THE OPEN UNIVERSITY OF TANZANIA

COURSE MATERIALS FOR THE LL.B DEGREEPROGRAMME

LAW OF CONTRACT

PART –I-

By N.N.N. Nditi

LECTURE NO.

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PART ONE: FORMATION OF CONTRACT

This part has three sections. The first is on introductory considerations. In the second section you will study how a contract is formed. The third section will cover essential elements of a contract.

SECTION I. INTRODUCTORY CONSIDERATIONS

(a) Objectives: (1). To introduce you to the historical background to an institution known as contract.

(2) To make you learn sources of contract law of the East African countries of Tanzania, Kenya and Uganda.

(b) Study strategy: Will be indicated in each lecture.

(c) Introduction: Will be covered in each lecture.

LECTURE NO.1: THE INSTITUTION OF CONTRACT

(a). Objectives:

(1) To define the term contract.

(2) To introduce you to an historical backdrop to the institution of contract (3) To explain to you the basic conceptions of contract.

(b). Study strategy:

Most of what you will read in this lecture is not necessarily legal material. It is however extremely important for your understanding the law of contract in its historical, socio-economic context. So carefully go through the lecture and understand it before you proceed to the next one. You must also

read the other literature especially that which is in your casebook.

(c). Introduction:

This first lecture as pointed out already does not contain much legal content. It is intended to let you understand how the institution of contract arose and its importance in the economic life of societies.

1.1 What a contract is:

The universal definition of a contract is that it is an agreement with legal force. So it is not all agreements or undertakings which amount to contracts. The legal binding nature of an -agreement is necessary for there to be a contract.

1.2 Historical socio-economic reasons behind the institution of contract

Tracing the historical development of mankind (See generally Engels, F. Origin of the Family, Private Property .and the State, Foreign Languages Publishing House, Moscow) one finds that private arrangements between individual persons began to surface with the appearance of surplus product. When man could produce necessary product only (i.e. that necessary to enable him subsist) he had no option but to follow communities rules, i.e. common ownership of means of subsistence and reciprocal dependence. Togetherness was the tool to combat famine, ferocious animals, bad weather, and sickness etc. The problem laid in the fact that production of necessary product only, could not ensure an individual adequate and constant food supply and the other amenities of life. Insecurity prevented man from developing acquisitiveness and greed. Production of surplus product (i.e. over and above that which was necessary for subsistence) ensured the individual adequate

and constant food supply. The surplus product he had could be exchanged for products he did not produce. With the production of surplus product man found that he could live on his own provided he exerted his labour power. Domestication of animals and in particular, cultivation of edible plants, guaranteed man constant and adequate food supply and this made him decide to own his means of subsistence and break away from communality of ownership of property.

This development ushered in the need for exchange with a view to acquiring more and more property. Acquisitiveness and greed became the order of the day, disrupted the old custom-of common ownership of property and led to creation of classes in the society. All class societies - those in the Slave mode of Production, Feudal Mode of Production arid the Capitalist Mode of production are characterized by propertied classes. Central to acquisition is exchange of values. Less value for more value: buying cheap and selling dear, a month's work for meagre wages and it is contract which- facilitated exchange of values. In simpler or more primitive economies solidarity of relatively self-sufficient family groups and the fear of departing from accustomed ways limit individual initiative as well as the scope-and importance of what can be achieved by deliberate agreements or bargains. In societies where there is production of not only necessary product but also surplus product rudiments of rules of contract begin to surface. The development of the institution of contract and the laws relating to it is closely linked up with the development of commerce and industry. Extensive commerce involving travel and contract with other peoples led to observation of habits and ideas which gave rise to a certain amount of free individual thought and enterprise. Hebrew, Greek and Roman law of contract grew due to the expansion of trade and commerce.

Commercial enterprises involve a greater anticipation of the future than is necessary in a simpler or more primitive economy. It was the commercial revolution, even before the industrial revolution, which served to transform a predominantly fixed land economy into a more fluid and enterprising economy on the basis of money and credit. Commercial transactions required a developed notion of binding nature of promises. The expansion of the institution of contract since the 17th century was intimately related to the Commercial revolution in Northern Europe following trade with the East and America. The industrial revolution which ushered in mass commodity production required a very developed institution of contract and the laws relating to it (See generally, Havard Law Review 553).

1.3 Basic conceptions of the institution of contract

The institution of contract carries with it certain basic conceptions. Firstly, whether or not a society has a conception of the binding nature of contract depends upon the material conditions in that society - on its mode of production (how in that society food, clothing and shelter and all other products labor are produced) and the relations of production (relations between people resulting from their roles in the production process). Secondly, a developed institution of contract carries with it two fundamental notions. These are freedom of contract and sanctity of contract. Freedom of contract means persons are free to contract as they wish. Once they have concluded a contract• voluntarily that contract becomes sacrosanct in the sense that nobody, not even the state, should interfere with it. The two fundamental notions are features of a capitalist legal system and are necessary legal developments in that society, based as it is upon the economic phenomenon of exchange of commodities, buying and selling, and are also necessary legal features of societies developing towards capitalism, or under the impact of capitalism

introduced from without, societies in which some things become commodities, i.e., are capable of being and are bought and sold, in particular land and human labour power. Thirdly, the two fundamental notions, i.e., sanctity of contract and freedom of contract form part of the bourgeois ideology and are "false consciousness". They do function not to describe accurately the real relationships of bourgeois society. They do obscure the real relationships. They are false in that their real function is to persuade people: (a) that they are free when they are not free,

(b) that they are equal when they are not equal,

(c) that they enter into relationships of their own free will when in fact those relationships develop independently of men's will. It is necessary to persuade people into all these things in order that they accept to be. Exploited, and minimise incidence of open conflicts arising out of the capitalist mode of production. This persuasion helps the state in that conflicts are allowed' only within the ambit of the legal system. So that when a party breaches a contract the innocent party, instead of fighting, seeks remedy in a court of law (see generally Lyall, A., "The changing Nature of Contract" and Friedman, Law in Changing Society, 2nd Ed., Stevens & Sons, 1972, chapter 4).

1.4 Institution of contract and the place of contract law

The law of contract governs 'or regulates agreements which are intended to be legally binding. The ~aw allows parties to an agreement to make law for themselves provided they do so within circumscribed limits. They should no~ infringe the laws of the land nor should they go against public policy. Once private persons have made their own law within the allowed limits the state will protect their legal interests by enforcing the law made by. the parties themselves or by

applying relevant laws of private persons as built up in the course of many years through, especially, case law.

1.5 Exercises: Answer the two questions below. Then find an opportunity to have your answer read and commented on by a fellow student or your tutor.

(a) What led to the rise and development of the institution of contract?

(b)Discuss underlying conceptions of the institution or contract.

1.6 Further readings:

(a)Engels: Origin of the Family, Private Property and the State, Foreign Languages Publishing House, Moscow.

(b) Cohen, "The Basis of Contract" in 1933 Harvard Law Review, 553.

(c) Friedman: Law in Changing Society, Stevens and Sons Chpt. 4.

(d) Your casebook.

LECTURE NO.2: DEVELOPMENT OF THE INSTITUTION OF CONTRACT IN AFRICAN COMMUNITIES

Objectives:

(1) To explain to you that there are contracts which are based on customary practices and rules.

(2) To show you that there has been a problem of recognizing customary contracts by the courts.

Study strategy: After reading this lecture carefully you must read your casebook…..

Introduction: In this lecture we are going to look at the institution of contract in African communities. The lecture is confined to the development of the institution in basically subsistence economies. The approach is historical. In addition in this lecture we are going to consider the problem of recognition of customary contracts by courts of law.

2.1 Customary contracts in African Communities: An historical backdrop

Customary contracts mean those contracts which are regulated or governed by customary law. Among peasant communities one cannot rule out production of surplus product in terms of food or other products of labour. So long as there is a surplus one would expect exchange. And, exchange involves agreements, be they in terms of barter or sale or another type of arrangement. Provided barter, sale or other type of exchange exist then one would expect exchange of promises and their fulfillment or breach. Such arrangements or agreements may be legally binding, i.e., binding according to customs, usage or rules of a given community or tribe. The agreements may be enforceable in recognized state tribunals, in which case their recognition is taken for granted. If they are not, then their very recognition becomes an issue. The question as to the existence of customary contracts is curious because one would not expect non-existence of exchange of goods and services in, say, African communities. The fact, however/ is that very little is

known about customary contracts, apart from marriage arrangements. Perhaps the problem lies in the tendency on the part •of writers to ignore researching and writing on customary contracts. Cotran and Rubin have this to say:

“The law of contract does not appear to form a very substantial part of African customary law. It is not entirely clear what the reason for this is. It may be the result on the part of writers to ignore this topic in favour of others; it may be that contractual relations are not very elaborately developed in African Society; and that the writers were therefore unable to discover very much material on the topic. In any event early writers on customary law paid very little attention to contract, and it is only more recently that the subject has been dealt with systematically (See E. Cotran & N.N. Rubin (Eds') Readings in African Law, Vol. I, African Publishing Corp. New York, 1970,p. 201).

A systematic treatment of the subject has shown that there are customary contracts in African societies. I. Schapera who conducted research on "Contract in Tswana Lawll from 1935 to 1940 says that a contract in Tswana Law is basically a voluntary agreement between two parties, imposing obligations upon one (or both), and reciprocally conferring rights upon the other (or both). The contracts are enforceable in Tswana tribal courts. (Read Contract in Tswana Law" in J .A.L Vol. 9 No. 3 p. l42). Writing on contracts among the Barotse, Gluckman says that agreements among the Barotse carry rights and obligations and are binding. Each party must look to his obligations rather than to his gains (See M. Gluckman Ideas in Barotse Jurisprudence Yale Univ. Press 1956, pp. 170-182). The agreements among the Barotse suggest relationships of generosity and utmost good faith. The agreements are, however, enforceable. Tabooes and special conventions of behaviour help in the fulfillment of obligations and thus minimise breaches. T.O. Elias writing on the "Nature of African Customary Law" points out that there are

innumerable contractual relationships existing in the so called simple African communities, at varying stages of economic development (Read T.O. Elias, The Nature of African Customary Law Manchester Univ. Press, 1956).

Today one cannot imagine a community or tribe that does not know about contact. The contracts may not be sophisticated labour contracts, contracts of assignment, sale of goods, house building contracts and contracts for services.

2.2 Customary contracts and their recognition in Tanzania

The Tanganyika Order-in-Council, 1920, required the Governor, when making Ordinances; to respect existing native laws and customs provided they were not opposed to justice or morality (See s. 13(4) of the Tanganyika Order-in-Council, 1920). And every court, was called upon, in all cases to which natives were parties to be guided by native law so long as it was applicable and. was not repugnant to justice and morality or inconsistent with an Order in Council or Ordinance or any Regulation or Rule made under any Order-in Council Ordinance. Moreover were required to decide cases to which natives were parties, according to substantial justice without undue regard to technicalities of procedure and without undue delay (See S. 24 of the Tanganyika Order-in Council, 1920). Basing on the Order-in-Council, 1920, one may argue that customary contracts were recognized and could be enforced in the courts provided they did not go against the provisions of the existing law and were not repugnant to justice or morality.

In 1963 under the Magistrates' Courts Act (MCA) primary courts were given general civil jurisdiction over causes of action governed ~y customary or Islamic law, and certain other matters in respect of which jurisdiction was specifically conferred by statute. Section 14 provided:

14.-(1) A primary court shall have and exercise jurisdiction-

(a) in all proceedings of a civil nature

(i).where the law applicable is customary law or Islamic law;

(ii) for the recover of civil debts, rent or interest due to the Republic, the Government or any municipal, town or district council under any judgment written law (unless Jurisdiction therein is expressly conferred on a Court or Courts other than a primary court), right of occupancy, lease, sub-lease or contract, if the value of the subject matter of the suit does not exceed two thousand shillings, and any proceedings by way of counter-claim and set-off therein of the same nature and exceeding such value.

Paragraph (ii) or section 14(1) (a) did not cover private civil debts. Customary contracts involving private civil debts. Customary contracts involving private civil debts could not be determined under it. Contracts regulated by customary law could be determined under para (i). This, however, does not seem to have covered claims arising out of private civil debts.

In 1968 referring to a case before him Georges, C.J., (as he then was) observed:

If persons of the same tribe enter into an agreement well known to tribal custom under which terms are prescribed, these persons must in the absence of evidence to the contrary be understood to be contracting in accordance: with these terms …(In such cases) relevant customary law must be applied if it is applicable and is not repugnant to justice or morality or inconsistent with any written law (Read Mtatiro Mwita v. Mwita Marianya(1968) HCD No. 82).

In that case the plaintiff received on bullock from the defendant in exchange for some finger millet. The bullock died two months later of unknown causes. Both parties belonged to the Kuria tribe and this type of contract was well known! in tribal custom. "The custom -,.;as that if an animal so exchanged for millet died within a year the meat and skin could be returned to the other party who would then be obliged to replace the animal. The plaintiff followed the procedure and then instituted the suit for another bullock. The lower courts refused to follow the custom on the ground that the dispute involved contractual rights and therefore the primary court had no jurisdiction to hear it. On a second appeal the learned Chief Justice allowed the appeal and found no reason agreements well known to tribal customs (See Fadhili v. Lengipengi [1971J Hen No. 31).

Other high court Judges, however t either doubted or simply ruled out the existence of customary contracts other than those of or relating to marriage, separation or divorce. Mustafa, J. (as he then was) doubted whether under section 14 of the MCA a primary court had jurisdiction to deal with an action arising out of an account for goods sold (See Gaudensia Samwel v. Melchior Marcel,[1967J HCD No. 333). The judge decided not to clear his doubt because neither party had raised the question. In another case involving recovery of a loan of Shs. 250/= originally filed in a primary court the learned judge said: The primary court had no jurisdiction to hear the case, as the law applicable was not customary law or Islamic law t nor was this an action for the recovery of a civil debt by the Government (S. 14(1) M.C.A., see also. Edward Kalemela v. Muyebe Rwenjege [1968) HCD No. 80. The whole proceeding was declared a nullity. In a number of other cases judges did not entertain the idea of existence of customary contracts (Read Ephraim Obongo v Naftael Okeyo [1968] HCD No. 288). In a case involving a claim for goods delivered, the judge was not prepared to treat it as a

case arising out of contract. He said that it was not established to his satisfaction that such a claim could not be brought "under customary law. His reason was that the case was simple involving a claim:"or goods delivered “not ... for breach of contract as Such" (Read Ephraim Obongo v. Naftael Okeyo [1968) HCD No. 288). Had the high court recognised the existence of customary contracts there would be no bar to primary courts entertainment private civil communities? There were many cases involving private civil before primary courts, which the courts, notwithstanding want of jurisdiction on their part, heard and determined. In Walimu Jilala v. John Mongo (See 1968 HCD No. 81), Mustafa, J. (as he then was) admitted that it was the practice of primary courts to hear cases involving private civil debts. He 'went on to remark, •'the Court" is aware this practice. By lithe” Court" he meant the High Court.

The question which taxed the courts is whether a suit arising out of a contractual arrangement was a civil proceeding entertains able by primary courts perhaps, be appreciated if it is asked that it that it was the involving peasant communities there were contracts other than those of or relating to marriage, separation or divorce. If there were such contracts, could they be regulated by customary law? If it is argued that there were "no contracts in peasant communities other than those of or relating to marriage, separation or divorce then/it can be said that the legislators did not heed to provide for non-existent contracts. Sir Kenneth Roberts-Wray, an eminent English lawyer, defending the whole-sale importation of English commercial law to Africa argued that indigenous law did not cover commercial law save in a very rudimentary form. He lamented:

One cannot hope to find commercial customs, such as those from which Lord Mansfield moulded a segment of the Common law in a community in whose

Philosophy the transactions to which they relate are undreamed of (In "The Need for study of Native Law" in (1975) J. - 2,).J.A.L. p.32 at 84).

