marriage, divorce, inheritance, making of contracts, incorporation of a company and driving of a motor vehicle without a license. It is practically difficult if not impossible to bring all such behaviours into one single definition. It is because of this that there is no generally accepted definition of law. Some definitions are so wide that they cover matters that are not law while certain other definitions are so narrow that they will not cover what is law. So, there is no universally accepted definition of law and so far no definition of law is considered as perfect.

For instance, John Austin, an English jurist defined **law as *the command of the sovereign body in a society***. The sovereign may be a person such as a king or Parliament. The command may be issued to an inferior (an individual), and enforced by punishment (or sanction as Austin called them). That is, law is a command, you must do this or you must not do that. Law commands that you must drive a motor vehicle on the left hand side of the road, or that you must not cause bodily harm to another person or should not damage another person's property. Since it is a command it is binding on every person and is enforced at the command of the sovereign authority. This definition by Austin applies in many instances but it cannot be said that it is a perfect definition. There are many rules of law which do not command us to do things at all. For example, the law does not command us to make a contract, but rather lays down the conditions under which an agreement will have the force of a legally binding agreement: Similarly, the law concerning wills never commands us to make a will but sets out conditions under which a person may make a will. There are many other instances in law where the legal rules in question cannot sensibly be described as a form of command such as laws relating to marriage and divorce, and laws which give powers to a minister to make rules or to a city council to make by-laws which cannot be reduced to the simple proportion that "that laws are commands". Also, Austin's definition does not account satisfactorily for laws made by judges.

Sir John Salmon defined law as ***the body of principles recognized and applied by the state in the administration of justice***. According to G.W. Paton, law consists of ***the body of rules which are seen to operate as binding rules in that community backed by some mechanism accepted by the community by means of which sufficient compliance with the rules may be secured to enable the system or set of rules to be seen as binding in nature***. Holland defined law as ***a general rule of external human action enforced by a sovereign political authority***. Vinogradoff saw law as ***a set of rules imposed and enforced by a society with regard to the attribution and exercise of power over persons and things***. Justice Oliver Wendell Holmes, an American judge defined law as ***what the courts do in fact about law***. This definition is based on the premises that law is what the courts will pronounce as law. Courts are thus creators or source of law.

On this premise, body of rules as made by Parliament or customs is not law. Acts of Parliament, or statutory law, delegated legislation and African customary law are not law according to this view. This definition is controversial because it emphasizes that judges make law. However, many believe that judges do not make law but merely

Summary

2.3 Classification of Law

2.3.1 Public Law and Private Law

2.3.2 Criminal Law and Civil Law

2.3.3 Written Law and Unwritten Law

2.3.4 Substantive Law and Procedural Law

2.3.5 International Law and National or Municipal Law

2.4 Distinction between Common Law System and Civil Law System

2.5 Summary

2.6 References

2.1 Introduction

In this lecture we are going to discuss various ways in which law may be classified. The most common way to classify law is by the type of law, that is, the matters that the law is regulating. There is another way of classifying law, that is, the source which it comes from, which affects the status of law. However, in this lecture we shall discuss classification by the type of law, the other classification we shall discuss in the next lecture as sources of law.

It should be noted that classification by the type of law may overlap in some cases and are not necessarily exclusive, some elements of one class may be found in another.

2.2 Objective

2.2 Objective

	At the end of this lecture you should be able to: 1. Discuss various ways in which law may be classified. 2. Identify each classification of law. 3. Describe the remedies available or consequences that may follow under each classification. 4. Explain who can initiate proceedings in each category of law and the procedure that has to be followed. 5. Explain the terminology used when a case is filed in a court of law.
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2.3 Classifications of Law

The major classifications by the type of law are:

2.3.1 Public Law and Private Law

2.3.2 Criminal Law and Civil Law

2.3.3 Written Law and Unwritten Law

2.3.4 Substantive Law and Procedural Law

2.3.5 International Law and National or Municipal Law

2.3.1 Public Law and Private Law

(a) Public Law

Public law is that branch of law which is primarily concerned with the state itself or in which the state has a direct interest. It is concerned with the organizations of the state, the relationship between the state and the people who compose it and between various state organs, the responsibilities of public officers to the state and to private persons.

Included in this category are:

(i) Constitutional law

This branch of public law is concerned with organization, powers and framework of government, the distribution of governmental authority and functions, and fundamental principles which are to regulate the relations of government and citizens.

(ii) Administrative law

This law regulates the functions of governmental and administrative agencies. It is concerned with the matters such as establishment and functions of statutory corporations and of administrative tribunals, rules of natural justice and judicial review of administrative actions.

(iii) Criminal law

It is concerned with suppression of wrongs which the state is concerned to prevent and punish.

Public law also includes election law, local government law and revenue laws such as the income tax law and value added tax (VAT).

(b) Private Law

Private law, on the other hand, is primarily concerned with rights and obligations of private persons, that is, individuals, associations and corporations, towards each other.

It defines, regulates, enforces and administers relationship among such persons.

Private law covers a wider field than public law.

Summary

Criminal law actions are commenced in accordance with the rules of the ***Criminal Procedure Code***. prosecutions, which are usually commenced by the state on behalf of society, although private prosecutions may be allowed in well defined circumstances. If the accused person is found guilty, he is liable to punishment which may be a fine and/or imprisonment, death penalty, probation or community service. If the prosecution is unsuccessful the accused is acquitted. The party instituting a criminal action is called the prosecutor while the party against whom the charges are brought is the accused. The accused who has been legally convicted of a crime is the offender or criminal. Criminal cases are called

The prosecutions involving offences are brought in the name of the state. The case will then be known as: ***Republic v Kimani***.

(b) The Civil Law

Civil law concerns, itself with regulating the relationship between individuals, associations and corporations. It deals with civil or private rights and duties and provides remedies for breach of such rights. Civil law is basically private law and covers almost all areas covered by latter. For example, the law of contract, tort, trust, succession, property and the family law.

The purpose of civil or private law is to resolve disputes between individuals and to remedy wrong done by one individual against another. The dispute may be on matters such as whether there is a binding contract between the parties or who is the owner of the property in dispute or whether the property in the goods has passed to the buyer.

Take Note:

	Private law and civil law are almost, if not entirely, synonymous because both are concerned with right and obligations of individuals, associations and corporations towards each other. The procedure to be followed and the remedies provided under both are the same
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There are many kinds of civil wrongs, for example breach of contract, breach of trust and torts.

Unlike criminal cases but like private law actions, civil law actions are generally initiated by private persons. The procedure to be followed in such actions is governed by the rules of the **Civil Procedure Act**. The remedies available in civil actions are damages, injunction and declaration. In contract there are also other remedies of specific performance, rescission and rectification. Whereas in tort the remedy of specific restitution of property is also available.

Civil cases generally involve wrong by one individual against another individual or they may involve disputes between two or more private persons. The party bringing or filing a case or plaint is called the plaintiff (in England now he is called a claimant). In divorce or winding up proceedings or in a petition under the Constitution he is called a petitioner. The person who defends himself in an action is called the defendant, but a person responding to a petition is called the respondent.

enactment. All Acts of Parliament that is statutes and delegated legislation such as rules, regulations, orders, and notifications and by-laws are written laws. In countries like Kenya where there is a written constitution, the Constitution is also a written law. Reference to the written law is to be found in section 77(8) of the Constitution of Kenya mentioned above.