This line of argument suggests that proceedings of a civil nature from peasant communities de not include proceedings relating to business transactions, e.g. loan agreements. It may be argued, on the other hand, that there were business transactions among the peasant communities. Contractual rights or obligations arising out of such business transactions did not differ from those under English law (the imported law). As such the imported law governing contracts was to be applied. Since the law relating to contracts is technical, primary courts were not allowed to hear and determine contract cases. This line of argument boils down to this: that a customary contract is, nevertheless, a contract; being a contract it is technical and, therefore, primary courts should have no jurisdiction to entertain such cases; these were to be instituted in district or higher courts. This line of thinking played down customary contract rules in favour of the imported rules and .forbade primary courts to hear civil suits arising out of contract because these were not governed by customary law. As shown above until 1968 the courts in Tanzania were of the view that a civil suit arising out of contract could not be heard by a primary court because the law applicable was not customary law. There were doubts cast here and there which were cleared by amending the Magistrates Courts Act, 1963 by the Written Laws (Miscellaneous Amendment) Act, No. 50 of 1968.

It is submitted that the problem was one of interpretation despite some clear guiding statutory provisions which could be called in aid. Section 9 (l) of the Judicature and Application of Laws Ordinance/Act, as amended by the Magistrates' .Courts Act, 1963 allowed customary law to be applicable to, and courts to exercise jurisdiction in accordance therewith, in matters of a civil nature where rule

of customary law relevant to the matter were in existence and acceptable by the members of the community (See Schedule IV -provisions relating to the civil jurisdiction of primary courts). The Customary Law (Limitation of Proceedings) Rules 1963 recognized proceedings for d-damages for breach of contract or to enforce a contract, other than contracts of or relating to marriage, separation or divorce (See 5th item of GN. 311 of 1964 which set a limitation period for contracts in writing as 3 years). Item No. 2 of the above customary Law rules gave a limitation period of three years within which to institute proceedings for money lent or money due for property sold and delivered. By paragraph (3) (1) (a) of the 4th Schedule to the Magistrates' Courts Act, 1963 a primary court was empowered, in proceedings of a civil nature, to order the specific performance of any contract. One wonders, therefore why the courts were reluctant to interpret section 14 (1) of the MCA as conferring jurisdiction upon primary courts to hear contract cases provided the law applicable was customary law. This reluctance necessitated amendment of the MCA, 1963 by adding paragraph (iii) to section 14(1) (a) which conferred jurisdiction upon primary courts to hear contract cases provided adding paragraph (iii) to section 14 (1) (a) which conferred jurisdiction on primary courts in cases involving civil debt arising out of contract but put a pecuniary limit (Read Hansard 1-3 October, 1968, p. 53). Section 14 (1) reads:

14. (1) A primary court shall have and exercise jurisdiction (a) in all civil proceedings of a civil nature: (i)…… (ii)…….

(iii) For set off therein of the same nature and not exceeding such value (See Act No. 50 of 1968).

Amendment of s. 14(1) of the MCA necessitated amendment of the Law of Contract Ordinance cap 433. Sub-section (3) was added to section 1 of the

Ordinance. The sub-section provides: Nothing in this Ordinance other than section 23 hereof, shall affect any customary law and in relation to any matter in which the law applicable is customary law, the provisions of ~he said section 23 shall be in addition to any relevant rule of customary law and the references to a law in the said section 23 shall be deemed to be and the Acts of the Common Services Organisation (See Act No. 50 of 1968). The effect of s. 1(3) of the Law of Contract Ordinance is to exclude application of the provisions of the Contract Ordinance I except section 23, in contract cases governed by [1968] No. 381), Platt, J. f after finding that the dispute was governed by Arusha law (on the grounds that the plaintiff based his claim upon it and no~ upon the Law of Contract Ordinance; that both parties had accepted that the agreement was governed by customary law and that the defendants claim for title of the land had been governed by customary law); held that since the agreement was governed by customary law, the Law of Contract Ordinance was excluded by section 1 (3) of that Ordinance. The proceedings were referred to the primary court. (See also eg. Bicoli v. Mahemba (1971] HCD No. 420). The Magistrates' Courts Act, 1963, was repealed and reenacted by the Magistrates' Courts Act, 1984 (No. 2 of 1984). The pecuniary jurisdiction of primary courts in cases arising out of contract is now ten thousand shillings (See s. 18(1) (a) (iii) of Act No.2 of 1984).

2.3 Exercises:

(i) What were the reasons which gave rise to the development of the institution of contract among African countries?

(ii) Do the courts in Tanzania recognize customary contracts?

2.4 Further readings:

(i) Your casebook.

LECTURE NO.3: SOURCES OF THE GENERAL PRINCIPLES OF CONTRACT LAW IN EAST AFRICA

Objectives: (i) To explain the various sources of contract law in East Africa.

(ii) To point out the difference between the applicable contract laws of Tanzania on the one hand and Kenya and Uganda on the other.

Study strategy: Carefully read this lecture with a view to know

(i) the various sources of contract law in Tanzania. (ii) the sources of contracts law of Kenya and Uganda (common law).

Introduction:

In this lecture you are going to study the various sources of contract law of the East African countries of Kenya, Uganda and Tanzania. You have to note from the very start that the sources of contract law of Tanzania are generally not the same as those of Kenya and Uganda.

Source of customary contract law

Customary contract laws are not codified. The rules are traceable in customs and usages of the given communities. Some customary contract rules can be found in the writings of some scholars (e.g. Cory & Hartnoll, Customary Law of the Haya Tribe (1945), Cory, Sukurna Law and Custom, 1953, Hydon, Law and Justice in Buganda).

3.2 Sources of non-customary contract law

3.2.1 The background

Non-customary contract law which constitutes a vast body of contract law in East African traces its origin from England either directly or indirectly due to the colonial connection. England colonized India in the mid 19th century. By that common Law of Contract, had very much developed and could be found in decided cases. It was not codified. However, it was thought proper to codify the law of contract for the colony of India. This led to the passing of the Indian contract Act, 1872 which codified the English common Law of Contract as it stood in the middle of the 19th century with some modifications to suit the circumstances of the colony of India (The Indian Contract Act, 1872 was the work of the famous draughtsman called Sir James Stephen) When the East African countries became colonies of Britain it was decided to apply the Indian Contract Act, 1872 in East Africa because it had worked reasonably satisfactorily in India. All the three East African Countries (Kenya, Uganda and Tanganyika, also Zanzibar) imported the Indian Contract Act, 1872 as an "Applied Act (In the case of Tanganyika see Application of Laws Ordinance/Act., 1920). The Indian Contract Act, 1872, applied in the East African countries was not intended for the indigenous inhabitants - the natives. In all the East African countries the courts were directed in all civil cases to which natives were parties to be guided by native law "so long as it is applicable and is not repugnant to justice and morality or inconsistent with any Order - in - Councilor Ordinance"(sec Tanganyika Order in Council, 1920)

Where the Indian Contract Act, 1872 could not provide an answer the East African courts resorted to the Law of Contract as it was applied in England.

3.2.2 Sources of the general principles of contract law in East Africa today

(a) Local Statutes

(i) Tanzania (Mainland)

Most of the general principles of contract law are contained in the Law of Contract Act, 1961, Cap. 433. The Ordinance/Act follows very closely the Indian Contract Act, 1872, which was disapplied here in 1961(See LC.A. cap. 433, s. 227). There are some minor differences between the Law of Contract Act and the Indian Contract Act.

(ii) In Zanzibar the Contract Decree (Laws of Zanzibar., Rev. Ed. 1959, cap. 149) carries the general principles of contract law. Like in Tanganyika, the Decree follows very closely the Indian Contract Act, 1872, with a few Modifications. It should be noted that the Zanzibar Contract Decree incorporates the portion of the Indian Contract Act dealing with sale of goods which portion was repealed in India itself in 1930 (In Tanganyika sale of goods is governed by the Sale of Goods Ordinance/Act, cap. 214 (1931).

(b) English common law of contract

(i) Kenya and Uganda

Unlike in Tanganyika and Zanzibar, Kenya and Uganda do not have local statutes containing the general principles of contract law. Before 1962 the Indian Contract Act, 1872, was applicable. This Act was disapplied in both Kenya and Uganda by acts of Parliament (Cap. 23 Kenya and cap. 75 Uganda) which provide, inter alia:

> "…….Save as many be provided by any written law for the time being in force, the common law of England relating to contract, as modified by the

doctrines of Equity, by the Acts of Parliament applicable by virtue of sub-section {2} of this section and by Acts of Parliament specified in the Schedules to this Act, to the extent and subject to the modifications mentioned in the said schedule shall extend and apply ....”

So, in Kenya and Uganda modified either by equity applicable. (ii) Tanganyika and Zanzibar: Where the Contract Act or Decree is silent on any particular aspect of contract law English common law of contract as modified by equity and Acts of Parliament is applicable. In Tanganyika Garage Ltd. v. Marceli G. Mafuruki (1975] LRT 23) it was said: where the circumstances of a contract are not provided for in the codified law of contract in Tanzania, one must fall back on the English common law. Where the circumstances of a contract are covered by the Contract Acte, English cases may be persuasive in the interpretation of the Ordinance (See Alidina v. Globe Mercantile Corporation Ltd. (1968] E.A. 114(T).

(c) Case law as developed in East Africa, text-books and writings of eminent lawyers, may also be sources of contract law in East Africa.

(d) By virtue of s. 1 (2) of the Law of Contract Act the following may also be sources of contract law:

(i) provisions of any written law in force in Tanganyika before enactment of the Act provided they were not expressly disaplied or repealed by the Act;

(ii) Any usage or custom of trade;

(iii) any incident of any contract not inconsistent with the provisions of the Act

3.3 Exercise:

(a) Discuss the various sources of contract law comparing and contrasting the position in Tanzania and Kenya.

(b) To what extent is customary law a source of contract law in Tanzania?

3.4 Further readings: (a) Your casebook

(b) Relevant statutes providing for sources of contract law of the East African countries.

SECTION 2: HOW A CONTRACT IS FORMED

(a) Objectives: (1) To explain and discuss the modalities of concluding a contract.

(2).To enable you to understand and appreciate the characteristics of v various components which constitute a contract

(3).To introduce you to the law relating to formation of an agreement especially the provisions of the Law of Contract Act, Cap. 433.

(b).Study strategy:

In order to be able to understand this section you will need to consult a copy of your Law of Contract Act cap. 433. Provisions in the contract Act which we are going to cover in this lecture are tricky and you must concentrate and go through them slowly. Note that due to some technical aspects in this lecture if you are not careful you may not be able to answer questions set.

(c) Introduction. In the first section we examined the history of the institution of contract and looked at the development of the Lecture 5 is intended to teach you what contracts and agreements are and differences between the two. Lectures 6, 7

and 8 dissect an agreement and lay bare to you the essential components which constitute an agreement. It has been necessary to cover the essential i components in 3 separate lectures because of the importance attached to each one of them. Do you know the essential elements of an agreement? They are Offer and Acceptance. They are covered in lectures 6 and 7. Lecture 8 deals with termination of offer

LECTURE NO. 4 CONTRACTS AND AGREEMENTS

(a) Objectives:(1) To explain to you the meaning and differences between contract and agreement.

(2) To introduce to you the essential elements• of any contract.

(b) Study strategy: You need to have a copy of your Contract Act, Cap. 433. You should also read other relevant materials especially from the case-book.

(c) Introduction: In this lecture, which is but a part of section 2 which is on How a Contract is Formed, you are going to leans the meaning~ of a contract and an agreement. Have you ever thought there is a difference between an agreement and a contract? In daily life we use the two terms as if they mean one and the same thing. In law they are not.

4.1 Meaning of an agreement

An agreement is made up of an offer made by one person and an acceptance of that offer by a person to whom the offer is made. •Once an offer has been accepted, the

offer and the acceptance change their characters and become promises. According to section 2(1) (e) of the Contract Act

Every promise and every set of promises, forming the consideration for, each other, is an agreement. Let us illustrate what we have said above. Say Adam has set his eyes on Eve and Wants to marry her. Adam will approach Eve and make a proposal or offers to marry her. If Eve loves Adam she will accept the offer. At that stage Adam and Eve have reached an agreement.

Or consider a situation where seller wants to dispose of his car to buyer. Let us say Buyer approaches seller and intimates his intention to buy the car. That intimation of his intention is called an offer If the seller agrees to sell to Buyer, then we say Seller has accepted Buyer's offer. Seller and Buyer have reached an agreement. Is the agreement between Adam and Eve or Seller and Buyer a contract?

4.2.1 Meaning of a contract

A contract must be an agreement. However to qualify as a contract an agreement must meet a number of tests. The main test you should look for is whether or not the agreement is enforceable by law. Note that not all agreements are enforceable by law.4.2.2 Essential ingredients of a contract To be enforceable by law an agreement must have the following elements which are stated in section 10 of the Law of Contract Act All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration with a lawful object ….

Let us now enumerate the essential ingredients which must be present in order to make an agreement a contract.

These are:

(i) Free consent

(ii) Competency or capacity to contract

(iii) Lawful consideration or object

Section 10 of the Contract Act does not say whether or not intention to create legal relations is also an essential element of a contract.

The three elements listed above and the element of intention to create legal relations will each be discussed in Section 3.

Would you now answer whether Adam and Eve's agreement is a contract? How about Seller and Buyer's agreement?

4.3 Exercises:

Answer the following two questions and then discuss your answers with your fellow student or get your tutor to mark them.

Q.1 Why is an agreement not necessarily a contract?

Q.2 When can one say an agreement has been reached?

4. 4 Further readings:

(a) Cheshire and Fifoot: Law of Contract, pp……

(b) Beale, Bishop & Furmston: Contract cases and Materials, pp.

LECTURE NO.5: FORMATION OF AN AGREEMENT: PROPOSAL OR OFFER

(a) Objectives: (1) To explain to you in detail one essential ingredient of an agreement called proposal.

(2) To make you understand the characteristics of a proposal.

(3) To enable• you to distinguish a statement which is a proposal from other types of statement.

(b) Study strategy:

You must read relevant provisions of the Law of Contract Act. In addition you need to study the cases are going to cite. In this lecture cases are treated in brief. Make sure you read the cases in full. Consult your case book and other relevant literature.

(c) Introduction:

In lecture No. 4 we looked at how a contract is formed. You learned that for

there to be a contract there must 'be an agreement in the first place. In this and the

following lectures we are going to dissect an agreement and see what it is made of and

what must be done in order to strike an agreement.

5.1. Meaning offer (or proposal)

In this work the word offer is used synonymously with the word proposal. Section 2 (1) (a) of the Contract Act defines the term proposal thus:

“When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtain• the assent of that other to such act or abstinence, he is said to make a proposal”.

In other words the word proposal means a signification by one person to another of his willingness to do or abstain from doing anything with a view to obtain the assent of that other to such act or abstinence. A proposal is made up of a term or terms. For example when Buyer makes a proposal to Seller to purchaser say, a motor cycle the offer of Buyer would be like: Seller I want to buy you motor cycle at Shs. 1. 5 million: Here Buyer has signified to Seller that he (Buyer) is willing to be bound by the terms he has proposed to Seller should Seller accept or assent to the offer. The terms of Buyer are (a) to purchase motorcycle (b) at Shs. 1.5 million. Note that Buyer will be bound only if Seller assents or accepts the offer. You must also note that the statement of Buyer to Seller which we term a proposal must have a number of characteristics.

5.2 Characteristics of a proposal

(a) Must be made willingly. For a proposal to be effective it must have been made willingly, that is, the proposer must be willing to be bound by the terms he has stated.

(b) The terms must be clear and certain clarity and certainty of an offer/proposal are essential because the person to whom the offer is made should be in a position to know what the offer is. Is a statement like "Seller I want to buy you goat" an offer? The statement looks clear and certain. But is it? Has Buyer specified the price which he is willing to pay Seller? So is the statement still clear and certain? If your answer is that the statement is not certain then section 29 of the Contract Ordinance becomes relevant. It states: Agreements, the meaning of which is not

certain, or capable of being made certain, are void. Where the terms of the offer are not certain, yet the offeree accepts the offer the agreement reached will be treated by the law as no agreement at all.

In two cases Alfi E.A. Ltd v. Themi industries and Distributors Agency Ltd (C.A.T. DSM Civil Appeal 28 of 1984) and Nitin Coffee Estates Ltd. And others v. United Engineering Works Ltd and another (C.A.T. Arusha, Civil Appeal 15 of 1988). The parties concluded agreements of sale of machinery and the second concerned sale of shares. In both cases the Court of Appeal of Tanzania stated that since price is a fundamental term in a sale agreement if it is not mentioned the agreement becomes uncertain. In law uncertainty renders the agreement void.

You may want to note that the terms of the contract are usually contained in the offer/proposal. So when one talks about uncertainty of the terms of the agreement, he really is referring to uncertainty in terms of the proposal.

(c). Final expression:

One other characteristic of a proposal is that it should be a firm and final expression by the proposer of his willingness to be bound should his offer be accepted. Where the proposer keeps on changing the terms of his statement then in law such statement cannot be regarded as a proposal.

5.3 Making of Proposal under various situations

(a) In unilateral contracts:

A unilateral contract is a one sided contract! Let us explain. Consider an advertisement in one of daily papers which reads:

"**MISSING ACCOUNT BOOK**

The General Public is hereby informed that the below mentioned account books have been stolen from our truck TZ 77118 hijacked on 8/5/88 at Ruvu Bridge: Cash books,Ledgers, Debt Hotel Credit Notes, Payment Vouchers and Income Tax file period 1978/86. Finder report to nearest Police station or ring phone No. 311-455 Songea or 37121 DSM Ruvuma Distributors (T) Ltd.

Reward Tshs. 20,000/=D T. 8RB. 20,000"

Can it be said that the advertisement is an offer? The answer would depend on whether or not it meets the characteristics we have explained in para 6.2. The statement is made by Ruvuma Distributors (T) Ltd. to the general public. Ruvuma Distributors are saying that their account books are lost and that any person "who finds the books and reports to the nearest police station or Ruvuma Distributors will be rewarded Shs. 20,000/=.

Now, can you say that the statement has been made willingly? Are the terms certain and clear? Is the statement a firm and final expression of willingness by Ruvuma Distributors that any finder will be rewarded Shs. 20,000/=? Each of these questions attracts a "Yes" answer. So it is an offer by Ruvuma Distributors to pay Shs. 20,000/= to any person who finds the books.

Suppose you find the books. Will you be entitled to claim the reward of Shs. 20,000/= from Ruvuma Distributors? The answer is "Yes", because Ruvuma Distributors made a categorical promise to give the reward to any finder. This means that once you find the books you will have done your part of the contract as required by Ruvuma Distributors. And note that you need not tell Ruvuma Distributors in advance that you will look for the books. You do not promise anything to Ruvuma Distributors. It is Only Ruvuma Distributors which has made

a promise. It is a one sided promise. Even if you see the advertisement and you know the whereabouts of the books you have no obligation to find them. That is why we say the advertisement leads to formation of a unilateral contract, i.e., only one party assumes an obligation. Only one part promises to do something. The other does not make any promise at all. The most famous case you should read on unilateral contracts is that of Carlill v. Carbolic Smoke Ball Co. ([1892]2Q.E.484 also reported in [1893] l Q.B.256). The Company manufactured what it considered to be a perfect prevention of the common cold. So confident was the Company that it advertised as follows: £ 100 reward will be paid by the Carbolic Smoke Ball Co. to any person who contracts the increasing epidemic influenza, colds, or any disease cause by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £ 1,000 is deposited with the Alliance Bank, Regent Street, showing our sincerity in the matter.

The advertisement continued to state that during the last were sold as preventives against the disease and that the company knew of nobody among the users who contracted the disease. The company further stated that the carbolic smoke ball was selling at 10 s. could be refilled at 5s and" it would last the family several months. The plaintiff, a lady, on the faith of the advertisement bought one of the balls, used it as instructed but contracted influenza. She sued the One of the arguments advanced in favour of the defendant company was that lilt is unreasonable to suppose (the advertisement) to be a definite offer, because nobody in their sense would contract themselves out of the opportunity of checking the experiment which was going to be made at their own expense". The company contended that the advertisement was a mere puff and not a promise or an offer. In deciding for the plaintiff the Court stated: The advertisement says that £1000 is lodged at the

bank for the purpose. Therefore, it cannot be said that the statement that £100 would be paid was intend to be a mere puff. I think it was intended to be understood by the public as an offer which was to be acted upon.

(b) In auction sales

In a sale by auction the bidder is the person who makes the proposal. The proposal is made when he states the price he is willing to pay for the particular item. Once a higher proposal or bid (higher price) has been made the previous bid ceases to have effect, in other words it lapses. This is so even if the higher bidder withdraws his proposal before the fall of the hammer or any other manner of accepting the bid.(See s.59 of the Sale of Goods Act cap. 214).

(c) Proposal in tenders

A person may advertise that he will sell certain goods by tender, or he may invite tenders to execute some works. The advertisement or the invitation does not amount to an offer. It is merely an invitation to the general public to make offers. The persons invited to tender may make tenders. To make a tender is to state the terms of the offer by which one is willing to be bound. The one who invites may accept or reject any tender unless it is expressly stated that the highest offer will be accepted. The person who invited tenders may require the tenders to include certain terms, e.g., that the person making the tender will supply goods as and when required. This term means that the tender will be a standing offer ready to be accepted by orders made from time to time (See Howard Co. (Africa) Ltd. v. Burton[1964] E.A. 540 (K).

5.4 Proposals and Invitation to Treaty

Unlike an offer which• is the final, firm and clear expression of willingness by• the offeror to be bound an invitation to treat does not express final willingness by the one who invites to be• bound in those terms. The invitor merely proposes certain terms on which he• is willing to negotiate. He invites any person to make an offer in the terms he has proposed. He may accept or reject the offer.

In bilateral contracts where both parties make promises and assume obligations you have to be careful whether or not a statement made amounts to a proposal or merely invites other persons to make offers. Let us have some illustrations.

(a) Where goods are displayed for sale:

The law says that display of goods in shop windows or on shelves in a self-service store even with the price marked, does not amount to a proposal. Rather the intention is to invite persons to come forward and make offers/proposals to buy. The position under the common law has been established by case law. Let us look at some of the cases.

(i). Fisher v. Bell (1961) 1QB 394 or (160) 3 All ER 731).

Bell was charged with offering for sale a flick knife (a knife which opens by pressing a button) in violation of the Restriction of Offensive Weapons Act, 1959, the relevant provision of which provided in part: "Any person, who manufactures, sells or hires or offers for sale or lends or gives to any person …a flick knife shall be guilty of an offence". Trial court decided that there had not been an offer for sale" of the flick knife. On appeal to the Queens Bench it was held that in the

absence of a definition of “offer for sale” of a flick knife in the Act, the words were to be construed as they are in the law of contract: The Court observed:

It is clear that according to the ordinary law of contract, the display of an article with a price on it in shop window is merely an invitation to treat. It is in no sense an offer for sale the acceptance of which constitutes a contract.

(ii) Pharmaceutical Society of Great Britain v. Boots Cash Chemists Southern Ltd (1953) 1 Q.B. 401).

Boots Co. operated a self-service shop in which certain drugs specified under the Pharmacy and Poisons Act, 1933 were displayed with prices attached. It was charged with selling drugs in contravention of the laid down procedure. The law required the sale of the drugs to take place under the supervision of a registered pharmacist. The defendant company had devised a procedure which customers had to follow. A customer, having selected articles which he wished to buy, and placed them in a wire basket, had to pass by one of two exits, at each of which was a cash desk where a cahier was stationed who scrutinized the articles selected by the customer, assessed the value and accepted payment. In every case involving sale of a drug a pharmacist supervised that part of the transaction which took place at the cash desk and was authorized by the defendant company to prevent, if he thought fit, any customer from removing any drug from the premises.

The Plaintiff Society argued that by their deliberately devised self-service system, the defendant was making an offer to sell and the customer accepted the offer when he picked an article from the shelf and put it in the basket and the contract of sale was concluded. The registered pharmacist who was placed at the cash desk did not therefore, supervise the sale. The Court observed that the self-service system was “a convenient method of enabling customers to see what there is an choose,

and possibly put back and substitute, articles which they wish to have, and then to go up to the cashier and offer to buy what they have so far chosen," That being the case, it held that, the self service system did not amount to an offer by the defendant company to sell but merely an invitation to the customer to offer to buy; that such an offer by the defendant company to sell but merely an invitation to the customer to offer to buy; that such an offer was accepted at the cashier's desk under the supervision of the registered pharmacist; and that there was, therefore, no infringement of the section.

The importance of the distinction between an offer and an invitation to treat can be appreciated if freedom of an individual to deal with his property in the manner he likes. He may dispose of his property by way of sale or as a gift to a person of his choice. In countries where hoarding is allowed he may hoard his goods as he wishes. One writer has this to say:

…a more natural interpretation of the display of goods in a shop with a marked price upon them would be that the shopkeeper impliedly reserves to himself impliedly reserves to himself a right of selecting his customer. A shop is a place for bargaining, not for compulsory sales. Presumptively, the importance of the personality of the customer cannot be eliminated. If the display of such goods ~ere an offer, then the shopkeeper might be forced to contract with his worst enemy, his greatest trade rival, a reeling drunkard, or a ragged and verminous tramp. That would be a result scarcely likely to be countenanced by the law.

In some countries the law relating to invitation to treat is restrictively applied. For example in Egypt and Switzerland display of goods in a shop window with a marked price upon them amounts to an offer to sell which the intending purchaser may accept. The shopkeeper may, however, instead of giving the customer the

article displayed, give him a similar article from the shop. This approach seems to be more realistic because to any reasonable person display of an article with a price marked would appear to be an offer.

(b) Advertisements

Partridge v. Crittendem ([1968]2 All E.R. 421).

The appellant had placed an advertisement indicating that he had certain wild birds for sale. The advertisement did specify the price but gave no details about delivery or quantities available. It was an offence to offer such birds for sale. In order to prove the offence it was necessary to prove that the advertisement was an offer. The trial court was satisfied that the advertisement was an offer and thus convicted the accused. On appeal it was argued that the advertisement was not an offer but a more advertisement was not an offer but a mere invitation to treat because first, the advertisement was not sufficiently specific amount to an offer. Secondly, the court said that it would not be reasonable to think that the appellant was willing to be bound by any and every acceptance made. You may ask yourself the distinction between the above cases and that of Carlill v. Carbolic Smoke Ball Co. in 6.3 .

You find that the statement in Carlill's case was sufficiently specific and it would be reasonable to think that the Company was willing to be bound by any and every acceptance.

(c) Request for information.

A person may request for supply of information. What is the legal effect of supplying information in the cause of negotiations? The case of Harvey v. Facey ([1893] A.C. 552) may help us answer the question. The appellant sent a telegram to the respondent asking will you sell us Bumper Hall Pen? Telegraph lowest cash

price, reply paid" of Bumper Hall Pen £900". The appellants then purported to accept this 'offer'. The respondent denied that his reply was an offer. The Court (Privy Council) held that no offer had been made which the appellants could accept. The reason given by the Privy Council for its decision 1. 5 that the respondents did not reply to the first, part of the question "will you sell us Bumper Hall Pen?" Rather that the reply was limited to the second part, of the question Telegraph the lowest cash price".

The words Bumper Hall Pen need not confused you. Bumper Hall Pen was the name given to a piece of land. What in your view was the reason for not holding the reply by respondents an offer? To help you answer the question considers: Was the statement of the respondents specific and comprehensive offering to sell Bumper Hall Pen? Did the respondents intend to be bound by the statement the lowest price of the land was £900?

(d) Contracts by tender

You have already learned that in contracts by tender offers are made by those tendering. Suppose the person inviting tenders puts conditions which must be fulfilled before a tender is considered. Suppose further that tendered fulfils those conditions. Can any liability arise cut of such a tender? The law is to the effect that where a person is invited to tender under certain conditions and he complies then he terms of the tender a binding contractual obligation arises. The obligation is that a tender submitted in accordance with the terms and within time must be opened and considered along with the other tenders.

But note: this does not mean that the person who invited tenders must accept the tender. The right is limited to the tender being opened and considered. (See

Blackpool & Flyde Aero Club Ltd. v. Blackpool Borough Council [1990] All E.R. 25).

Having looked at the position at Common Law let us now examine the position under the Law of Contract Act The Contract Act is silent on the issue of invitation to treat. However if you read s.2 (1)(d) carefully statements which are not clear and certain, firm and final expression of willingness to be bound, would fall under invitation to treat.

At any rate as you learned according to the case of Mafuruki the Contract Act cannot provide an answer then yo~ fall back on the Common Law position.

5.5. Mode and Communication of a Proposal

An offer or a may be made either expressly or impliedly. Since a proposal has to be communicated to the person for whom it is intended, then its communication may be made either expressly or impliedly. The communication of a proposal is deemed to be made by an act or omission of the party proposing and which has the effect of communicating it (s.3 L.C.A.)" Where the proposal is made in words it is said to be express, and where it is made otherwise; it is said to be implied (S. 9 of LCA,). Proposals are made either in writing or by a proposal may be made to a definite person, to some definite class of persons or to the world at large. Where an offer has been to X, Y cannot accept it. If an offer is made to a class of persons, only a member of that class may accept it. A prize offer to the overall best second year LL.B student cannot be accepted by overall second year LL.B student.

A proposal may be made to the world at large, in which case anybody may accept it. A good example of this type of offers is reward advertisements for performing a condition or conditions, e.g. finding and returning lost property. In Carlill v. Carbolic Smoke Ball Co. the Court made it very clear that it is possible to make an

offer to the world at large, and that the contract is then made with any one who accepts the offer but not with the entire world. The Court pointed out that:

It is an offer made to the entire world; and why should not an offer be made to all the world which is to ripen into a contract with any body who comes forward and performs the condition? It is an offer to become liable to anyone who, before it is retracted, performs the condition, and although the offer is made to the world, the contract is made with that limited portion of the public who come forward and perform the condition on the faith of the advertisement.

Communication of an offer becomes effective when it is complete, i.e when it comes to the knowledge of the person to whom it was made (Read) s. 4(1) L.C.A).

5.6 Exercise

Answer the following two questions and then discuss your answers with your fellow student or get your tutor to mark them.

(a) What distinguishes an offer from an invitation to treat?

(b) The following advertisement appeared in the Daily News:

"Nissan Sunny, 198~, reconditioned.

Excellent condition & TV/Video, music system etc.

Phone: 21527 (Evening)"

Juma approaches you for advice as to the legal status of the advertisement. Advise Juma.

5.7 Further readings:

(a)Your casebook

(b) Cheshire & Fifoot: Law of Contract

(c) Beale, Bishop & Furmston: Contract cases and Materials.

LECTURE NO.6: FORMATION OF AN AGREEMENT: ACCEPTANCE

(a) Objectives: (1) To further explain and discuss the modalities of concluding a contract.

(2).To explain to you in detail one essential ingredient of an agreement called acceptance.

(3).To make you understand the characteristics of an acceptance.

(4).To enable you appreciate the rules governing acceptance of a proposal. You must read the relevant provisions Ordinance of the Contract You also have to read cases in full. Study carefully the rules governing communication of acceptance.

(c). Introduction: In Lecture No. 5 we looked at a proposal as an element of an agreement. In this lecture we look at the other element called acceptance. Remember that once a proposalhas been accepted an agreement is reached. You will need to pay special attention to rules governing 'communication of acceptance because the position under the Law of Contract Act is different from that at common law.

6.1 Meaning

According to s.2 (1) (b) of the Contract Act acceptance is defined as signification of assent to the proposal by the person to whom it was made. This signification' of assent must be a firm and final expression of assent to the terms of the proposal as communicated by the proposer.