(b) Unwritten Law

Unwritten law signifies all unenacted laws. That means all that portion of law, observed and administered in the courts, which has not been enacted or promulgated in the form of a statute, is unwritten law. Unwritten law includes; common law and rules of equity, African customary law and the rules and principles established by judicial precedents.

Take Note

	Written laws supercede unwritten laws because they are superior to the unwritten law. Thus, the Constitutional Law and the legislation shall prevail over judicial precedent, common law and equity, and the African customary law.
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The term unwritten law is misleading. Unwritten law does not mean that the law is literally unwritten. For example, judicial precedent can be found in judicial decisions which are often reduced to writing in the form of law reports. Similarly, African customary law and common law can be found in books and articles. These laws are often in written form, but because they are not formal enactments, they are unwritten laws.

Written law is superior to the unwritten law and thus it supercedes the written law. Where provisions of the unwritten law are in conflict with the provisions of the written law, the later shall prevail.

Activity 2.2

	Give three examples each of written and unwritten law.
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2.3.4 Substantive Law and Procedural Law

(a) Substantive Law

Substantive law lays down the actual rules of law. It is that part of law which creates, defines and regulates rights and duties among and for persons, natural or otherwise. Thus it comprises of rules of law and those legal principles that define the existence and extent of a right and obligation in a particular branch of law. For example, in law of contract, the rules which lay down the conditions under which an agreement will have force of legally binding contract, in the criminal law, defining what conduct shall amount to an offence, in the family law, rules prescribing the requirements of a valid marriage, and in the law of succession, rules providing who

Summary

	The common law, rules of equity and judicial precedents are unwritten laws and therefore superseded by the written law, i.e. the statutory law.
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3.4.5 African Customary Law

African Customary law is the oldest source of Kenyan law, having existed in various communities and tribes long before the advent of British in Kenya. All tribes in Kenya had certain rules and customs for redressing personal wrongs. They also had some means whereby a wrong could be remedied.

African customary law is not a single uniform set of customs prevailing throughout Kenya. There are important differences between customary laws of different tribes. When British came to Kenya they did not abolish customary law but permitted it to exist side by side with the new law introduced by them. They did, however, control it within certain limits.

African customary law is still applicable in Kenya subject to four conditions.

First, it applies in civil cases only and never in criminal cases. This is because African customary law is an unwritten law and therefore by virtue of section 77 of the Constitution quoted earlier it cannot be applied to criminal matters. Also, section 3 (2) of the Judicature Act specifically provides that African customary law shall be applied only in civil cases. Secondly, it will apply only in cases when one or more of the parties is subject to it or affected by it. Thirdly, customary law will apply only if it is not "repugnant to justice, and morality." Lastly, it applies only if it is not inconsistent with any written law.

In Maria Gisele Angoi v Marcella Nyomenda (1982), the High Court of Kenya had an opportunity to consider when customary law may be repugnant to justice. In that case Kisii customary law allowing women to women marriages was involved. A Kisii custom allowed a widow who had no male child of her own to marry a girl by entering into an arrangement with the girl's parents. The widow then chooses a man from her husband's clan who will be fathering children for her through the girl she married. This custom was held to be repugnant to justice and the marriage between the widow and the girl and was, therefore, declared as null and void.

Although the African customary law is applicable in civic cases, its scope even in civil matters is further restricted the Magistrates' Court Act. Section 2 of this Act empowers District Magistrates Courts to deal with a claim under customary law. The Act defines a "claim under customary law" as a claim concerning any of the following matters:

- (i) Land held under customary law
- (ii) Marriage, divorce, maintenance or dowry
- (iii) Seduction or pregnancy of an unmarried woman or girl
- (iv) Enticement of or adultery with a married woman

i) **A void contract** is one which has no legal effect. It is no contract at all. The contract fails from the very beginning and no consequences can ensue from it. Here, the parties have attempted to make a contract, but the law will not give effect to it. When a contract is void, the title or ownership of the property which is subject matter of the contract will not pass from the seller to the buyer. The original seller, i.e. the owner will, therefore, be able to recover the property from the buyer or from any other person to whom the buyer has sold it. Examples of void contract includes simple contracts without consideration, contracts entered under a genuine mistake and contracts by a minor to buy goods which are not necessities.

ii) **A voidable contract** is one where the law gives option to one of the parties to avoid or set it aside, thus rendering it void. Until avoided it remains valid. Such a contract is binding if the innocent party elects to treat it as binding and void if he opts to avoid it. The other party, however, has no option to avoid it. Under a voidable contract if a buyer of the property resells the property to a third person before the contract is avoided, the third person will acquire a good title, provided he bought it in good faith. Examples of voidable contracts are those by which the minor acquires an interest in subject matter of a permanent or continuing nature such as land, share in a company or contracts of partnership, and where one of the parties has been induced by the other by misrepresentation or duress or undue influence to enter into the contract.

iii) **An unenforceable contract** is a valid contract but cannot be enforced because of some technical defect, such as the absence of a note or memorandum in writing required under a statutory law. Under an unenforceable contract any goods or money transferred cannot be recovered even from the other party to the contract. For example, the Hire Purchase Act requires that a hire purchase contract must be in writing, otherwise it is unenforceable. Consequently, where a hire purchase contract is not in writing the owner of the goods cannot enforce the agreement as against the hirer and therefore cannot recover the goods from the hirer. The hirer may be able to use the goods indefinitely even without paying the due instalments.

Intext Question

	Distinguish between a void, voidable and unenforceable contract?
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iv) **Illegal contract** is a contract made illegal by a statute or the common law. Such contracts are prohibited or forbidden by law and therefore illegal and void. Illegal contracts include contracts to commit a crime, a tort or a civil wrong, contracts contrary to morality, contracts prejudicial to the public safety, contracts that tend to promote corruption in public life, contracts tending to pervert the course of justice and contracts to defraud public revenue.

(c) Unilateral, Bilateral and Multilateral Contracts

Contracts can also be classified on the basis of obligations of the parties

A unilateral contract is a contract under which only one party has an obligation but the other party has no obligation to perform. It has been defined as "a contract where one party (the promisor) binds himself to perform a stated promise upon

but at the time of doing so he was unaware of the fact that there was a reward of £1,000 for such information. Held, **C** could not claim the reward because he could not be deemed to 'accept' an offer of which he was not aware at the relevant time.

4.8.5 Termination of Offer

An offer may be terminated in the following ways:

4.8.5.1 Revocation or Withdrawal of the offer

The general rule is that an offer may be revoked any time before acceptance. Once an acceptance has taken place the offer is irrevocable. In **Khale v Athamas Bros (Aden) Ltd** (1968). **A**, a majority shareholder in a company offered to buy **B's** minority shares in the company. After negotiations for sometime **B** accepted an offer of £40,000 for his shareholding. A final contract was prepared but **B** refused to sign demanding some alterations. The alterations were finally made and **BA** then purported to revoke the offer. Held, **A's** revocation of offer was not valid because it came after **B's** acceptance when **B** had already signed the contract. signed the contract.

The rule that an offer may be revoked anytime before acceptance applies even where it was originally promised that the offer would remain open for a specific period of time.

In **Routledge v Grant** (1828), **D** offered to take a lease of premises belonging to **P** and told **P** that the offer would remain open for six weeks. After three weeks **D** withdrew his offer. **P** purported to accept it within the six week period. Held, **D** had been under no obligation to keep the offer open and was free to withdraw it anytime provided it had not already been accepted.

However, if there is a consideration for keeping the offer open for a certain period, (that is, option), the offer cannot be revoked before the expiration of that time, otherwise there would be breach of contract.

Revocation, however, is not effective until it is communicated to the offeree. Communication of revocation does not always have to be made by the offeror himself, but can be made by any reliable source.

In **Dickson v Dodd** (1876), **P** was invited to buy property from **D**, who promised to keep the offer open until 9 a.m. June, 12. **D**, however, sold the property to another person. **P** learnt of this sale from a third party on June 11. He then purported to accept the offer at 7 a.m. June 12. Held, this was not a valid acceptance since an offer could be withdrawn at any time before expiry of the duration promised and that **P** learnt from a reliable source that **D** had sold the property to another person thereby revoked his offer.

In case of unilateral contracts the rule is that once the offeree has started to perform the requested act, the offer can no longer be withdrawn and the offeree must be allowed to complete.

4.8.5.2 Rejection - An offer is rejected:

a) if the offeree communicates his rejection to the offeror. Once the offer is rejected, it is terminated and the offeree cannot subsequently accept it.

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Summary

	This lecture has introduced you to the concept and formation of a contract. We considered that a contract can be in any form but certain contracts are required by law to be in writing whereas others must be in writing as well evidenced in writing. Contracts are classified in various ways such as simple contracts and contracts under seal or deeds, or void, voidable, unenforceable, illegal contracts, or unilateral, bilateral and multilateral contracts, and executory and executed contracts. There are certain essential requirements of valid contract such as an agreement intention to create legal relations, consideration, capacity to contract, reality of consent, etc. If any of these requirements are not present the contract may not be a valid contract. One such requirement the agreement is constituted by an offer and acceptance of that offer. This lecture considered the question what amounts to an offer? We have distinguished an offer from an invitation to treat. Advertisements generally, display of goods in a shop or supermarket, a company prospectors, invitation to bid at an auction sale and invitation for tenders are not offers but invitation to treat. We have also examined rules on offer, including those for the termination of an offer. We have supported our arguments by the decided cases so that you may grasp the subject easily.
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Activity

	Activity 1 1) Explain briefly the essentials of a valid contract. 2) Discuss various classifications of contract. 3) Distinguish between an offer and invitation to treat by looking at different examples. 4) Explain with the help of decided cases rules on offer. 5) Discuss the legal position in the following cases: a) A advertises in a news paper offering Kshs.1,000 to any one who participate in a hunger walk on Sunday. b) X sends a price list to Y offering to sell a car for Kshs.2 million. a) A matatu goes along the road. b) D by letter dated July 13 offers to sale his farm to P for Kshs.3 million. The letter reaches P on July 20, which he immediately accepted. On July 16 DX sold the farm to c) Odek enters into a hire purchase contract orally with Kimani d) Mbugua on May 20 offered to buy 1,000 bags of maize from Ouma at a certain price. There was no reply from Ouma. On Dec 13, Ouma supplied
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6.5.3 Consideration Need Not Be Adequate But Must Be Of Some Value

The courts will not inquire into the adequacy of consideration as long as some value is given. It is for the parties to strike their own bargains and determine what they consider is the proper value of their acts or promises. If a party has made a bad bargain the courts are not there to repair it. For example, if **A** sells his car worth Kshs.3 million to **B** for only Kshs.100, 000. The consideration given by **B** is of some value, although it is not equivalent to the market value of the car. Bad or foolish bargains as this may still be enforceable at law. In *Thomas v Thomas (1842)*, **P**'s husband expressed his wish to the executor that if she survived him she should be allowed to live in his house for as long as she wanted and did not marry again. After his death the executor allowed **P** to occupy the house because of her husband's wish, and also if she paid £1 per year rent and kept the house in repair.

Held, that satisfying the wishes of the husband was not a good consideration but **P**'s promise to pay £1 a year was a valuable consideration.

However, inadequacy of consideration may be evidence of deception, fraud, duress, undue influence or mental incapacity.

Activity 6.1

	Explain the relational behind the rule that consideration need not be adequate
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6.5.4 Consideration Must be Sufficient

Although consideration need not be of adequate value, it must nevertheless be sufficient. In order to be sufficient the consideration need not be of some economic value, something of purely nominal value may be treated as valid consideration. In *Chappell & Co v Nestle Co. Ltd*, discussed earlier, worthless chocolate wrappers were considered as sufficient consideration. In the case it is clear authority for the principle that sufficiency rather than adequacy is the requirement of consideration *Lombard Banking Ltd v Gandhi and Patel (1964)*, the defendants originally made a promissory note in favour of a bank that cancelled forty nine earlier notes and promised not to take any legal action upon them. This bank then endorsed the promissory note to the plaintiff bank who sued the defendants to recover the balance of the amount due on the promissory note. The defendants denied liability by arguing that the plaintiff had given no consideration for the promissory note. Held, the act of cancellation of the forty nine notes and handing over of the replaced note whatever their value was a good consideration because the bank had suffered detriment in doing so.

In certain cases even though the bargain has been struck, the consideration may be deemed insufficient. In most circumstances the general rule is that the performance of an existing duty does not amount to a consideration for a fresh promise.

Take Note

Summary

	in exchange of something of consideration such as sale a house. However, consideration must be sufficient sufficiency of consideration means that the consideration must be of some economic value to the promisee. Performance of an existing public or contractual duty is not a sufficient consideration unless the promisee has done something more than what was required under the duty. Similarly, part payment of a debt in full satisfaction of it is not a sufficient consideration. The harshness of this rule is somewhat mitigated by the doctrine of promissory estoppel which applies only as a defence and does not create a cause of action. Performance of an existing duty however towards a third party is a sufficient consideration. Consideration must move from the promise. This rule is similar in effect to the doctrine of privity of contract. Under this doctrine a person is not entitled to enforce a contractual promise if he is not a party to the contract. The doctrine of privity is criticised on several grounds and has proved problematic in modern circumstances. A number of devices, therefore, have evolved to circumvent it.
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Activity 6.3

	1. Explain the concept of consideration. 2. Discuss various types of consideration. 3. Explain the rules relating to consideration. 4. Discuss the doctrine of promissory estoppel and its limitations. 5. Examine the doctrine of privity of contract and its exceptions. 6. Discuss the legal position in the following cases. (a) X promises his friend Y Shs.5,000 as a help for his study at the University of Nairobi. Later X refuses to pay Shs.5,000 to Y. (b) Mberia went to a police station to file a report of a robbery in his house. Mwangi, a police officer at the police station was very cooperative and helped Mberia in filing the report. Mberia promised to pay Shs.1,000 to Mwangi. Mberia failed to keep his promise of Shs.1,000 to Mwangi. (c) Murangu entered into a contract for the sale of his land to Musyoki for Shs.5,000. The land in fact was worth about Shs.5 million. Murangu later refused to transfer the land to Musyoki on the ground that the consideration was not adequate. (d) David on finding that his neighbour Christopher's car is very dirty,
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ridge of hard ground beneath the mud and was damaged. Held, there must be implied into the contract an undertaking on the part of D that the river bottom was, so far as reasonable care could make it, in such a condition as not to endanger the ship. Accordingly, D were held liable to pay damages to P.