6.2 Characteristics

Section 2(1) (b) provides in part that a proposal when accepted, becomes a promise proposal has been accepted in part that It is a proposal, when And, s.2(1) (c) says that once the person making the proposal becomes the proposer and the person accepting the proposal becomes the promisee. In law the promisor and the promise are referred to as parties to the agreement. You may ask: What is the relevance of what has been stated above in relation to characteristics of acceptance. This is a valid question. It is important to introduce the element of promise before we proceed because it is an essential ingredient of an agreement. Breach of a promise gives rise to liability in law. So what is the nature of acceptance which may give rise to legal liability? In order to constitute an agreement:

(i). the acceptor must signify his assent to the proposal as made to him. In other words the acceptance must be absolute and qualified (see .s.7 L.C.A.

(ii). If the acceptance is qualified it ceases to be acceptance instead it becomes a counter-offer to the original proposal. The original proposal would be free to accept or reject the counter offer.

We can now state that to constitute acceptance the offeree's signification of assent to the proposal must:

(i). be made in response to the offer

(ii). exactly match the terms of the offer.

The matching acceptance must be communicated to the offeror.

6.3 Rules governing acceptance

Let us now deal with points (i) –(iii) enumerated above in detail. Communication of acceptance will be covered under 6.4.

(i). That acceptance must be in response to and in exchange for, the proposal.

(a). In response to the proposal: The offeree must be aware of the proposal. So knowledge of the existence of the proposal is necessary. Where a person is not aware of the offer/proposal he cannot be said to respond to it.

Examples:

- Where "A" has knowledge of B's offer of reward for recovery of lost goods. A finds the goods. The finding of the goods is here in response to B's offer.
- Where A is not aware of B's offer of reward. "A" finds the goods and takes them back to B's offer. Here what "A" has done is not acceptance of B's offer of reward. So B is not bound to give A the reward promised.
- "A" is in Dar es Salaam and "B" is in Moshi. A offers to purchase "B's books. At the same time B offers to sell his books to "A". Both offers are sent by post and they cross each other. These offers are known as cross-offers. Neither is an acceptance of the other. After getting the offer then either A or B may accept it after which an acceptance will have been reached.

(b). In exchange to the offer/proposal

A person may have knowledge of the offer but may accept it not in exchange for the offer. If this be the case, then there no acceptance of the offer.

Let us illustrate what we have said with the case of R. v. Clarke (1927) 40 CLR 227). An offer of reward was to be given to any person who volunteered information leading to the arrest of certain murders and pardon to an accomplice who gave the information. Clarke, an accomplice volunteered information which led to the arrest of the murderers. He did give the information as he himself confessed not because of the offer of reward but because he wanted the pardon so as to clear himself of the charge of murder. Later• on, he claimed the reward. His claim failed because he had given the information not in exchange for the offer of reward. In other words the information given by Clarke was not an acceptance of the offer of reward.

(ii) That the acceptance must exactly match the terms of the offer (the mirror image rule). The offeree must accept the terms as offered. If he makes any changes he cannot be said to have accepted the offer. Section7 (a) puts it very clearly that in order to convert a proposal into a promise the acceptance must be absolute and unqualified.

In Hyde v. Wrench (1840)3 Beav. 334) th8 facts were as follows:

June 6. The defendant wrote to the plaintiff offering to sell his farm for £1,000. The plaintiff's agent immediately called on the defendant and made an offer. of £950 which the defendant wished to have a few days to consider.

June 27. The defendant wrote to say that he could not accept the offer of £ 950.

June 29. The plaintiff wrote "accepting" the offer of June 6. The defendant refused to sell his land to the plaintiff at £1,000.

The plaintiff filed a case asking the Court to order the defendant to sell him the farm at £1,000. The Court ruled that the plaintiff's offer of £950 had the effect of making the June 6 offer to lapse. So, when the plaintiff. Purported to "accept" the June 6 offer, in fact there was no such offer at all, it having lapsed. So there was no offer on the 29th June by the defendant to sell the farm to the plaintiff at £1,000 unless the defendant expressly revived it.

Matching of the terms of the offer is at times referred to as the "mirror image" rule. When you look at a mirror what do you see Yourself? The offeree has to accept the offer as put to him, nothing more and nothing less. In the business world parties may not be particularly concerned about the details of ancillary terms. They may fail to notice discrepancies between the offer and the purported acceptance. Indeed the parties may go on with the performance as agreed. In such cases courts have upheld the agreements as contracts in order to give business efficacy to the transactions. (See the case of Brodgen v. Metropolitan Rly Co.).

You may have noted that businessmen use. printed contract forms which contain terms and conditions. It happens that the offeror may use his own printed form and the offeree may purport to accept by using his own conditions in the offeror’s form may not be the same as those of the offeree. What is the legal effect of using such forms?

Example 1:

B offers to purchase goods from S. “S” replies that he is willing to supply the goods on his usual conditions". Is S's reply an acceptance of B's offer? Prima facie

(i.e., on the face of it) S's reply is a counter offer which B is free to either accept or reject. Alternatively B may accept S's counter offer by accepting the goods. Should B accept the goods then one may say a contract has been concluded between "S" and "B" (Here S's counter offer has been accepted by conduct).

Example II

"S"has got standard terms of sale. "B" has got his own standard terms of purchase.

S's and B's terms conflict. What is the legal consequence of such conflict? Let us have an illustration from the case of B.R.S. v. Arthur V. Coutchley Ltd (1967) 2 All ER 285. The Plaintiff delivered a consignment of goods to the defendants for storage. The delivery note purported to incorporate the plaintiff's conditions. The delivery note was stamped by the defendants received under (the defendant's). The plaintiff handed over the goods.

Was a contract concluded between the plaintiff and the defendant? If yes under, whose conditions? The court held that the defendant's statement amounted to a counter offer. Which the plaintiffs accepted by handing over goods. The contract was made under the terms and conditions of the defendants and not those of those plaintiffs.

Now we can look for a rule. The rule is this: Where conflicting communications are exchange each being a counter offer, but ultimately a contract results (e.g from an acceptance by conduct) it must be on the terms of the final document in the series.

However, the case of Butler Machine Tool Co. Ltd v. Ex- cell-O-Corp (England) Ltd (1979)1 WLR 401) seems to call for a modification of the "last shot" doctrine. It is not necessary that he who shoots last has the contract formed under his terms

and conditions. In Butler's "S" offered to supply a machine at a specified price. The offer was expressed to be subject to certain terms and conditions including a "price escalation clause. According to this clause the price payable by B would depend on the "prices ruling on date of delivery". B replied. He placed an order for the machine on his own terms and conditions which differed from those of "S" containing no prices escalation clause and also in various other respects.

In addition the reply contained a "tear off s1ip" to be signed by S and. returned to B. The slip stated that S accepted the order on the terms and conditions stated therein. S did sign the slip and returned it to B with a letter which said that they were altering the order in accordance with their original offer.

This last communication by S was held to be an acceptance of B's counter offer. So the resulting contract was on B's terms and conditions. 'Who shot last? S. why then was the contract based on B's terms? The answer is this: S's reply to B's order did not prevail (though it was the "last shot" in the series) because the reference in it to the original offer was not made for the purpose. of reiterating all the terms of that offer, but only for the purpose of identifying the subject matter. (See Treitle: Law of Contract, p. 17).

Not that had S insisted on their entire original terms this would have amounted to a counter offer.

6.4 Communication of acceptance:

The matching acceptance must be communicated to the offeror. In Household Fire Insurance Co. v. Grant ((1879)41 LT 289) the court said that an acceptance which only remains in the breast he court said that an acceptance which only remains in the breast of the acceptor without being actually or by legal implication communicated to the offeror is no binding acceptance. You must always remember

that an acceptance must be communicated. In addition you should always bear in mind that communication of acceptance must be complete~.

(a) Communication to an agent

Where an agent is authorised to receive acceptance then communication to the agent is as good as communication to the principal. But where the agent's authority •is merely to transmit the acceptance to the principal, there is no acceptance until it is actually transmitted to the principal.

(b) Conduct of offeror

Where by his conduct the offeror falls to see the notice of acceptance of the offer he cannot disclaim liability on the ground that the acceptance was not communicated to him.(See Brodgen v. Metropolitan Railway Co. (1877)2 App. case 666).

(c) Terms of the offer

In some cases the offeror may either expressly or impliedly intimate the mode of acceptance of his offer. In such cases the offeree need only follow the indicated method of acceptance. In unilateral contracts" no advance communication of acceptance is required. Performance of the required act or service is sufficient acceptance of L.C.A)

(d) Communication of acceptance by post

(i) The position at common law

Communication of acceptance by post poses a problem as to when it can be said "to be complete and thus a contract concluded. In 1818 in Adams v. Lindsell

(1818) 106 ER. 250 (K.B.) the Court said that where acceptance is communicated by post a contract arises on the date when the letter of acceptance is posted in due course letter of acceptance actually reached the offeror the court remarked:

“If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiff till the answer was received, then the plaintiff ought not to be bound till after they had received the notification that the defendants had received the answer and assented to it. And so it might go on ad infinitum”.

The rule in the above case was further rationalized by Thesiger, L.J., in 1879 when he said: An acceptance which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offeror, is no binding acceptance But if the post be treated as agent of both parties, then as soon as the letter 'of acceptance is delivered to the- post office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger set by the offeror himself as his agent to deliver the offer and to receive the acceptance The acceptor, in posting the letter has "put it out of his control and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound". (See Household Fire and Accident Insurance Co. v. Grant (1879) L.R. 4 Ex. Dv. 26 (C.A.). cf. s.4 L.C.A. so as to be out of the power of the acceptor) . The posting rule was consolidate in Bryne v, van Tienhoven (1880) 5 C.P.D. 344) and Henthorn v. Fraser(1892) 2 Ch 27).

In the former case the court pointed out that a contract is complete on posting the letter of acceptance even though the letter may not reach the offeror (its destination). In the latter case Lord Herschel refined the rule thus : “ Where circumstances are such that it must have been within the contemplation of the

parties that, according to the ordinary usage of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted".

According to this common law rule once a letter of acceptance has been posted a contract is formed and both parties become irrevocably bound. This rule appears not to give any opportunity to the acceptor to revoke his acceptance by a speedier means, say, by telephone.

(ii) The position under the L.C.A.

Section 4(2) provides as to when communication of acceptance is complete:-

4.(2) The communication of an acceptance is complete-

(i) as against the proposer, when it is put in the course of transmission to him, so as to be out of the power of the acceptor;

(ii) as against the acceptor, when it comes to the knowledge of the proposer. The Act does not provide for a posting rule as such. But where an acceptor posts his letter of acceptance so that the letter is out of his power, then the proposer is bound, but not the acceptor himself. That is to say a contract has been concluded in as far as until his acceptance comes to 'the knowledge of the proposer. This provision affords an opportunity to the acceptor to revoke his acceptance by a speedier means. An acceptance may be revoked at, -any time before the communication of its acceptance is complete (s.5 (2) L.C.A.). And, the communication of acceptance is complete as against the acceptor, when it comes to the knowledge of the proposer. Revocation of an acceptance is not effective until its communication is complete. The: communication of a revocation is complete:-
(i) As against the person who makes it, when it is put into a course of transmission

to the person to whom it is made, so as to be out of the power of the person who makes it: (ii) As against the person to whom it is made, when it comes to his knowledge (s.4 (3) L.C.A.).

An acceptor -who revokes his acceptance becomes bound by his revocation once he cannot recall his revocation. A proposer or offeror becomes bound only after he has knowledge of the revocation. Since the acceptor is not bound by his letter of acceptance until it comes to the knowledge of the proposer (s.4(2) {ii)L.C.A.) he can revoke it. But, this revocation will be effective only if it reaches the proposer before the acceptance. An - acceptor who has revoked his acceptance cannot, again revoke his revocation (s.4(3)L.C.A.). To sum up, section 4(2) L.C.A marks a difference between the position in England and Tanganyika as far as the acceptor is concerned. While in England when 'a letter of acceptance is posted, both the offeror and acceptor become .irrevocably bound, in Tanganyika the acceptor does not become bound by merely posting his acceptance. He beomes bound only when his acceptance “comes to the knowledge of the proposer”.

The rule in s. 4 (2) seems to be anomalous in that it suggests that there can be party contract.

(e) Instantaneous communications

Where a telephone or telex is used to communicate acceptance, the acceptance becomes complete when the offeror receives notification of the acceptance; and the contract is made, at the place where the acceptance is received. (See Entores Ltd v. Miles Far East Corp (1955) 2 All ER 49.

6.5 Exercise

(a). When can an offer be said have been accepted (a; at Common Law

(b) under the Law of Contract Act

Exp1ain the rationale behind whatever contrasts there may be.

On the 1st of March Diki gave Jaja a written offer to se11 a house for Shs. 500,000/=, the offer to remain open for acceptance till 4 p. m. on the 4th of March. em the 3m of March Diki sold the house to Bahati for Shs. 600OOO/= and immediately thereafter posted a letter to Jaja revoking the offer. On the 3rd of March Jaja posted a 1etter of acceptance. On the 4th of March Diki received Jaja's letter of acceptance at 12.00 noon. On the same day Jaja received Diki's letter of revocation at 9.99 a.m.

Examine and decide whether there was a concluded contract between Diki and Jaja, or not.

6.6 Further readings:

(a) Yourcasebook

(b) Cheshire and Fifoot

(c) Tritel: Law of Contract

7.0 LECTURE NO. 7: FORMATION OF AN AGREEMENT

Termination of proposal

(a). Objectives:

(1)To appraise you with the rule relating to termination of a proposal;

(2) To make you under what circumstances it can be said the offer/proposal has come to an end.

(b). Study strategy:

You will have to read provisions of the contract ordinance, relevant cases cited in this lecture and also additional literature on termination of offer.

(c). Introduction: In lectures 5 and 6 we dissected an agreement an agreement and laid bare its component parts. We also examined rules relating to proposal and acceptance. While in lecture No. 6 we saw how an acceptance can come to an end in lecture No.5 we did not look at how a proposal can be terminated. We did that deliberately as we intended that it be covered after examining acceptance and rules relating to it. In this lecture we now look at termination of proposal.

7.1 When a proposal can terminated

An offer or proposal may be terminated at any time before its acceptance is complete. (See Payne v. Cave (1789) Tnu Rep. 148). Once an offer has been accepted a binding contract is formed. In the words of Anson:-

Acceptance is to an offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone. But the powder may have laid until it has become damp, or the man who laid the train may remove it before the match is applied (See Anson: Law of Contract, 23rd Ed. P. 55)

(i). Lapse for want of acceptance

(ii) Revocation

(iii). Death

(iv). Failure of condition subject to which the of was made.

7.2 Lapse for want of Acceptance

An offer may provide that it will remain open for specified period of time. In such a case acceptance must be affected within the time limit. The offer lapses after the fixed period of time. What is reasonable is a question of fact depending on circumstances of each case. The test is not whether the de before communication of acceptance is unreasonable or not whether a reasonable time has lapsed between the date of offer and the communication of acceptance. (See Industries Ltd v. Powsland B.E.A. Ltd (1953) E.A.P.

Where acceptance has to be communicated by telegraph the existence of a public holiday (and possibly Sunday) is to be taken into consideration. In Chatur Lollen v. Allibhai Rahimtulla (1914) 5 EAPLR 156) the held that in considering the promptenses of an acceptance by telegragraph, the existence of a public holiday is to be taken into consideration.

Under the Law of Contract Act a proposal may terminate by the lapse of time prescribed in such proposal for its acceptance, or, if not time is prescribed, by the lapse of a reasonable time, without communication of the acceptance (See s. 6(b) L.C.A).