Secondly, the terms which are implied by the courts consist of legal obligations generally imposed on one of the parties in a common contractual relationship, even though the parties may not have intended them to be included. There are called **terms implied in law**. Terms are only implied in law in respect of contracts of a defined type, such as contracts for sale of goods, employment contracts and tenancy agreements. In *Liverpool City Council v Irwin* (1977), the Liverpool City Council let flats and maisonettes in a tower block to tenants. The amenities of the block were seriously impaired so that the lift and rubbish chutes constantly broke down and the stairs were mostly unlit. There was no formal tenancy agreement, but the Council and the tenants signed a list of obligations on tenants. The list was, however, silent about the obligations of the Council for the maintenance of the building. The defendants (tenants) withheld payment of rent in protest at the Council's failure to maintain the building properly. The Council brought an action to obtain possession of the defendant's maisonette and the defendants' counter-claimed for breach of implied terms of the contract of tenancy to keep the building in proper repair. The Council argued that there were no implied terms. Held, since it was not possible to live in such a building without access to stairs and provision of a lift service it was necessary to imply terms as to these matters, however, there was no absolute obligation on the landlords to maintain these services. It was sufficient to imply an obligation of the landlord to take reasonable care to keep in reasonable repair the common parts of the building.

In *Harbutt's Light & Co v The Produce Shop* (1967), P repaired D's motorcycle and then stored it for a quite sometime as D did not collect it within a reasonable time. P, therefore claimed storage charges but D argued that there had been no contract with regard to the storage charges. Held, there was an implied term in the agreement that the person who undertook storage was entitled to a reasonable sum in respect of storage, Where the object remained on the repair's premises considerably in excess of the time it took to complete the repairs.

Take Note

	Express terms are those terms which the parties by their words spoken or written formulates the contract. In certain circumstances terms may be implied into a contract by custom, statute or court.
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7.8 The Classification of Terms

In a contract it is unlikely that all the terms will be equal importance. The courts recognize this inequality and classified the terms into conditions, warranties or innominate terms.

(i) Condition

A **condition** is a more important term in a contract the breach of which may give rise

Summary

to a right to treat the contract as repudiated. A condition may thus be described as a major or main obligation in the contract. It is a vital term going to the root of the contract. It is the essence of the contract.

In *Poussard v Spiers* (1976), an actress was hired to play a leading part a French Operatta during its entire run. Owing to illness she did not arrive until one week after the season started, when a substitute had been taken on. The producers then refused her service. Held, the actress' inability to perform from the first night was a condition, which went to the root of the matter, which justified the producers to rescind the contract.

(ii) Warranty

A **warranty** is a less important term, the breach of which may give rise to a claim for damages but not to a right to treat the contract as repudiated. A warranty is thus a term which is collateral to the main purpose of the contract. In *Betteni v Gye* (1876), B, a singer was hired by G, the Director of an Italian Opera to sing at concerts as well as in operas during certain dates. He undertook to arrive six days in advance for the purpose of the rehearsals but was three days late. GB's breach did not allow the contract to be treated as repudiated, but G could only claim damages for any loss he has incurred. Similarly, in *Kampala General Agency (1942) Ltd v Mody's (P.A) Ltd* (1963), P under a contract of sale agreed to supply goods to D at certain railway station. P sent the goods to another station on discovering that it was nearer to D's ginnyery. D refuse to take delivery alleging that P was in breach of a contractual condition, Held, failure to supply goods at the agreed railway station was not central to the main purpose of the contract so as to entitle D to repudiate the contract. On the other hand, it was a breach of warranty and therefore D was entitled to damages. On this ground D sought to terminate his contract. Held, the clause relating to rehearsal was not central to the main purpose of the contract and therefore It should be noted, however, that the use of the term "condition" or "warranty" by the parties is not conclusive. If the breach of the term expressed to be a condition only produces a very small loss it may be held that the breach will not justify repudiation.

(iii) Innominate Term

A third term type of term is an **innominate or intermediate** term. Such terms remain unclassified until the seriousness of a breach can be judged. They lay somewhere between conditions and warranties in terms of relative importance in so far as in some events the breach of them may entitle the innocent party to repudiate the contract and in other events the breach entitles him only to claim damages but does not entitle him to repudiate the contract. Thus the remedy available for breach depends upon the actual result of the breach. In *Hong Kong Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* (1962), D contracted for the charter of a vessel for a period of twenty four months and described the vessel as "being every way fitted for ordinary cargo service". When delivered the vessel was unseaworth. It took seven months to make her seaworthy and DP sued for breach of contract and claimed damages for wrongful repudiation. The question for the court was whether the breach entitled D to treat the contract as repudiated, or only entitled them to damages. Held, the breach of contract by P did not entitled DD could only claim damages for

Summary

Standard form contracts, particularly those containing exemptions clause are widespread in all industrial and trades, but their impact is particularly felt in sectors such as travel, carriage of goods and insurance

In Kenya standard form contracts containing exemption clauses are purely governed by the common law rules discussed above.

7.13 Summary

Summary

In this lecture we examined the rules to determine extent of rights and obligations created by a contract. In order to do that, it is necessary to ascertain the terms of the contract in question. Prior to entering into a contract, the parties may have made several statements but not all of them may become a part of the contract. Statements which are not part of the contract are representations, while statement which form the integral part of the contract are terms. Whether a statement is merely a representation or a term of the contract is one of the apparent intentions of the parties. However, the courts have developed a series of indicators to ascertain the parties' apparent intention.

The existence of the necessary intention is regarded as a question of facts but some guiding principles to decide emerge from examination of the cases. The guiding principles to decide whether a particular statement is a term or a representation include such indicators as, importance of the statement, interval between the negotiation and the contract, reliance by the plaintiff, special knowledge possessed by the person who made the statement and whether the contract has been reduced to writing?

We have also examined in this lecture, the parole evidence rule which states that extrinsic evidence, , especially oral evidence may not be admitted to add, to vary or contradict the terms of a written contract or deed. Parole evidence rule, however is subject to many exemptions.

Contractual terms may be express or implied. Express terms is a term agreed by the parties by words whether spoken or written. However, express terms do not always make up the whole contract. The parties may not provide for every contingency or may not express all the primary obligations in the contract. In that case certain terms may be implied by custom, by statute or by the courts.

The terms of the contract are classified into conditions, warranties and "innominate" terms. These terms are distinguishable from each other by the legal consequences which flow from the breach of any of them.

A condition is a term which goes to the root of the contract, a breach of which entitles the injured party to repudiate the contract and/or sue for damages. A warranty is a term which does not go to the root of the contract, a breach of which gives the injured party a right to claim damages but he can not repudiate the contract. An innominate term is an intermediate term which lay

	somewhere between a condition and warranty in terms of relative importance. The remedy available for the breach of innominate terms depends upon the factual consequences which flow from its breach. Thus, where the result of the breach is such as to deprive the innocent party of the benefit he was intended to obtain from the contract, he is entitled to treat the contract as repudiated. On the other hand, if the breach is relatively minor, the innocent party is only entitled to damages and has no right to repudiate the contract. This lecture also considers the circumstances in which exemption clauses will be legally effective. An exemption clause is a term in a contract which excludes or limits liability for breach of contract, or liability arising in tort or by statute. Exemption clauses are governed by the common law. In the first place, the courts consider whether the exclusion or limitation clauses have been incorporated by signature, by notice or by previous dealings between the parties. Once it has been established that the exemption clause has been incorporated into the contract, then the next step is to construe it. Three rules are of particular importance in construing exemption clauses: (1) the <i>contra proferentum</i> rule under which any ambiguity in the wording of the exemption clause shall be construed against party seeking to rely on it. (2) the main purpose rule under which there is a presumption that the exemption clause was not intended to defeat the main purpose of the contract, and (3) the doctrine of fundamental breach under which if a party committed a fundamental breach of the contract, he was not entitled to rely on any exemption clause in the contract. The doctrine, however, is not a rule of law, but merely one of construction. Exclusion clauses are usually contained in standard form contracts imposed by a party having superior bargaining power setting its own terms on the other party. Such contracts are not the result of any negotiations between the parties but are dictated by superior party. Standard form contract are governed by the common law rule discussed in this lecture.
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Activity 7.2

	1. Distinguish between terms and representations. Explain the ways in which a statement may be incorporated as a term into a contract. 2. Distinguish between express and implied term. Discuss various ways in which terms may be implied into a contract. 3. Explain various classifications of terms of a contract and remedy provided for their breach. 4. Critically examine the rules developed by the courts to construe exemption clauses. 5. Kemboi booked a hotel in Mombasa on telephone and paid deposit by visa
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television sets, it is not entitled to enter into a manufacturing of refrigerators. A company may, however, enter into contracts that are reasonably incidental to or consequential upon the operations that it is authorized by the objects clause to perform. Thus, a company may validly make contracts to buy stationery for its office, or to employ persons, because such contracts are incidental to its business. In **Ashbury Railway Carriage and Iron Co Ltd v Riche** (1875) the objects of the appellant railway company were to make and sell, or lend on hire, railway carriages, wagons and all kinds of railway plants, fitting machinery plants and rolling stock; to carry business of mechanical engineers, etc. The director entered into a contract to buy concession for the construction of a railway in Belgium which they assigned to R. The company's shareholders disapproved the deal and the company repudiated the assignment of contract with R. R brought an action against the company to recover damages for breach of contract. The House of Lords held that construction of a railway was not within the objects clause of the company and that the company did not have capacity to enter into contract to construct a railway. The contract was held to be **ultra vires** and void. Accordingly, R was not entitled to damages.

It was further held that the company could not ratify such a void contract even by the unanimous vote of all its members. In such cases, the company itself could plead that it had acted **ultra vires** and thus avoid the contract, though the other party to the contract was unaware of the fact that it was

The rigours of the doctrine of **ultra vires** is much softened by the decision of the Court of Appeal in **Bell House Ltd v City Wall Properties Ltd** (1966) where the objects authorized the company to carry on any other trade or business which in opinion of the directors might be carried on advantageously in connection with or ancillary to its main business of developing housing estates. Held, to make the opinion of the directors the criteria of whether the new business would be advantageous was legitimate and therefore **intra vires** (within the powers), provided such opinion was reached in good faith.

The doctrine of **ultra vires** had long been criticized. It was thought the doctrine protects shareholders against use of company's funds for unauthorized purposes but in view of the drafting of the objects clause in a very broadway, as in the case of **Bell House Ltd**, has made such protection largely illusory. Also, the doctrine is unfair to persons contracting with companies since they cannot enforce an **ultra vires** contract against the company. The doctrine now no longer applies to a third party dealing with companies in U.K see the **Companies Act 1989** which substituted a new section 35 (1), in the **Companies Act, 1985**. In Kenya, however, the doctrine is still applicable.

Take note

	A company may exercise and only exercise the powers set out in its memorandum of association and such powers as are reasonably incidental to the operations that it is authorised to perform.
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Activity 8.3

	1. Discuss how far the law attempts to protect a minor while entering into
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Summary

compensation. Held, the agreements to pay compensation were valid since the circumstances of the case itself disclosed no operative mistake and that the mistake was one of the quality of the service agreement. The decision is to the effect that it would only be in the most exceptional cases that a contract could be made void at common law mistake as to quality.

But in ***Solle v Butcher (1950)*** the Court tried to give some relief from this rule of the common law by formulating the principle of equitable mistake under which if a mistake being found to be operative in equity the agreement was said to be voidable and not void. In this case **P** agreed to lease a flat owned by **D** for seven years at an annual rent of £ 250. Both parties acted on a mistaken assumption that the flat, having been so drastically reconstructed as to be virtually a new flat, was no longer controlled by Rent Restriction Acts. The flat was, in fact under the rent control and was subject to a maximum of £140 a year. After two years **P** discovered the mistake and sought to recover the rent he had overpaid. Held, the contract was not void *ab initio* and **D** could rescind it so that he could serve notice of his intention to raise the rent to £250 a year. **P** was given the choice between surrendering the lease or continuing in possession by paying the full amount of £ 250 of rent.

In this case the principle of equitable mistake was formulated under which if a mistake being found to be operative in equity the agreement was said to be voidable and not void. However, in **Great Peace Shipping Ltd. v Tsavliris Salvage (International) Ltd.** (2002) it was said that **Solle v Butcher** was wrongly decided since the decision was inconsistent with **Bell v Lever Bros Ltd.** This means that where there is a mistake as to quality of characteristic of the subject matter there is no operative mistake and the contract therefore is neither void nor voidable.

9.3.2 Mutual Mistake

Mutual mistake occurs when both parties misunderstand each other and are at a cross - purposes, either as to the terms of the contract, or as to the subject matter.

X, for example; intends to offer his Toyota Corolla car for sale but Y believes that offer relates to the Toyota Carina also owned by X. If the parties to an apparent contract misunderstand each other, then it can be argued that this is no agreement between them. Although one or both parties may assert that a contract exists, but on an objective interpretation it is impossible to resolve the ambiguity over what was agreed. So the only possible conclusion is that it is impossible to impute any definite agreement to the parties. In ***Scriven Bros and Co v Hindley and Co.*** (1913) an auctioneer was employed to sell both hemp and tow. A lot of tow was put up for auction for which **D** successfully bid at an extravagant price thinking that it was hemp. **P** intended to sell tow and ***DRaffles v Wichelhaus*** (1864) may also be treated as a case of mutual mistake. Here, **P** promised to sell and deliver to **D** a cargo of cotton to arrive "ex Peerless" sailing from Bombay. There were two ships called "Peerless" both sailing from Bombay with cargo of cotton. One left Bombay in October

prospectus containing a statement that the company had the right to use steam power instead of horses. P took shares on the faith of this statement. The Board of Trade refused their consent to the use of steam power and the company was wound up. P brought an action for fraud (*deceit*) against the directors founded upon false statement. Held, the action against the directors claiming damages for fraudulent misrepresentation must fail since they honestly believed their statement to be true.

9.4.2.2 Negligent Misrepresentation

Before 1963, the common law made no distinction between negligent misrepresentation and innocent misrepresentation. If a misrepresentation was not fraudulent it was treated as innocent and the only remedy available was rescission of the contract and no damages could be recovered. But developments at common law since the decision of the House of Lords in *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* (1963), have altered this position, and now there is a distinction between negligent and wholly innocent misrepresentation. The remedy of damages is available for negligent misrepresentation also.