7.3 Revocation:

An offer can be revoked at any time before its acceptance (See Payne v. Cave). This is the case even where the offeror has stated that his offer is open for a specified period of time. Provided his promise to keep the offer open is not supported by consideration, it does not bind him and as such he can revoke his offer even within the period when the offer is open (See Anson: p. 56). Revocation

of an offer must be communicated to the offeree and it becomes effective when it comes to the knowledge of the latter. In Byrne v. Van Tienhoven {(1880)5C.P.O. 344) the defendants posted a latter in Cardiff on 1st October I addressed to the plaintiffs in New York, offering to sell 1,000 boxes of tinplates. On 8th October they posted a letter revoking the offer. On 11th October the plaintiffs telegraphed their acceptance and confirmed it by a letter posted on 15th October. On 2•0th October the letter of revocation reached the plaintiffs. The Court held that the revocation was inoperative until 20th October when the notice of revocation came to the knowledge of the plaintiffs. Where acceptance of an offer is to be by performing an act, it is not clear whether or not, and if so, at what point in time, the offeror may revoke his' offer. It has been suggested Led that the answer will depend on the circumstances of each case:

In some cases the parties may well understand that the offeror reserves a right to revoke at any time until performance is complete, while in others it may be proper to hold that he can not revoke once the promisee has started performance. There may well be intermediate cases where the promisor can revoke after performance has started but is obliged to compensate the offeree for his trouble. (See Daulia Lt.d. v. Fous Mullbank Nominees Ltd. [1978]2 All E.R. 557).

In Tanzania one of the ways of terminating a proposal is by communication of notice of revocation by the proposer to the other party. (See section 6 (a) L.C.A).

7.4 Death

Where the offeror dies before the offer is accepted and the offeree is aware of the death it would seem the offer lapses and becomes incapable of acceptance. (See Coulthart v. Clementson. (1870) 5Q.B.D. 42). There may be instances where the offeree accepts the offer in ignorance of the fact that the offeror is dead at- the time

of acceptance. In such instances it has been suggested that: An offeree who does not know of the offeror's death should be entitled to accept the offer, -unless the offer on its true construction indicates the contrary, e.g. where the offeror's, personality is a vital element in the transaction. (See Anson: p. 56). The-death of the offeree determines the offer and the personal representative cannot accept the offer on behalf of his .estate. (See Re Cheshire Banking Co. (Duff's Executor's) (1886)32 Ch.D. 901). Under the Law of Contract Ordinance a proposal is revoked by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge. o~ the acceptor before acceptance. (See s.6 (d)L.C.A.). The provision seems; to suggest that if the fact of the d~ath or insanity of the 'proposer is not known to the offeree at the time of, acceptance then he should be entitled to accept the offer.

7.5 Failure of a condition subject to which the offer was made

Where, for example, the subject matter of the offer is destroyed or is no longer in existence before acceptance the offer lapses. Or, where an offer is subject to the fulfillment of a condition precedent by the offeree before acceptance, failure to fulfill the condition precedent causes the offer to lapse. Section 6(c) of the Contract Ordinance provides that-a proposal is ~evoked by the failure of the acceptor to fulfill a condition precedent to acceptance.

7.6 Exercises

(a) Describe the various ways of terminating another.

(b) Examine whether there is a concluded agreement between the parties in the following case: On March 1 firm DARCO of Oar es Salaam posted a letter to 'film OOOOCO of Dodoma offering, to supply certain goods and asking for an acceptance "by return of post". This letter was received by, DODOCO on the 4th.

Immediately thereupon DODOCO booked a long• distance telephone' call to, DARCO and spoke their acceptance into the telephone. ; The’ telephone line was in sound working condition, .but the assent was not heard by DARCO d~~ to some 'loud explosion ju~t outside their ~office at the time. They, however, did not' 'ask -OODOCO-to repeat and DOOOCO therefore believed that their assent was duly 'heard by-: DARCO. The same evening OOOOCO sent a telegram to DARCO revoking their acceptance which was received by DARCO the next morning.

7.7 Further readings:

(a) Your casebook

(b) Anson: Law of contract

(c) Treitel: Law of Contract

SECTION 3: ESSENTIAL ELEMENTS OF A CONTRACT

You will recall that the first section was on introductory considerations and the second examined formation of a contract. In this third section we are going to look at the essential elements of a contract. These are intention to create legal relations, contractual capacity, consideration, and free consent. Except for the element of intention to create legal relations section 10 of The Law of Contract Ordinance provides for the other three. The section provides:

10. All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby declared to be void:

Provided that nothing herein-contained shall affect any law in force, and not hereby expressly repealed or disapplied, by which any contract is required ~o be

made in writing or in the presence of witnesses, or any law relating to the registration of documents. .

In the following lectures of this section we are going to examine each of the essential elements.

LECTURE NO. 8: INTENTION TO CREATE LEGAL RELATIONS

Objectives: (1) To make you understand the importance of intention to create legal relations. (2) To let you know whether or not intention to create legal relations is an essential element in a contract in Tanzania.

(3) To explain under what factual situations or circumstances the element of intention to create legal relations will be presumed.

Study strategy:After carefully studying this lecture read the relevant cases reproduced in your casebook.. Also read the relevant chapters in the basic textbooks.

Introduction: This lecture deals with intention to create legal relations as an essential ingredient in a contract. 'It should be noted from the very start that while' the position, at common law (and therefore in Kenya and Uganda) is clear in that intention is an essential, element, the 'position in Tanzania is not spelt nut in the "Contract Ordinance. As such whether or "not .intention" is an essential element of a contract, in Tanzania must based 'on residual law.

In this lecture you will study why intention to create legal relations is an essential element both at common law and under the 'contract law in Tanzania. In addition you will also study the 'circurnstances which are consistent and those which are inconsistent with legal intention.

8.1 The principle:

As we have seen there is, A provision in the Law of Contract Ordinance requiring that an offer or its acceptance should be made with the intention to create legal relations. However in English law it is a settled principle (stated by Atkin, J. in Rose & Frank Co. v. J. R. Crompton & Bros [J.923) 2 KB. 261) that to create a contract there must be a common intention of the parties to enter into legal relations. The rationale behind this principle is that contracts should not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the 'parties to have any serious effect whatsoever (See Darlymple v. Darlymple (1811)161 E.R. 665). As such despite the fact that there may be evidence of an offer that has been accepted the courts may not recognize the agreement as a legally binding contract if they feel that there "was no intention on the part of the persons involved that a contract should result from their dealings. 'In other words the parties must be shown' to have intended that legal consequences should result in their contractual dealings.

8.2 Intention in domestic arrangements

You know that in everyday life people enter into many types of agreement. Of the many types two divisions of agreement can be made. The first is of agreements which are social or domestic in nature. These include arrangements between husband and wife, family members and friends. The second division covers arrangements which are commercial in nature.

There is a presumption that social or domestic arrangements do not give rise to legally enforceable contracts even though they may have the outward appearance of a contract.

The case of Balfour v. Balfour (1919)2K.B.571 illustrates the position. The facts are simple. H went to work in India leaving W in England for health reasons. H promised to pay W £30 per month for her maintenance. W later divorced H. H then refused to pay the £30.W, the wife, sued and failed. One of the judges explained:

There are agreements between parties which do not result in contract .within 'the meaning of that "term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and acceptance of hospitality. Nobody would suggest in ordinary circumstances that these arrangements result in what we know as contracts, and one of the most usual forms of agreement which does not constitutes a contract appears to be the arrangements which are made between husband and wife. The arrangements do not result in a contract at al, even though there may be what would constitute consideration for the agreement. They are not contracts because parties did not intend that they shall be attended by legal consequences. (See pp.578-9).

On the basis of the above case it can be said that in the case of arrangements regulating social relations it follows almost as a matter of course that the parties do not intend legal consequences to follow. This does not, however, mean that in family or social matters there cannot be a legally binding contract. What the law requires is that the parties must intend legal consequences to follow. The case of Jones v.Padavatton([1969]2 All E.R. 616) illustrates what we have said above.

A divorced woman was living in Washington with her son. In Washington she was employed 3S an assistant accountant in the Indian Embassy on attractive terms. Her mother was in Trinidad and wished her daughter to be near her. She was particularly attached to the grandson. The mother persuaded her daughter, much against her will, to leave service, take legal education in England and finally come

back to Trinidad as a practising lawyer. The mother promised to foot the expenses and give the daughter a monthly allowance. The mother later moved to London; bought a house there and the daughter lived in part of it and this was to count towards part of the monthly allowance. For five long years the daughter could not complete her education. She also remarried in the meantime. Sometime later the two quarrelled and the mother sought possession of the house. The daughter resisted the claim on the ground that the agreement was in fact a contract giving her legally enforceable rights. This was a difficult case to decide. One of the Lords said:

“There is no doubt that this case is a most difficult one, but ... is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements (at p. 620).

Another Law Lord was of the view that the agreement was a contract as the parties intended that legal consequences should follow. He, however, decided in favour of the mother on the ground that the agreement could last only for a period reasonably sufficient for the daughter to complete her education and the period of five years was more than sufficient for the purpose. His Lordship said that the daughter could not have expected her mother to support her, her son and husband in perpetuity.

Let us consider another case. It is Merrit v. Merrit(1970)1W.L.R.1211. H had left W and was living with another woman. He agreed to pay W 40pound a month and signed a written agreement that, in consideration of W's paying off the mortgage on their jointly owned house, he would then transfer it to her sole ownership. W paid off the mortgage. He refused to transfer the house to W. She sued H who argued that there was no contract between himself and W because the arrangement was a social one and not intended to be attended by legal consequences. 'The Court

decided that the presumption that agreements between husband and wife are not intended to create legal relations does not apply when they are not living in amity but are separated or about to be separate. So given the circumstances of this case the presumption was rebutted.

In •addition to the surrounding circumstances the words used must be clear in order for •the presumption to be invoked. In Gould v. Gould(1970]1 Q.B. 275, in deciding whether there was an intent to create legal relations the court had regard long as business was O.K." or "as long as I can manage it". The uncertainty of the words/used made the court to conclude that there was no intent to create legal relations.

Before wind up this part let us have a look at one case which was decided by the High Court of Tanzania. The case is 81 Khadija Kilumanga v. Bi Peri.s Misso (1982] T.L.R. 266). The plaintiff and the defendant were close friends. They had exchanged various gift and other valuables to consolidate their friendship. In the course of their friendship, the plaintiff promised to buy a car and give it to the defendant. The plaintiff bought the car in Holland and shipped it to Dar es Salaam in the defendant's name. The defendant incurred expenses in clearing the car from the port. Before actual physical delivery of the car by the plaintiff to the defendant the former revoked her offer of gift of the car. The court was of the view that for a gift to be valid one of the prerequisites is that there must be intention to give and an intention to take. The court found that mere delivery of documents of title to the car 'did not constitute the defendant owner of the car. In other words the court was of the view that the intention of the plaintiff to give the gift had to be evidenced by physical delivery of the car itself and not the documents of title. In short the court was saying that given the circumstances of this case the plaintiff did not intend that

the arrangement between herself and the defendant should be attended by legal consequences.

In the course of his judgment the learned judge did not refer to s.25(2) of the Contract Ordinance which says that the validity of any gift actually made as between the donor and donee shall not be affected because of failure to comply with the requirements spelt out under section 25(1). (Section 25(1) provides for exceptions to the requirement of consideration in simple contracts and what conditions must be complied with in order to make an agreement without consideration a contract). A number of questions may be asked. When is a gift actually made? .Suppose a car is delivered without documents of title does ownership pass? Suppose documents of title are delivered but not the car, has ownership passed?

All we can say at this stage is that the judgement has left many questions unanswered.

8.3 Intention in business/commercial arrangements

We have already seen that in case of social or domestic arrangements there is a presumption that the parties did not intend legal consequences to result from their agreement.

In the case of agreements regulating business relations it follows that a1most as a matter of course that the parties• intend legal consequences to follow. A contrary intention may, however, be proved in which case the presumption becomes rebutted. The case of Rose & Frank Co. v. J.R. Crompton ([1923]2K.B 261) is usually cited to show that even in business matters parties may intend to rely on

each other's good faith and honour and not on legal consequences. The facts of the case cited were as follows. An exhaustive agreement was drawn between one American and two English firms for their dealings in paper tissues. The agreement contained the following clause: "This arrangement is not entered into as a formal legal agreement and shall not be subject to a legal jurisdiction in the law courts either in the U.S. or in England". The agreement was terminated by one of the parties contrary to it~ terms. The American firm brought an action for breach. The Court held that the document did not constitute a binding contract as there was no intention to affect legal relations.

8.4 The test of contractual intention

The intention of the parties must be ascertained from the terms of the arrangement and the surrounding circumstances. It is for the court in each case to find out whether the parties must have intended to enter into legal obligations. (See A. Singh: Law of Contract (1980) p.6). The Court employes an objective test not subjective tes. What is important is not what is the minds of the parties rather what a reasonable person would say, in the circumstances, their intention to be.

Note that since a contract is a freely negotiated agreement then the parties have aright to say that although it is their agreement they do not want it to be subject to the court's jurisdiction should •anything go wrong. (see Hodgin: Law of Contract in East Africa (1975) p.63).

8.5. Intention: Its applicability in East Africa.

We pointed out in the introduction to this lecture that at common law e(Kenya and Uganda) the element of intention to create legal relations is an essential ingredient in a contract. We also saw that the position in Tanzania is not expressly provided for in the Law of Contract Act.

It can now be stated that for Kenya and Uganda the element of intention in a contract is essential. As for Tanzania an examination as to the place of the element of intention must be made. Although there is no express provision in the contract Act, that intention is an essential element a close examination of the definition of the word proposal seems to show that the element is , by necessary implication, essential. A person who makes a proposal signifies his willingness to be bound according to the terms contained in the proposal. And, an acceptor signifies his willingness to be bound according to the acceptance terms. One could read the word willingness to mean intention to be bound according to the terms of offer or acceptance. Another argument which you may advance is that the Contract Act does not cover all areas of contract law. The Contract Act defines and amends certain parts of the law relating to contracts. So there are areas of law which are not covered by the Act. In such cases one has to fall back to the common law of contract (See Tanganyika Garage Ltd v. Marceli G. Mafuruki (19750 LRT 23).

8.6. Exercise

(a) Discuss the presumption relating to intention to create legal relations.

(b) Do you think intention to create legal relations is an essential element of a contract in Tanzania?

8.7. Further readings:

(a) Your casebook

(b) Avtar Singh, The Law of Contract.

(c) Treitel: Law of Contract

LECTURE 9: CAPACITY TO CONTRACT

Objectives: (1) To introduce you to this essential element of a contract.

(2) To define what is meant by capacity to contract

(3) To let you understand why capacity to contract is an essential element.

Study strategy : Read this lecture carefully. Then study the legal provisions mentioned in this lecture. In addition you have to read cases cited in this lecture. And of course, you have further readings which you should go through.

Introduction: Capacity to contract is treated in two lectures. i.e 9 and 10. Lecture 10 is devoted to factors vitiating capacity to contract and as such examines various types of persons who are declared not to be competent to contract.•

This lecture introduces you to the meaning of capacity to contract and the importance of this element.

9.1 Meaning:

Capacity to contract refers to competence to contract. You know that in our daily lives every person enters into a contract of some sort everyday. Children, old

people, drunken persons sell and buy goods. It is not uncommon to find that some groups, e.g., children do not know exactly what they are doing when buying, say, kerosine. If short measure is given the child cannot stand up and defend herself. A person of unsound mind may also not know the nature of the transaction he enters and may not be capable of protecting his economic interests. As such the law recognizes certain groups of person as not being capable to contract and protects them.

As a general rule only sane, sober persons of contractual age are capable of making valid contracts. (See Hodgin: Law of Contract, p. 66).

In our Contract Act there is a requirement that parties to a contract must pe competent. (See s. 10).

Section 11 defines the word competence. It says: 11.-(1) "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject".

Competence is thus defined in terms of persons who are not competent to contract. These are minors, persons of unsound mind and persons who have been disqualified by law to which they are subject.

A minor is a person who has not attained the age of majority according to the law to which he is subject. In East Africa statutes have been passed to provide for the age of majority.

In Tanganyika the Age of Majority Act Cap. 431 (Revised Laws) declares the age of majority to be 18 years. In Zanzibar by virtue of the Laws of Zanzibar, Cap. 53, the age of majority is 18 years. In Kenya according to the Age of Majority Act

1974 one attains majority when he reaches 18 years. In Uganda the age of majority is 18 years according to the Uganda Contract Act Cap. 75. In England before 1969 the age of majority was 21 years. In 1969 the Family Law Reform Act was passed, according to which now the age of majority is 18 years.

A person of unsound mind is that one who is not of sound mind. A person of sound mind is that who, at the time of making the contract should be (a) capable of understanding it, and (b) capable of forming a rational judgment as to its effects upon his interests.

9.2 Importance and Rationale

The importance and rationale behind the law relating to capacity to contract is not far to seek. As a rule a person without capacity to contract lacks intellectual maturity, lacks experience to exercise sound judgment and in addition he may not know or appreciate the effects of the agreement upon himself. This being the case he cannot protect himself. It follows he needs the protection of the law.

The law, however, in some cases tries to strike a balance. The law does not allow persons without capacity to use their position to defeat with impunity the economic interests of persons with capacity to contract. So as we shall see in the following lecture the protection offered by the law is not always absolute. The minor or infant participates in the adult world. Contractual relationships are an essential part of his environment (See Hartwing, "Infants' Contracts in English Law: With Commonwealth and European Comparison" in 15 International and comparative Law Quarterly 780 (1966).

9.3 Exercises:

(1) What do you understand by a person who lacks capacity to contract?

(2) Why does the law protect persons who lack capacity to contract?

9.4 Further readings: (1) Your casebook

(2) A. Singh: Law of Contract

LECTURE NO. 10: FACTORS VITIATING CAPACITY

Objectives: (1) To let you understand the effect of age: unsoundness of mind and other types of incapacity on formation of a contract.

(2) To survey the various types of persons who are not capable to contract.

Study strategy: Read this lecture carefully. Note in particular the legal effect of contracts by persons who have been declared incompetent to contract.

Introduction: This lecture is a follow up of lecture No.9. It examines factors vitiating capacity to contract which are age, unsoundness of mind and legal incapacity of corporations. In this lecture the legal effect of an agreement by a person who has no capacity is looked at in detail.

10.1. Age

Age is one factor which may vitiate a person's capacity to contract. As we have seen section 11(1) of the Law of Contract Ordinance states that a minor is not competent to contract. And section 11(2) says in effect that an agreement by a minor is void, i.e is no agreement at all in the eyes of the law.

Does section 11(2) mean that minors cannot contract at all? We know that minors deal with majors everyday and indeed enter into agreements. We have to go into some detail, therefore to see the import of section 11(2).

The law on minors' infants' contracts is based on two principles. First, the law-is there to protect minors from their inexperience, hence to invalidate agreements which are unfair to the minor or which are improvident (wasteful). Secondly, the law is not to cause unnecessary hardship to adults who deal fairly with minors.

Under the second principle the law recognizes some contracts with minors as valid and others as voidable. In addition a minor may also be liable in quasi-contract and in equity where he is found guilty of fraud.

(a} Valid "contracts"

(i) Contracts" for necessaries

A minor's agreement for necessaries is valid and enforceable against him. This is the position at common law as well as under contract law of Tanzania. In Tanzania the general law of contract based on the Contract Act is silent on the contractual liability of a minor. However the Sale of Goods Act Cap. 214 provides in section 4 that a minor may be held liable for necessaries. A minor may also be held liable in quasi-contract under section 68 of the Contract Act.

Let us reproduce the two sections for ease of reference. Section 4 of the Sale of Goods Act

provides:

> “Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property: Provided that

> where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section means goods suitable to the condition in life of such infant or minor or other person, and to his actual requirement at the time of sale and delivery.

Section 68 of the Contract Act provides:

> "If a person incapable of entering into a contract, or any one who he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person".

Section 4 of the Sale of Goods Ordinance does not seem to impose contractual liability on the minor exist. Food, clothing and shelter are necessaries. In addition education and medical services may be included. You should also note that what is or is not a necessary will depend on the condition in life of the minor. As such articles that to one person might be mere conveniences or matters of taste, may in the case of another be considered necessaries.

Let us reiterate that agreements for Supplied/offered goods/ services which are necessaries will not be treated as void. However no contractual supplying the goods or offering the services becomes entitled to either a reasonable price or reimbursement from the property of the minor if he has any.

(b) <u>Voidable contracts</u>

As pointed out earlier section 11 (2) of the Contract Ordinance says clearly that an agreement by a minor is void. The subsection does not mention valid or voidable contracts.

However at common law a contract with a minor may be declared voidable. Such a contract binds both parties until such "-time when the minor repudiates it. Agreements relating to land, shares in companies, partnerships and marriage settlements may be treated as voidable contracts. In such cases the minor/infant is allowed to call the contract to an end. The law requires such minor to do so during infancy or within reasonable time after attaining majority (See Minors Contract Act 1987, England).

(c) Void contracts

Section 11(2) of the Contract ordinance, as we have seen provides that an agreement with a minor is void. As we have said section 11 makes it essential that all contracting parties should be competent to contract. It expressly provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. Since the question whether a contract is void or voidable presupposes the existence of a contract within the meaning of the Act, it cannot arise in the case of a minor/infant.

Again as we have shown minors do appear in public life frequently. a minor has to travel, to get her dresses tailored or cleaned, to visit cinema halls, etc. Now, a minor's agreement being void" ordinarily it should be devoid of all effects. If there is no contract, there should, indeed, be no contractual obligation on either side. Consequently all the effects of a minor's agreement must be worked out independently of any contract. (A. Singh: Law of contract pp. 97 et seq.).

10.2 Unsoundness of mind

According to section 11(1) a person who is of unsound mind is incompetent to contract. The definition of a person of unsound mind is given in comparison to one who is ,of sound 12 (1) A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. The law allows a person who is usually of unsound mind, but occasionally of sound mind, to make a contract when he is usually of sound mind, but occasionally of unsound mind, to make a contract when he is of unsound mind (S.11(3). Apart from what we have explained above, an agreement of a person of unsound mind is, like that of a minor, void. According to Avtar Singh, Law of Contract, 1980, in English law a person of unsound mind is competent to contract, although he may avoid his contract if he satisfies the Court that he was incapa91e of understanding the contract and the other party knew it. The contract is voidable at his option. It becomes binding on him only if he affirms.

10.3 Corporations

A corporation or company which is duly registered under the Companies Ordinance is regarded as a legal person. It is capable of concluding contracts in its company name. It does so through its duly authorised agents. A company cannot, however make whatever contract it likes the contractual capacity of a corporation or company is limited. A company can enter into those contracts which the Memorandum of Association of the company allows. The Memorandum of Association is a document which sets down the various functions and purposes of the company. lf a company concludes a contract which is within its objects such contract- is described as being intra-vires and is valid. If a contract is made outside

the objects of the company it is referred to as being ultra vires i.e., beyond the powers of the-company to do and it becomes void.

10.4 Exercises:

(i) What do you think is the' rationale behind the law governing infants' contracts?

(ii) Can (a) drunken persons (b) mentally disordered persons conclude contracts?

10.5 .Further readings:

(1)Your casebook

(2) A. Singh: Law of Contract, 1980

(3) Hodgin: Law of Contract in East Africa

(4) G.M. Treitel: The Law of contract,' 1979.

LECTURE NO .11: CONSIDERATION, IMPORTANCEAND DEFINITION

Objectives: (1).To explain to you the importance and rationale of consideration in a contract.

(2).To give a general definition of the term consideration.

Study strategy: After carefully reading this lecture make sure you red the literature which defines and gives the importance, and rationale of consideration in a contractual setting.

Introduction: This lecture is but a start of a number of lectures on consideration. Lectures 12-15 will also be on consideration. It has been necessary to devote enough time to consideration because it is one of the very necessary or essential elements of contract both at common law and under the contract law of Tanzania.

11.1 Importance and rationale

The element of consideration is vital to the English conception of contract (See **Thomas v.Thomas** (1842) 2 Q.B. 851. It traces its history to before the 16th century.

According to English law for an agreement to have legal force it must either be under seal or must be supported by some considerations. In modern English law, i.e since the 16th century, the crucial factor is the presence or absence of consideration (See Furmston, M.P. Cheshire and Fifoots Law of Contract, 10th edn.., p.10).

One of the problems surrounding the development of the doctrine of consideration was its definition. The other problem was one of the recognizing consideration as an essential ingredient in a contract. He decided to treat consideration as merely evidence of the parties' intention to create legal relations. He asserted, therefore, that if such intention could be ascertained by other means, e.g., presence of writing, then consideration was unnecessary to make the agreement binding. In

Pillans v.Van Mierop (1756)3Burr 1663) he held that consideration is only one of several modes of supplying evidence of the promisor's intention to bind himself; if the terms of the contract are reduced into writing by reason of commercial custom, or in obedience of statutory requirement, such evidence dispensed with the requirements for consideration.

This legal proposition by Lord Mansfield survived for 22 years. In 1778 in Rann v. Hughes (H.L.1778 7T.L 346) the House of Lords repelled Lord Mansfield's assault on the doctrine of consideration pointing out that all simple contracts, (i.e contracts not under seal whether written or not) must be supported by consideration. The Court pointed out that:

"All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class…as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved".

After Rann's case consideration became an essential ingredient of a simple contract. Lord Mansfield accepted this legal position, but then he sought to define consideration. in terms of moral obligation. His approach amounted to this example: if a man is under a moral obligation to pay money, and subsequently, promises to pay, the pre-existing moral duty furnishes consideration for the promise. He rationalized moral obligation as consideration by asserting that the ties of conscience upon an upright mind are a sufficient consideration. Lord Mansfield's equation of consideration with moral obligation survived for 60 years: it was thrown overboard in l840 in Eastwood v. Kenyon (113 E.R.482). In this case the Court held that moral obligation to fulfil a promise was insufficient where consideration was wholly past. Lord Danman said in delivering judgment: "the

doctrine would annihilate the necessity for any consideration at all, in as much as the mere fact of giving a promise creates a moral obligation to perform it."

The place of consideration in the English common law of contract today was enunciated during the capitalist perfect competition era in Rann v. Hughes. The Court said:

It is undoubtedly true that every man is by the law of nature bound to fulfil his engagements. It is equally true that the law of the country supplies no means, nor affords any remedy, to compel performance of an agreement made without sufficient consideration.

According to contract law in Tanzania as a general rule, an agreement made without consideration is void (See s. 25 L.C.A.). This means consideration is an essential ingredient in all simple contracts concluded in Tanzania.

11.2 Definition of considerations

(a). At Common Law:

The definitions of-the word consideration at Common Law revolves around exchange of values embedded in goods or services. A person who parts with value must be given some value in return. Nothing should go for nothing: " *Quid pro quo"*.

The definitions of considerations being polished with time reflect the basic requirement of exchange of values. One of the earliest definitions of considerations was that it was a recompense given by the party contracting to the other. In 1842 in **Thomas v.Thomas** (1842) 2Q.B 851 consideration was defined as something

which is of some value in the eyes of the law. It may be some benefit to the Plaintiff 'or detriment to the defendant. A more explicit definition was given in **Currie v. Misa** (1875) L.R. 10 Ex. 153) It was said that a valuable consideration in the• sense of the law may consist either in some right, given, suffered or undertaken by the other. Sir Frederick Pollock simplified the definition of consideration. He defined it a price for which the promise is bought. This description of consideration got the approval of the House of Lords in **Dunlop Pneumatic Tyre Co.Ltd v. Self-fridge Ltd** (1915) A.C.847.

(b). Under the Law of Contract Act:

In Tanzania there is a statutory definition of the term consideration. Section 2(1)(d) defines consideration as follows:-

“When at the desire of the promisor, the promisee or-any other person has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something such act or abstinence or promise is called a consideration for the promise.”

This definition suggests that a consideration is for the promise given. And, consideration may be in the form of an act, abstinence or a promise. The consideration for the promise This definition may be executed, or executor . It is not clear whether the consideration for the promise may be past.

The definition of consideration in s.2(1) (d) needs some analysis because, first, a consideration for the promise must be furnished at the desire of the promisor, secondly, consideration must move 'from either the promisee or any other person,

and thirdly consideration may have beer executed already or in' the process of execution or to be executed in future.

11.3 Exercises

Q. 1. Now you are in a position to do the following exercises:

Q.2 What do you think underlies the definition of consideration?

Q.3 What in your view is the importance of consideration in a contract?

11.2 Further readings:

(a). A. Singh: Law of Contract.

(b). Treitel: Law of Contract

LECTURE 12: ANALYSIS OF THE DEFINITION OF THE WORD CONSIDERATION: LAW OF CONTRACT ACT VS. THE COMMON LAW POSITION.

Objectives: {a) To give an analysis of the definition of consideration.

(b).to point out to you the differences which exist in defining consideration at Common Law and under the contract law of Tanzania.

Study strategy:

Do not start reading this lecture unless you have understood lecture 11. Go through this lecture slowly and carefully.

Introduction:

This lecture is a follow up of lecture 11. While the previous lecture dealt with the definition and importance of consideration this definition is explained in such a manner as to make you understand and enjoy the lecture.

12.1 That consideration must be given at the desire of the promisor

Let us start by' stating that" apart from the statutory provision. that' consideration::must he furnished at the desire of the promisor, there is no other authority in Tanzania dealing with this legal proposition use those cases to illustrate what is meant by the' phrase

In India, however, a similar legal provision has been dealt with in a number of cases. We are going to use those cases to illustrate what is meant by the phrase "…at the desire of the promisor".

The first case is that of **Durga Prasad v. Baldeo** (1880)3A.I.R 221) In this case the plaintiff was ordered to build certain shops in a bazaar at his own expense.

Some of the shops came to be occupied by the defendants. In consideration of the plaintiff having built the shops at his own expense the' defendants prormised to pay him some commission on the goods they sold. The defendants did not honour their promise. The plaintiff sued them. In dismissing the suit the Court pointed out that the plaintiff's building of the shops at his own expenses was not done at the desire of the defendant and therefore it could not constitute consideration.

The second case is that of **Kedar Nath v. Gorie Mohamed** (1886) I.L.R. 14 Cal.64). This case illustrates the proposition that an act done at the desire of the promisor constitutes consideration; and that is so even if its is of not significance or personal benefit to him.

In Kedar Nath case the defendant had promised to subscribe Rs 100 for erecting a town hall. On the faith of the defendant's promise and other subscription promises the plaintiff engaged a contractor to build the hall. The defendant failed to pay the Rs.100. He contended that there was no contract between him and the plaintiff there being no consideration for the promise. Court held him liable. It observed:

The promise is: In consideration of your agreeing to enter into a contract to erect, I undertake to supply money for it. The act of the plaintiff in entering into a contract with the contractor was done at the desire of the defendant (the promisor) so as to constitute consideration within the meaning of section 2(d). (See also Doraswami Iyer v. Arunachala Ayar, AIR 1936 Mad. 135).

Now you understand the meaning of the phrase" ... at the desiree of the promisor…." We have looked at Indian cases to illustrate the phrase.

The legal position is not unique to India or Tanzania. It has its root in the Common Law of Contract. At Common law an act done at the desire of the promisor constitutes consideration. The case of **Lampleigh_v.Brathwaite** (80E.R. 255) is

relevant. The defendant, after killing Patrick Mahurne, asked Lampleigh to do all he could to get a free pardon for him from the King. Lampleigh incurred expenses and got the pardon for the defendant. Then the defendant promised the plaintiff £100 for his trouble which amount he failed to pay. The Court decided in favour of the plaintiff on the ground that the services were rendered at the desire of the promisor (defendant).

The reason for holding the promisor liable seems to be hinged on estoppel. The legal position may be posited like this. Since the promisor made a promise on the faith of which the promisee acted thereby altering his postion the promisor should stopped from denying the fact that the promise acted on the faith of his promise which by implication amounted to to a reqest that the promise should act. Essentially the promsor's promise is unilateral because all what the promise is required to do is to act in accordance with the desire of the promisor. The promisor's prmise amounts to his desire and request that the promisee should act accordingly.