"A negligent misrepresentation may be defined as a false statement made by a person who had no reasonable grounds for believing it to be true". In *Hedley Byrne & Co. Ltd v Heller & Partners Ltd*. (1963) P had been asked for credit by a company, Easipower Ltd. P therefore asked its bankers to obtain a report from D, who were Easipower's bankers, on the financial standing of Easipower. D who had known the purpose of P's request, had carelessly replied that Easipower were financially sound. Relying on the advice given by D, P gave credit to Easipower and suffered losses. Held, on the facts of the case that D were not liable since the reply had been given "without responsibility". However, the importance of this case lies in the fact that for the first time the Court has recognised that there could be a liability under the tort of negligence, for negligent misstatement causing economic loss. In order to succeed in an action for tort of negligence, the plaintiff must establish that: (1) the defendant owed him a duty of care; (2) the defendant was in breach of that duty; and (3) the breach had caused him loss.

In negligent misstatement cases, contractual relationship need not be established, but the plaintiff must prove that a "special relationship" existed between himself and the defendant. It may be noted that liability for negligent misstatement can attach not only statements of fact but also to other forms of negligent statements such as expression of opinion or statement of law.

Further cases suggest that the common law doctrine of negligent misstatement is not limited to representations which results in a contract but it also applies to pre-contractual representations which induce a contract between representator and representee (see *Esso Petroleum Co. Ltd & Mardon* 1976).

9.4.2.3 Innocent Misrepresentation

Innocent misrepresentations are those not covered by fraudulent or negligent misrepresentation. An innocent misrepresentation is a statement which the maker honestly and reasonably believes to be true though in fact it is false.

Take Note

agreement under which it paid Kshs 54 million in settlement of the loan. However, one week later the payment was returned and the receivership was restored because the company had imposed conditions unacceptable to the debenture holders. Eventually, the company executed a deed binding itself to pay Kshs110 million to the debenture holders in full and final settlement of the loan. Subsequently, the company brought a suit against the debenture holders claiming Kshs56 million allegedly extracted from them. The case was partly based on the doctrine of economic duress. Held, the doctrine of economic duress was not applicable because there was no pressure or duress illegitimate or otherwise applied to induce the company to pay.

There are two factors which must be established before the contract is voidable for economic duress:

- (1) That there was illegitimate or unlawful economic threat
- (2) That the party threatened had no reasonable alternative but to agree to the contract in question.

It is worth noting that economic duress must be distinguished from mere commercial pressure, which is an everyday incident of the hard-nosed bargaining which goes on in the business world. Commercial pressure is legitimate in the eye of law.

Take Note

	Duress is of two types : Physical duress which means actual or threat of violence to the person, and Economic duress which occurs when commercial threats or forms of pressure, not associated with threats to person, is applied. As physical duress the contract is void whereas for economic duress it is voidable
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9.6 Undue Influence

The common law doctrine of duress was rigid and was initially confined solely to physical threats. As a result equity developed a separate doctrine of undue influence. Equity recognized that consent may be affected by influences other than physical ones. ***A contract may be induced by undue influence where one party had exerted influence over the other and thus procured a contract that would otherwise not have been made.*** The effect of undue influence is to make the contract **voidable**. Contracts which may be set aside for undue influence fall into two categories:

9.6.1 Actual or Express Undue Influence

Actual undue influence does not depend on any particular form of relationship between the parties to the contract. The party seeking to avoid the contract must prove that as a result of improper pressure by the other party, he felt compelled to enter into the contract. In ***Williams v Bayley CIBC Mortgages plc v Pitt*** (1993). In this case a husband (H) and Wife (W) jointly owned a family home. The only encumbrance on it was a mortgage in favour of a building society. H induced W to

Summary

accedes to the request of the other, and promises that he will not insist upon performance according to the strict letter of the contract, this is an indulgence. Arrangement of this kind is generally described as *waiver* or *forbearance* by the party who grants indulgence. The party who has granted indulgence is bound by it. **W. J. Allan & Co v El Nasr Export & Import Co.** (1972) concerned a contract for sale of coffee. Under the contract the price was to be paid by irrevocable letter of credit in Kenyan currency. The buyers, however, obtained a letter of credit expressed for payment in sterling pound. The sellers took no objection about payment in pound and in fact drew on the credit in part payment of the contract price. Subsequently, pound was devalued and the sellers claimed payment in Kenyan currency. Held, the sellers had waived the right to be paid in Kenyan currency by accepting the letter of credit and by drawing on it. Hence, they have to accept payment in Kenyan currency.

10.4.2.4 Novation

A contract may also be discharged by novation. Novation occurs where one party to the contract releases the other and substitutes a third party who then undertakes to perform the released person's obligations. The terms of the contract, however, remains the same.

10.5 Discharge by Breach

Breach generally means failure to perform any promise which forms the whole or part of the contract: A breach is of two kinds:

10.5.1 Actual Breach

Actual breach occurs where a party fails to perform one of his obligations under the contract. Actual breach may take three forms:

(a) **Non-performance**, where a party fails or refuses to perform his obligations when the

performance is due. *For example*, if **A** hires a lorry belonging to **B** to carry his livestock from Nairobi to Mombasa on certain date and **B** never brings his lorry to **A**'s place, that is a breach

of contract by non-performance.

(b) **Defective performance**, where a party attempts to perform a contract but in a defective

manner, it is a breach of contract. Thus in the above example, if **B** brings his lorry to **A**'s place not on the date fixed but three days late, that is a breach of contract by defective performance.

(c) **Non-truth of a statement**, if a statement that is term of the contract is untrue; it is a breach of

contract. Thus in the above example, where there is a term of the contract that the lorry is suitable for carrying livestock and, if in fact, it is not, that is a breach of contract.

Activity 10.2

because they had no knowledge of such contracts. agreed to install the boiler on June 5

The rule was further examined and approved by the House of Lords in **Heron II (Koufos v Zarnikow)** (1969). **D**, a ship owner agreed to carry a cargo of sugar from Constanza to Basrah. **DP** were sugar merchants. But they did not know that **P** intended to sell the cargo immediately on arrival. Because of unauthorized deviation from its agreed route the ship arrived nine days late. During the nine days the market price of sugar had fallen heavily and **P** suffered loss. Held, **D** were liable for the consequential loss of profit since the loss was one which the parties could reasonably have contemplated at the time of making the contract as "not unlikely" to result from such breach. knew that there was a market for sugar at Basrah and that

In this case the House of Lords approved the rule in **Hedley v Baxendale**, but saying that the loss must be contemplated as, a 'real danger' or a serious possibility rather than as the probable result of the breach'.

Activity 11.2

	What is the purpose of the remoteness of damage rule? What is the guiding principle adopted by the courts in this regard?
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11.3.3 Quantification of Damages

Once the court has decided that a particular kind of damage is recoverable under the rule in **Hedley v Baxendale**, the next step is to decide in what principle the damages must be evaluated or quantified in terms of money. This may be called the question of the **measure of damages** or quantification of damages. The basic principle is that the innocent party must, so far as money can do it, be restored to the position he would have been in had the contract been performed properly. There are, however, many situations in which some principles have been established to decide the measure of damages.

11.3.3.1 The Market Value

In the contract of sale of goods prima facie, the loss is measured by reference to the market. If the seller is in breach, for example if he fails to deliver the goods, and the goods are finally available in the market, the buyer can buy similar goods at the market price and can claim the difference between the market price at the date of the breach and the contract price. If the market price is equal to or below the contract price, the buyer will only be entitled to nominal damages since he will be in the same financial position as if the contract had been performed.

Conversely, if it is a buyer who breaks the contract, for example by refusing to take the delivery, the seller will be entitled to compensation for the difference between the contract price and any lesser amount which he gets for the goods by selling them elsewhere.