12.2 Who may furnish consideration

(a). The ,position at Common Law

The. English Common Law of Contract requires that consideration must be furnished by the promisee and the promise only. This legal position began to hold sway after mid-19th Century. Before that time it appears what mattered was the main object of the arrangement. In **Dutton v. Poole** ('(1667)83E.R. 523) a contract was entered into by a father and a son for the benefit of a daughter. In consideration of the father not selling a piece of forest to provide the daughter with a marriage portion the son promised the father to pay his sister 1000 pound. The

father abstained from selling the forest. The brother did not give his sister the amount as promised. The sister was not a party to the contract or did she furnish consideration for the brother's promise. The daughter was, however, successful in the suit on the ground that the object of the contract was to benefit the daughter. The court was prepared to hold that if the daughter were a party to the contract with the brother, the consideration furnished by the father would be sufficient to entitle her to sue the brother.

In 1861, in the case of **Tweddle v. Atkinson** (123 ER 762). The Court of the Queen's Bench refused to follow the principle in Dutton v. Poole. In Tweddle's case, in consideration of an intended marriage between the plaintiff and the daughter of one G., the plaintiff's father and G entered into a written agreement that each was to pay the plaintiff a sum of money. G failed to so and the plaintiff sued. The court held that it was an established principle that no stranger to the consideration can take advantage of a contract although made for his benefit. This principle was affirmed by the House of Lords in **Dunlop Pneumatic Tyre Co. v. Selridge & Co**. (1915) A.C. 847 in which Lord Viscout Haldane declared that:

"In the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it…A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him".

The second principle in the case requires a party to a contract to furnish consideration himself. If consideration is furnished by a third party, the party to the contract who has not himself furnished consideration cannot enforce the contract.

(b). The position under the Law of Contract Act.

While at common law consideration must move from the promise who is ipso facto ,a party to the contract, s. 2(1)(d) provides that consideration may be furnished either by the promise (a party to the contract) or “any other person” (one who is not a party to the contract”.) . That consideration must be furnished is a legal requirement since section 25(1) provides s a general rule that an agreement made without consideration is void,

Now let us explain what is meant by “any other person”. We are going to use Indian and East African cases to illustrate the point. First is the Indian case of **Chinaya v. Ramay** (1882)4 Mad. 137). The plaintiff was a sister of an old lady who used to pay a sum of Rs. her landed property to the daughter. A deed of gift was drawn. There was a term in the deed which required the donee daughter to continue paying the plaintiff the sum of R.653 every year. The daughter did not pay the amount as promised in the deed of gift to the plaintiff. The plaintiff sued to recover the money.

The plaintiff was the promisee and was thus a party to the contract. The plaintiff however could not prove that ‘she gave any value to the defendant for the promise to pay the annuity. The Court was of the view that by missing payment of the annuity the plaintiff suffered loss. And, that loss was sufficient consideration in the eye of the law.

Note that the Court did not decide the case on the ground that consideration was furnish shed by "any other reason”, in this' case the old lady by giving the landed property to the defendant.

In East Africa the question as to who may furnish consideration was discussed in the case of **Tarlock Singh Nayar & Another v. Sterling General Insurance Co. Ltd.** ([1966JE.A.144 (K). The case was from Kenya. When it was instituted the

law applicable in Kenya and the rest of the East African countries was the Indian Contract Act of 1872 (as an applied statute). The relevant facts of the case are that the first plaintiff insured his car with the defendant insurance company. The policy was comprehensive and covered the first plaintiff and "authorized drivers". The second plaintiff was an authorised driver. He borrowed the car, was involved in an accident injuring a passenger in the car. The Court ordered the driver to pay Shs. 47,006/50 as damages to the injured passenger. The second plaintiff (driver) wanted the defendant insurer to indemnify him for the amount awarded to the passenger.

Let us establish who parties to the contract were. These were the .insurer (Insurance, Company) and the insured (first plaintiff). So the authorized driver was not a party to the insurance contract. He was, however, a beneficiary under the contract. One of the questions before the Court was whether the second plaintiff. The claimant, who had incurred liability, was covered under the policy but was not a party to the contract could sue the defendant insurer in his own name.

From the facts we know that the driver was not a party to the contract. Assuming he was a party could he sue on the contract? This question is asked because the driver did not give consideration, instead it was furnished by the insurer. i.e the first plaintiff.

The Court said that had had driver been a party to the contract, that he did not furnish consideration would not have barred him from suing on the contract in his own name. According to section 2(d) of (Which is similar to our s. 2(1)(d) the promise need to furnish consideration himself. What mattrs is whether the promisor has received value or not. In the case at hand the Court said that had the

driver been a party to the contract he could have sued because consideration had ben furnished by a third person (any other person).

Note that a person who is not a party to the contract cannot sue on, the contract even though he may have furnished consideration. In other words furnishing of consideration by itself does not entitle a person to sue on the contract. In order to be able to sue one must show that he is a party to the contract.

12.3. Exercises

(a). "In he law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Or law knows nothing of a jus quaesitum tertio arising by way of a contract. (Lord Haldane in Dunlop v.Selfridge (1915) A.C. 847). The other principle is that only a person who has furnished consideration can sue on it. Discuss and state whether the above-mentioned English principles' have a place in the Tanzania Mainland contract law.

(b) The Umoja wa Wanawake Tanzania (U. W. T.) University of Oar es Salaam branch wishes to rebuild its nursery school which has ~ecently been demolished bY a fire. The nursery school committee invites subscriptions from the general public fer that purpose. In a fit of generosity, 1i, the Chief Catering Superintendent of ,thQ students Cafeteria, whose three children attend the nursery school promises to donate Shs. 5,000/=. On the strenSJth of such promises and gifts already received he U.W.T. has engaged a contractor to rebuild the school. When Ali is approached for Shs., 5,000/= he backs- and flatly refuses to pay. Can the U.W.T. successfully sue Ali?

12.4 Further readings:

(a) Your casebook.

(b) A. Singh: Law of Contract

LECTURE NO. 13: TYPES OF CONSIDERATION

Objectives: At the end of this lecture you should be able to:

(a) Understand the consideration.

(b) Appreciate the weight of each type.

(c) Underscore the place of past consideration in contractual transactions.

Study strategy:

It will be useless to start reading this lecture before fully understand lectures 11 and 12. This is so because lecture 13 is a follow up to lecture 12. The cases cited in the lecture are important. You may want to read as many as possible.

Introduction: As pointed out above this lecture is a follow-up to lecture 12. It is dedicated to a discussion on the three types of consideration i.e.•Executory, executed and past consideration. In this lecture the positions at Common Law and the Law of Contract Ordinance are covered distinctly for the sake of clarity.

13.1 The Position at Common Law

One of the celebrated principles in English law is that consideration should be contemporaneous with the promise given. The rationale for this principle seems to be that since consideration is the price for the promise it should be given in

response to and as an inducement for the promise. An act or abstinence or a promise given in response to a promise may be executory or executed. An act or abstinence done or abstained from, not in response to or as an inducement for the promise is known as past consideration.

At common law consideration may be either executory the test of contemporaneity, and, as such, as a general rule English law treats past consideration as no consideration at all.

(i). Executory Consideration

It is not uncommon in commercial transactions for contracts to be concluded by a mere exchange of promises. The promise of one of the parties is bought by the promise of the other. Consideration for the promise is executory in that liability to perform is outstanding in consideration for the promise of B. A contract of sale of goods may be a good illustration. The seller and the buyer may conclude a contract by a mere exchange of promises to sell certain goods and the buyer promises to pay the price for the goods to the seller. A contract has been concluded, delivery of the goods and payment of the price will take place in future. A bigger part of commerce takes the form not of physical exchange of things but of exchange of promises. A promise to pay money against a promise to deliver goods. Roscoe Pound once said that in a commercial age wealth is largely made up of promises (11 Jurisprudence163, 1959).

(ii). Executed Consideration

As opposed to an executory consideration which comprises a promise to be performed 1n future, an executed consideration consists of an act which has been done in response to a promise. Where A promises a reward to anyone who finds and returns to him his lost article he does not expect those who intend to look for the lest article to promise him that they are prepared to find the article. B may find the article and take it back to A. B's act of finding and returning the article to A amounts to not only acceptance of the offer made by A but also a consideration for A's promise. The consideration, in part has yet to perform his promise by giving the reward to B. A's consideration for B's already performed act is yet to be executed. It remains executor.

iii) Past Consideration

Past consideration comprises an act (or abstinence) which was done before the promise was made and not in response to, or induced by the subsequent promise. According to English law past consideration cannot -support a promise. Anauthority for this legal proposition is the case of **Roscorla v. Thomas** ([1842) 3Q. B. 284). After Completion of the sale of a horse the seller promised the buyer that the horse was sound,. In fact the horse was vicious. The buyer sued the seller on the promise arguing that the buying of the horse constituted consideration for the seller's subsequent promise. The court held that since buying of the horse was past in relation to the seller's promise, the buying of the horse amounted to past consideration which could not support the seller's promise. **Re McArdle** (1951]Ch.669) is another authority for, the general proposition that past consideration cannot support a promise.

The general rule as to past consideration admits a number of exceptions.

(a) Past service rendered at the promisor's request

A past act or service rendered at the request of the promisor constitutes consideration for a subsequent promise by the promisor. This exception to the general rule as to past consideration is well rationalised by case law. As far back as 1615 in **Lampleigh v. Brathwaite** (1615) Hob.1052) the court recognized the exception. Brathwaite killed Patrick Hume. The he asked Lampleigh to do all he could to get a free pardon for him from the King. Lampleigh incurred expenses and got the pardon for the defendant. Then the defendant promised the plaintiff 100 pound for his trouble which amount he failed to pay. It was argued in favour of the defendant that the consideration furnished by the plaintiff was past and thererore was not consideration at all. The Court decided in favour of the plaintiff holding that the services rendered though past were rendered at the defendant's request, that both parties assumed throughout that the services would ultimately be paid for and that the services were performed by way of business.

In 1892 in **Re Casey's Patents, Stewart V. Cases** (1892) Ch. 104) Bowen, L.J. rationalized past service at request as sufficient consideration on the following grounds:"the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and if it was a service to be paid for, when you get a promise o pay, that promise may be treated as an admission which evidence, or as a positive bargain, which fixes the amount of that reasonable remuneration on the faith of which the services were originally rendered".

And, in **Pao On v. Lao Yiu Long** (1979) 3 W.L.R. 435) the Privy Council was of the view that an act done before the giving of the promise could be valid consideration if:the act had been done at the promisor's request.The parties had understood that the act was to be remunerated either by payment or conferment of a benefit; and The payment or conferment of a benefit would have been enforceable had it been promised in advance.

(b). Time barred debts

Acknowledgement of a time barred debt is sufficient to make such debt enforceable. According to the English Limitation Act, 1890 there need not be any promise, express or implied by the debtor to pay the creditors. No consideration need be sought; the acknowledgement is enough (Furmston: Cheshire & Fifoot-Law of Contract, p.66). The acknowledgement must (a) be in writing (b) be signed by the person making it (c) admit legal liability to pay the sum clamed by the creditor (d) relate to a debt or other liquidated sum.

Note that expiry of the statutory period does not extinguish the debt it merely renders the debt unenforceable in a court of law. The debt is still payable and the creditor may use any other method to obtain satisfaction (See Busch v. Stevens[1963JQ.B.l).

(c). Negotiable Instruments

There is a statutory exception to the rule that past consideration is no consideration at all. S. 27 (1) of the Bills of Exchange Act, 1882 provides that an antecedent debt or liability may constitute valuable consideration The wording of section 2(1) Cd) of the Law of Contract Act does provide for: (i)executory consideration for a bill.

13. 2 The position under the Law of Contract Act

(a). Execuroty and Executed consideration

The wording of section 2(1)(d) of the Law of Contract Act does provides:-

(i). executory consideration, in that a person may promise to do or to abstain from doing;

(ii). Consideration which is in the process of being executed in that a person may be doing or abstaining from doing; and

(ii). executed consideration, in that a person may already have done or abstained from doing something.

It is doubtful whether the words "has done or abstained from doing" suggest that past consideration is good under the Law of Contract Act.

In as far as the two types of consideration, executory and executed are concerned; the position under the Contract Ordinance is not different from that at Common Law. However, the law relating to past consideration requires some discussion.

(b) .<u>The status of past consideration under the Contract Act</u>

Two sections of the Law of Contract Ordinance are relevant for this discussion. These are sections 2 (1") (d) and 25(1).

Section 2(1) (d) provides in part:

When at the desire of the promisor, the promisee or any other person has done or abstained from doing such act or abstinence ••• is called a consideration for the promise.

And, s.25(1) provides that an agreement made without consideration is void unless:-

(a)……

(b) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do.

(c) ……

In India there are similar provisions. And, the question as to whether past consideration is good consideration for a promise has attracted different conflicting views. Profesor Ponnuswami writes:

"…..It is still controversial whether a past act or abstinence is good consideration for a promise and different conflicting views have been expressed. The more common view seems to be that "past consideration is good consideration" under our law (and he cites Namberumal v. Veeraperumal, 59 M.L.J 596: A.I.R 1930 Mad.956 at p.960 per Ramesam, J., "In India Law past consideration is good consideration, etc., T.S. Vakentesa, The Law of Contract, 2nd Ed., p.90, 91) and that the contract Act has departed from English Law in this respect as in others. This view would appear to proceed from the words "has done or abstained from doing used in the definition of consideration which is said to give recognition to past consideration as good under our law. It is also argued that the cumulative effect of the definition in section 2, clause (2) would be to render all past acts and abstinences good consideration of a promise under our law. The opposite view has also been expressed (Rao's Commentaries on the Indian Contract Svy, Z (1965) pp.27 and 28) that past consideration is no consideration in our law as in the English law, that the framers of the Act who were familiar with the English law had a partiality for that law and that the provisions of the Act do not warrant a consideration that they intended to admit as good consideration what had been in

toto rejected as no consideration in the English law. (See K. Ponnuswami, Past Consideration: A Note in the Supreme Court Journal, Vol XX, 1958).

The above quotation shows that the law as to past consideration in India is not yet settled. Since the provisions under the Law of Contract Act are similar to those in the Indian Contract Act, 1872 it is tempting to say that the law as to past consideration in Tanzania is not yet settled.. The Indian position however need not influence the position in Tanzania.

It can strongly be argued that there is no general rule in Tanzania that a past act o abstinence is good consideration to support subsequent promise. Section 2(1)(d) uses present perfect tense, “has done or abstained from doing”, not past tense. The use of present perfect tense, it submitted, suggests that the act done or abstained from being done is not independent of the promise. They form one and the same transaction. Here the act done is executed consideration and not past consideration. Section 2(1)(d) does not import any rule that past consideration is good to support a subsequent promise

Section 25(1)(b) provides for an exception to the general rule requiring consideration for an agreement which is intended to have legal force. The provision is to the effect that a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do is legally enforceable. From the wording of this section, one can argue that the question of consideration does not arise in the excepted instances i.e under (a), (b), and (c). Should one argue on the basis of the past voluntary act as constituting consideration then it is submitted that such consideration would be past. Since Section 25(1)(b) is excepted from requirement of consideration, it can be argued that Section 25(1) does not

recognize past consideration as good, otherwise the legislature would have said so expressly.

The provision so of the Law of Contract Act do not recognize past consideration as good, otherwise the legislature would have said so expressly. Also the provision so of the Law of Contract Act do not render it safe to propose as a general rule that past consideration is good consideration under the Act. It would, perhaps, be safe to adopt the general rule in English law that a past act or forbearance does not constitute consideration for a subsequent promise.

The general rule that past consideration cannot support subsequent promise exceptions may be admitted.

(a). A past act (or abstinence) done at the desire of the promisor

A past voluntary act at the request of the promisor may constitute good consideration for a subsequent promise to pay. The rationale in Lampleigh v.Brathwaite, Re Caseys Patents (1892)1Ch 104) and Pao On v. Lau Yiu Long (1979)3 WLR 435) are relevant. A past voluntary act should be distinguished from a past gratuitous act which was done at the desire of the promisor, or not at his desire, but with no intention of being recompensed.