Where there is no available market the loss must be calculated in other way. If it is the seller who

It is worth noting that the mitigation principle applies not only to ordinary breach, but also to breach by anticipatory repudiation but it does not apply to a claim for an agreed sum.
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11.3.4 Liquidated Damages

The parties may incorporate into the contract a clause providing that in case of breach the damages shall be a fixed sum or be calculated in a special manner. Such damages are known as **liquidated damages**. In the event of breach, the innocent party will be able to claim damages only to the amount as agreed between the parties, no more and no less, without being required to prove actual damage.

Unliquidated damages, on the other hand, are damages that are not fixed by agreement of the parties but are determined by the court as the proper measure of damages.

The essence of liquidated damages is that it should be a genuine pre-estimate of the loss which will be suffered by the innocent party. Sometimes, however, the amount of agreed damages may be very high so as to compel the other party not to breach the contract. Such amount is referred to as **penalty** and will be struck down by the courts.

11.3.4.1 Liquidated Damages and Penalty

When a contract provides for a fixed sum of damages to be paid upon breach, it is a question of construction whether this sum is liquidated damages or a penalty. Express use of the words "penalty" or "liquidated damages" by the parties is relevant but not conclusive, and the court must still decide whether the sum is a genuine pre-estimate of the probable loss. In *Colt v. Acetate Silk Co Ltd v Widness Foundry Ltd* (1933) D agreed to erect a plant by a certain date. The contract contained a term whereby D would pay £20 per week by way of penalty for late performance. P claimed £5,850, their loss resulting from the delay of 30 weeks. Held, D were only liable to pay £20 per week for delay as agreed between the parties and the sum was not a penalty although designated as a penalty.

Certain rules to distinguish a penalty from liquidated damages are set out in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* (1915).

They are as follows:

(a) It is a penalty if the sum payable is extravagant and unconscionable in amount compared with

the greatest loss, which might be caused by breach. In *Kemble v Farren* (1829) P an actor entered into a contract with the theatre management to act at the theatre and to conform to all the regulations of the theatre. A term in the contract provided the party in breach must pay £1,000 as liquidated damages to the other. Held, this was a penalty clause because (i) even if P did not conform to the smallest regulations of the theatre he was liable to pay £1,000, and (2) the sum was disproportionate to the P's daily fee.

Summary

they were bound not to aggravate the damage. Thus mitigation is not relevant to a claim for agreed sum, it is relevant only to claim for damages.

Activity

	Discuss the common law remedy of agreed sum for a breach of contract
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11.5 Quantum Meruit

Where a party has provided a benefit to the other and cannot obtain payment for some reasons under the common law, the equity provides a remedy of quantum meruit, that is, "as much he deserved". This remedy operates in two situations:

(a) Where there is a contract

The fundamental rule is that where there is a contract between two parties the payment is to be determined according to the terms of the contract. The common example is where a contract for sale of goods fail to fix a price, the buyer must pay a reasonable price (see the **Sale of Goods Act**). In certain circumstance, however, this general rule is not applicable and the court will allow a *quantum meruit* remedy despite the existence of the contract. Also, where there is a contract in existence, the plaintiff can claim *quantum meruit* if he can show that the contract was void or that it has been discharged in some way. In **Craven- Ellis v Canons Ltd** (1936) P was employed as a managing director of a company under a written contract which provided for his remuneration. The contract was void because the directors did not obtain the required qualification shares. P rendered services for the company and claimed remuneration specified in the contract or alternatively reasonable remuneration on a quantum meruit. Held, P could recover reasonable value on quantum meruit but his claim under the contract failed since the contract was void.

Furthermore, as we have explained in the previous lecture that in an entire contract partial performance generally does not entitle the party in breach to any payment. Where, however, the innocent party voluntarily accepts a benefit conferred by partial performance, the party in breach may claim *quantum meruit*. Conversely, a quantum meruit action may also be brought by innocent party in cases where he conferred some benefit on the other party before the latter's breach. So also a *quantum meruit* claim can be made where a party to the contract is prevented by the other from completely performing the contract.

(For details on rules on performance recall the previous lecture).

(b) Where there is no contract

Where there is no contract as such but one party confers a benefit on the other with the intention on both side that benefit will be paid, then, the former can recover value of that benefit under a *quantum meruit*. In **British Steel Corporation v**

the same order could be made against the plaintiff.

It must be noted that it is possible to claim damages and specific performance at the same time.

11.8 Restitution

The remedy of restitution seeks to restore money paid or the value of a benefit conferred in circumstances in which there is no longer any obligation to perform under a contract or in which no contract exists. In the context of contract, the remedy of restitution is available in two circumstances.

(a) A party may recover money paid under a contract where there is a total failure of consideration in the sense that there is a total failure of performance of whatever was promised in the agreement.

(b) A party may generally recover money paid under a void contract.

11.9 Extinction of Remedies

The right action for breach of contract does not remain alive for ever. The **Limitation of Actions Act, 1968**, lays down that actions founded on a contract, and actions claiming equitable relief for which no period of limitation is provided by the Act or by any other written law may not be brought after the end of six years. The period begins to run from the time the cause of action arose, that is, from the time of the breach of contract. If on the date when the right of action accrued the plaintiff is under disability such as insanity or minority, the limitation period does not begin to run until disability ceases or the plaintiff dies. In case of a person claiming specific performance or injunction must do so without unreasonable delay or laches.

Activity

	1. When a contract is broken the injured party generally has a remedy to claim damages. In the light of this statement explain the rules governing a claim for damages for breach of contract 2. What is an injunction? Discuss various types of injunction and explain in what circumstances an injunction can be granted for breach of contract. 3. Discuss the circumstances in which the courts may grant or refuse the remedy of specific performance. 4. Explain the following: a) Quantum meruit b) Action for agreed sum 5. Kuria, a taxi owner gave his taxi for some repair to Ken Repairs Ltd. The repairs were to be completed within a week. However,
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The agent must keep proper accounts of all his dealings on behalf of the principal. He must render accounts to the principal when required. Where he receives money on behalf of the principal, he must keep it separate from his own.

(e) Duty to Act Personally

The agent may not delegate his authority to act on behalf of the principal unless expressly or implicitly authorised to do so. Delegation may take place in case of necessity, or where it is customary or authorised by the principal.

Where delegation is reasonable in the circumstances, then the principal is responsible to the third party for the acts of the sub-agent. However, the agent will be responsible to the principal for sub-agent's acts, and sub-agent will be responsible to the agent who appointed him.

12.7.2 Agent's Rights Against The Principal

(a) Right to Remuneration

The agent has a right to claim remuneration for the services he provides, where there is a contract between him and the principal. The amount of commission and other remuneration depends entirely on the terms of contract between the agent and the principal. If nothing has agreed, the agent is entitled to what is customary in the particular business. In absence of a custom, the agent is entitled to a reasonable remuneration. A gratuitous agent, however, cannot expect or demand any remuneration.

Whether or not an agent is entitled to commission depends upon the individual facts of each case, and especially the precise wording of the agency contract. In absence of clear and precise wording, the court seems to be reluctant to make the principal liable unless the agent was the cause of a completed contract. In **Luxer (Eastbourne) Ltd v Cooper** (1941) P instructed A, an estate agent to find a purchaser for his cinemas. The agent contract provided that P should pay a fee of £10,000 "on completion of sale". A found a prospective purchaser, who was ready, willing and able to purchase subject to contract, but P withdrew from the sale. Held, A was not entitled to commission since the court refuse to imply a term that P must give A the opportunity to earn his commission.

It seems today the courts may be more willing to imply a term in contracts of agency that the principal must give the agent the opportunity to earn his commission. But again it depends upon

the precise wording of the agency contract. In **Sheggia v Gradwell** (1963) the agency contract provided that P, the seller of a property should pay A, an estate agent commission as soon as "any person introduced by us enters into a legally binding contract to purchase". P later rescinded the contract because of the purchaser's breach. Held, A was entitled to his commission when the purchaser entered into a binding contract.

In claiming his commission the agent must show he was the effective cause of the transaction entered into by the principal. In **Miller v Radford** (1903) P employed A to find a tenant or a purchaser for his property. A was paid commission when he found a

Summary

The principal's power to revoke the agent's authority is limited in the following circumstances:

(i) If the principal has allowed the agent to assume authority, revocation will only be effective

against the agent, if he knows of the revocation of the authority, or against the third party if the third party has notice of it.

(ii) If the principal has given the agent an authority coupled with an interest, the authority is

irrevocable. In *Gausson v Morton* (1830) a large sum of money was owned by P to A. In

order to pay the debt P gave A **power of attorney** to sell certain land and to take the money owned to him from the proceeds of sale. Held, A's authority was irrevocable since it was coupled with interest. The same rule applies where a **power of attorney** is expressed to be irrevocable and is given to secure some interest of the agent.

(d) **Performance**. When both principal and agent have performed their contractual obligations the

contract of agency comes to an end.

12.9.2 By Operational Law

(1) **Death**. Since agency is regarded as a personal contract it is terminated by death of either party, even where the other party has no knowledge of the death.

(2) **Insanity**. Agency terminates when either the principal or the agent becomes insane, since an insane person has no capacity to appoint or act as an agent.

However, the principal will be bound by the contract made by the agent with the third party who has no notice of that incapacity.

In *Drew v Nunn* (1979) H, the husband authorised his wife W to buy goods on credit from P, H became insane but W continued to buy goods from P, who had no knowledge that H had become insane. Held, P could recover the price of goods supplied to W from H. Subsequently

(3) **Bankruptcy**. Bankruptcy of the principal imposes legal incapacity and so it would automatically terminate the agency.

(4) **Frustration**. The contract of agency is subject to the usual rules of frustration which we have discussed earlier in our lecture on termination or discharge of contract. In *Turner v Goldsmith* (1891) A was employed by P, a shirt manufacturer to sell various goods manufactured and sold by P. The contract of agency was for five years. After two years P's factory was burned down and he closed down his business. Held, the contract not frustrated since P could still supply other goods or goods manufactured by other persons. Accordingly, A was held to be entitled to damages for loss of commission.

12.10 Summary

Summary

Summary

	contract in certain circumstances. The agency relationship creates certain rights and duties between principal and agent. The duties of an agent are: duty to exercise due care and skill, duty to obey instructions, duty to act in good faith and duty to act personally. The rights of an agent include the rights to claim commission and other remunerations, or indemnity for the loss suffered in the course of agency or to claim lien over the goods in his possession to secure debt arising out of the agency. The rights of an agent are the duties of the Principal. There are various types of agent which may be appointed. Classification according to function includes agent such as auctioneers, mercantile agents, brokers, del credere agents, estate agents and confirming house. Another way to classify agents is according to the extent of authority. Such agents are universal agent, special agent and general agent. An agency can be terminated either by the act of parties or by the operation of law. It can be terminated by agreement between the parties, by notice or by revocation by the principal. It can also be terminated by death, bankruptcy, insanity or frustration.
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12.1 Activity

	1. Explain an agency relationship. 2. Discuss various ways in which an agency may be created. 3. With the aid of examples critically discuss various duties of an agent. 4. Explain authority of the agent. 5. Discuss the effect of a contract made by the agent on the principal and the third party. 6. Discuss the liability of the agent towards the third party. 7. Explain various types of agent. 8. Describe ways in which an agency may be terminated. 9. Discuss the legal position in the following cases: (a) Kiama had sent some fruits from Meru to Nairobi by a lorry belonging to Kentransport Ltd. A landslide occurred at a place half way between Meru and Nairobi. As a result it was not possible to carry on further journey to Nairobi at least for a week. The driver of the lorry therefore decided to sell the fruits at the local market as
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	they were getting bad. (b) Otieno asked Ombaka, an estate agent to sell his house for a certain price and agreed to pay him two per cent commission for a job. Ombaka, sold the house to Kairu for the stated price but also took two percent commission from Kairu. When sued by Otieno, Ombaka argued that Otieno had not suffered any loss, therefore he was not liable.
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SAMPLE EXAMINATION PAPER

UNIVERSITY OF NAIROBI

MODULE II DEGREE PROGRAMME

FIFTH SEMESTER EXAMINATIONS

THIRD YEAR EXAMINATIONS FOR THE DEGREE OF BACHELOR OF COMMERCE

DBA 301: BUSINESS LAW A

INSTRUCTIONS:

- Answer any THREE questions.

- All questions carry equal marks.

1. (a) With the help of the decided cases, discuss various ways in which an agency may be created. (12 marks)

(b) Juma had sent 10 tons of mangoes from Meru through Meru Transporters Ltd to a buyer

in Nairobi. It was not possible for the mangoes to continue the journey further after about

100 kms from Meru since a bridge had collapsed. Meru Transporters entrusted their driver to sell the mangoes in a nearby town. The driver sold the mangoes at a price lower than the marked price. Juma sued Meru transporters for selling mangoes. Advise Meru Transporters. (11 marks)

2. The mere act that one or more parties to a contract under a mistake does not, as a general rule, affect the validity of the contract. A contract is only void on the ground of mistake when the mistake is such that there was never any real agreement between the parties. In light the light of this statement discuss different types of mistake and their effect on the validity of a contract.

3. (a) Whenever there is a breach of contract by one party, the other is entitled to bring an

action for damages. If the innocent party has sustained loss, he is entitled to substantial

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Page 180 of 181

Summary

damages which are calculated in accordance with certain rules. Discuss those rules. (12 marks)

(b) Kimani bought a boiler from Kuria for use in his factory. Delivery was to be made on 15th March but was not made until 20th October. Kimani claimed (1) loss of profit the factory would have made had the boiler been delivered in time and (2) loss of profit from some highly profitable contracts.

Advise Kuria on the legal position. (11 marks)

4. (a) Examine various rules in respect of an acceptance of offer. (12 marks)

(b) Abba & Co. accepted a tender submitted by Khamala for supply of stationary for two

years as when required within two years & Co. never placed any order. Khamala sued Abba & Co. for breach of contract.

Advise Abba & Co.

Will your answer be different if Abba & Co. bought stationary from Kenstationer Ltd within the contract period? (11 marks)

5. (a) Discuss various classifications of law (8 marks)

(b) Discuss the following sources of law

(i) Common law and equity (8 marks)

(ii) African customary law (7 marks)

6. Write explanatory note on any TWO of the following:

(a) Capacity of a minor (12 marks)

(b) Frustration of a contract (12 marks)

(c) Invitation to treat (12 marks)

(d) Consideration (12 marks)

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Page 181 of 181