(b) A promise to compensate for a past act

A promise to compensate a person for a past act voluntarily done fro the promisor is interchangeable under s. 25 (1)(b) and no consideration need be proved. The promise will however have to prove that first, he voluntarily did something for the

promisor himself or that which the promisor subsequently promised to compensate him wholly or in part.

The basis for the promise's claim will be the past voluntary act, which one may call past consideration. S. 25(1)(b) could, therefore, be considered as an exception to the rule that past consideration is no consideration.

The subsequent promise is one to compensate the promise. To compensate presupposes that in doing the act the promise suffered some loss or injury. It is submitted that if the promise, in performing the act suffered no loss, incurred no liability or suffered no injury then s. 25(1) (b) cannot be invoked in his favour.

(c). A promise to pay tine-barred debt.

S. 25 (1) (C) provides that where a debtor promises in writing and under his signature or of his authorized agent to pay his time-barred debt, then the creator may enforce the promise and proof of consideration for the promise is not necessary. In actual fact the past debt would constitute past consideration, which as a general rule is no consideration. The legislation, instead of providing for an exception (in this case) to the general rule, chose to treat an agreement to pay as time-barred debt a contract even though there is no consideration for the promise. The rationale for allowing the promisee to enforce a time barred debt seems to be that the debt is not destroyed only that the general legal remedy is lost. So a new promise to pay the debt should logically be enforceable.

(d) Antecedent liability or debt in relation to negotiable instruments

An antecedent debt or liability constitutes valuable consideration for a bill (see s. 27(1)(b) Bills of Exchange Act, Cap 215). An antecedent debt or liability constitutes past consideration, which in this case is valuable consideration.

13.3: Exercises

(a) Distinguish between an executory and an executed consideration.

(b). What do you understand by past consideration? Under what circumstances is past consideration good?

13.4 Further readings

a) Your casebook.

(b) A. Singh: Law of Contract

(c) Treitel: Law of Contract.

LECTURE NO.14: SUFFICIENCY OF CONSIDERATION

Objectives: (a). To make you understand the difference between adequacy and sufficiency

in as far as consideration is concerned.

(b). To let you know what the law considers as sufficient consideration.

(c). To show you reactions by some judges on the question of importance of consideration in a contract.

Study strategy: You may not read this lecture before understanding the contents of lecture No. 13 because again this is a follow up lecture.

Introduction: This lecture discusses, from a legal point of view, what consideration is sufficient to make a contract binding. You will note that courts are not much interested in adequacy of consideration. Anything valuable may constitute sufficient consideration.

14.1 Sufficiency and adequacy of consideration

A contract is a consensual agreement. The parties themselves agree as to what each of them has to do under the contract. So what consideration a party has to furnish for the promise of the other is supposed to be fixed by the parties of their own free consent. Where the parties have freely fixed the amount of consideration the Courts will not interfere even though the amount not be of equal value with what the other party has obtained under the contract. What matters is that some value has been given for the other party's promise. The Courts will not ask whether adequate value has been given for a promise. (Se Treitel, Law of Contract, 5th Edn, p.56.) The rationale for this seems to be that the parties are presumed to be capable of appreciating their own interests and reaching at their own equilibrium. (See Furmston: Cheshire and Fifoot Law of Contract, p.71). In Tanzania the Law of Contract Act provides:

An agreement to which the consent of the promisor is freely given is not void merely because the consideration in inadequate; but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given (s.25 (3).

So both under the English common law of contract and under the Tanzania contract law consideration for a promise need not be adequate. The consideration, however, must be sufficient to support the promise. Sufficiency of consideration is

measured in terms of its value. The courts wil have to be satisfied that the consideration given is valuable. In Thomas v. Thomas (1842) 2 Q.B. 851 the court defined consideration as something which is of some value in the eyes of the law.

14.2 Factors guiding courts in determining sufficiency of consideration

(a). Nominal consideration

Nominal consideration is that consideration which is of token value only in relation to the performance promised in return. For example a consideration of Sh.100/= is valuable consideration and therefore sufficient consideration even though it is grossly inadequate. The rationale for nominal consideration may be found in the need to evade the doctrine of consideration, and make otherwise gratuitous promises legally enforceable.

(b) Things with no economic value:

Sentimental motives: e. g. natural affection and love are of no economic value. As such these cannot suffice as consideration. Tanzania an agreement made on account of natural love and affection between parties standing in a near relation to each other is enforceable and no consideration need be proved provided it is in writing and is duly registered. (s. 25 (1) (a) L.C.A). A promise not to bore somebody has no economic value and thus cannot support a promise. In White v. Bluett (1853) 23 L.J. Exch.36) Pollock, C.B. said that “it would be ridiculous to

suppose that such promises could be binding. In reality there was no consideration whatsoever".

In Australian case Dunto v. Duton (1892) 18 V.L.R.114) in consideration for the husband's promise to make provision of 6pound monthly to his divorced wife, the latter was to conduct herself with sobriety and in a respectable orderly and virtuous manner. The Court had to decide whether the wife's forbearance to behave in a unbecoming manner constituted a consideration. The Court held this kind of consideration to be illusory and thus could not support a promise.

(c). Trivial acts:

On the ground that consideration need not be adequate, acts, or omissions of very small value may constitute sufficient consideration. Chapple & Co. Ltd v.Nestle's Co. Ltd (1960) A.C. 87 (H.L) illustrates this proposition. Nestle's Co. were manufacturers of milk chocolate. In order to decrease sales of their chocolate bars the company ordered 3000 gramophone records of the famous hit "Rockin" Shoes" from Hardy Company the manufacturers. Nestle's Co. advertises to sell each record at 6pound. Plus three wrappers of their 6d milk chocolate bard. The copyright of the music vested in Chappel & Co. Ltd. And according to the Copyright Act 1956, s. 8(1) Nesstle's Co. had to pay the copyright owners royalty of 6 and ¾ of the "ordinary retail price". One of the issues the Court had to decide was whether the three wrappers of the chocolate bars, which Nestles's Co. threw away after receiving the, formed part of the consideration (i.e the price) for a

gramophone record. The Court held that the wrappers formed part of the consideration (the other part being Is 6d) because the sale of the records was intended to attract increased sales of their milk chocolate bars. The wrappers could from the whole of the consideration. A promise to give a record could therefore be supported by delivery of three useless chocolate wrappers.

In the Nestle's Co. case the consideration seems toile in the company's inducement of the general public to buy their chocolates.

(d). Forbearance and Compromise

(i). Forbearance

A party may forbear to sue or to enforce a claim or a right. Can it be said that such forbearance constitutes consideration for a promise?

- Forbearance to sue

Where A has a cause of action against B and B promises A something should A forbear to sue B, A's forbearance to sue will constitute consideration for B's promise. A;s forbearance to sue will be a benefit to B and a detriment to A. The position at common law is not different from the Tanzanian position. Section 2(1)(d) does not use word forbearance, instead the word abstinence is used. In Patel Bros. v. Hasmani (19EACA 170) the Court held that actual forbearance at request, express or implied, of the defendant, is good consideration.

Forbearance to constitute consideration the plaintiff must have a right of action against the defendant. Where the plaintiff's claim is invalid forbearance to file such a claim cannot constitute consideration.

- Forbearance to enforce a claim or a right.

Where a debtor cannot pay the creditor on the due date and promises the creditor to pay him a higher interest if he does not enforce his right on the due date, then the creditor's promise not to enforce his right on the due date or his actual forbearance to enforce his claim on the due date constitutes consideration. The creditor's promise may be expressed or implied. Actual forbearance may be evidence of an implied promise no to enforce a claim. In Alliance Bank v. Broom (1864) 62 E.R. 631) the defendant owed 22,000 pound to the plaintiff bank. The bank pressed the defendant to give some security for the amount. The defendant promised to give security but the bank did not promise not to sue him. The defendant did not give the promised security. When sued he argued that for his promise to give some security the bank furnished no consideration. It was held that there was consideration on the part of the plaintiff bank in that the bank did actually forbear to sue. In contrast to the decision in the Alliance Bank case is the decision in Miles v. New Zealand Alford Estate Co.(1866)32 Ch.D.267). In this case S sold land to B. After the sale B showed dissatisfaction with the purchase. S fearful B might institute proceedings to rescind the contract promised to make some payments to B. S did not honour his promise. It was argued in favour of S that his promise to make the payments was not supported by consideration because B had never intended to institute proceedings. For B it was contended that his forbearance~ to take legal proceedings to rescind the contract was consideration for S's promise. Evidence showed that no proceedings to rescind were ever intended by B. B lost the case.

(ii) Compromise,

A compromise, i.e an agreement between parties to a dispute to settle it out of court constitute good consideration. There must be a dispute or the parties must believe there is a bonafide dispute. Mohamedali Virji Wali v. ShiI1yanga African Trading Co. Ld.([1968] H.C.D. No. 401) illustrates this proposition. The defendant company had been formed by the plaintiff and other group to distribute beer. Afterwards disputes arose between the plaintiff and the other group. All the directors agreed to authorise a firm of accountants to audit the books and records of the" Company to ascertain the amounts due to the plaintiff and his controlled companies by the defendant. The accounting firm found that the plaintiff was entitled to Shs. 23,695/25.the defendant refused to pay this amount to the plaintiff for various reasons one of which was that the account stated by the accounting firm was not binding because at the" the time the firm was authorized to audit the books and records the defendant was not aware of facts constituting fraud by the plaintiff. The court held that the agreement to submit the dispute to the accounting firm was binding because consideration was supplied by the mutual and reciprocal" promises by" each party to forego their claims and accept the account to be stated. The Court cited s. 2(1) of the Contract Act. (Cap. 433). S. 2(1) (f) provides that promises which form the consideration or part of the consideration for each other are called reciprocal promises.

(e) Performance of an existing duty

The legal position as to whether performance of an existing duty constitutes sufficient consideration to support a promise does not seem to be settled. There is a view' that a promise to pay for performance of an existing duty ,may be enforced

on the basis of public performance of an existing duty or a promise to perform an existing duty constitutes good consideration.

(A) Performance of a public duty imposed by law

A person who by his official status or through operation of the law is under a public duty to act in a certain way .cannot be taken as furnishing consideration merely by promising to discharge or even by discharging that duty. The reason for this proposition appears to be that if we regard consideration as the price for the defendant's promise, then merely performing a duty one is bound to discharge seems to offer nothing at all. It is suggested, therefore, that the plaintiff, in order to succeed, must do something more than what he is legally bound to do.

In Collins v. Godfrey (1831) 109 E.R. 1040 the plaintiff was subpoenaed to give evidence on the defendant's behalf. The defendant promised to pay him 6 guineas for his trouble. he plaintiff sued him for the money. The court held that if it is a duty imposed by law upon a party regularly subpoenaed to attend from time to time to give evidence, such attendance does not constitute consideration for a promise of remuneration. In this case the plaintiff was legally bound to attend, therefore his attendance did not constitute consideration.

The decision in Collin's case was based on the fact that the plaintiff did no more than the law required of him. In Glassbrook Bros. Ltd v. Glasmorgan City Council (1925) A.C. 270) mine owners who feared violence from the extra police protection than ordinarily given to them. The mine owners promised to pay for the extra protection which the police provided. They refused to pay the promised amount on the ground that the City Council police furnished no consideration for their promise in that they performed a public duty which they were legally bound

to perform. The Court was of the view that the police did more than they were required to do and held that the extra protection offered was good consideration for the mine owners' promise to pay.

Pronouncements by their Lorsdships in Ward v.Byham (1956)1WLR495 do not seem to agree on the question as to whether, and if yes, on what grounds performance of an existing duty constitutes consideration. In that case the parties were the parents of illegitimate child. After the parties had separated the father paid a neighbor 1pound weekly to take care of the child. Later the mother got a housekeeping job. She then asked the father to let her live with the child and be paid 1pound weekly. The father agreed provided she could prove that she would look after the child well and also that she would allow the child to decide for herself whether or not she wanted to live with the mother. The mother lived with the child and was getting 1pound weekly. Then she married her employer. The father then stopped payment of the 1pound weekly allowance whereupon the mother sued him One of the issues before the Court was whether the mother furnished consideration for the father's promise. The trial Court decided that the mother furnished consideration. The father appealed and the following pronouncements are traceable in their lordships speeches: Denning L.J. said:

> …in looking after the child the mother is doing what she is legally bound to do. (s.42 of the National Assistance Act, 1948 provided that a mother of an illegitimate child is bound to maintain it). Even so, I think that there was sufficient consideration to support the promise. I have always thought that a promise to perform an existing duty, or the performance of it, should be regarded as good consideration, because it is a benefit to the person to whom it is given".

Referring to the case before the Court he said that it was as much as a benefit for the father to have the child well looked after by the mother as by a neighbor. Morris, L.J, said:

> The father was saying in effect: “irrespective of what may be the strict legal position, what I am asking is that you shall prove that the child will be well looked after and pay …the child is to be allowed to decide for herself whether or not she wishes to come and live with you”

His Lordship was of the view that if those terms were fulfilled then there was sufficient consideration for the father's promise to pay £1 weekly to the mother,

Lord Morris' decision which was shared by Parker, L.J. was grounded on his finding that the mother had performed the duty cast u.pon her by law in that she promised in accordance with the terms of the defendant's letter both to look after the child well, satisfy the defendant that the child was happy and allow' the child to decide which home she preferred. According to Treitel the decision of Lord Denning has not based on legal consideration but on grounds of public policy (See Treitel: Law of-Contact, pp. 77).

Perhaps the interesting aspect of the speeches is that all their Lordships had to find consideration to enable the mother" enforce the defendant's promise. Lord Denning, a bold spirit, was prepared to assault the well established English principle that consideration is an essential element in every simple contract by finding a consideration where there was none. Lord Morris on the other hand found consideration in the mother's exceeding her legal duty. It is doubtful if the mother exceeded the duty imposed by the law by doing exactly what the law required from her. The statement that judges are ready to find a consideration if this be humanly possible (See Furmston: Cheshire & Fifoot, p. 78) seems to have some truth.

The pronouncement by Lord Denning that performance of an existing duty constitutes sufficient consideration was repeated in the case of Williams v. Williams([1957] 1 All E.R. 305). A husband promised to pay his wife who had deserted him 30s. a week if she would maintain. herself and undertake not to pledge his credit. He was sued by the wife when he fell into arrears• with the payments. For the husband it was argued that there was no consideration for the promise in that being in desertion she was bound to maintain herself and could, not pledge her 'husband's credit in any way. Lord Denning said:

> "... in promising to maintain herself whilst she was in desertion, the wife was only promising to do that which she was already bound to do. Nevertheless, a promise to perform an existing duty is, I think, sufficient consideration to support a promise, so long as there is nothing in the 'transaction which is contrary to the public interest"

The words "so long as there is nothing in the transaction which is contrary to the public interest" is an addition to what Lord Denning said in Ward v. Byham. Consideration was also found in that the wife who had wrongfully deserted her husband did not lose her right to be maintained, she merely suspended it. She could go back to her husband and be maintained. Her promise to maintain herself therefore, constituted sufficient consideration for the husband's promise to make the payments. On this ground Lord Hodson agreed with Lord Denning. Lord Morris found consideration in that:

> "…apart from any question of an offer by the wife to return, while she was still in desertion , there might have been trouble, expense or embarrassment if the wife had incurred debts.

So the promise by the wife to maintain herself and not to pledge her husband's credit constituted sufficient consideration.

Again, as in Ward v.Byham the judges were ready to find consideration even where there was none so long as it was humanly possible. A wife who is in desertion has no right to maintenance and if she pledges her husband's credit that amounts to obtaining credit by false pretences. It is doubtful that a promise to do what one is legally bound to constitutes sufficient consideration. (See Horrocks v.Forray (1976)1All ER.737.

(B) Performance of a contractual duty

(i). Pre-existing contract with the promisor

Where the promise is under a contractual obligation to perform his part such performance does not constitute consideration for a new promise by the promisor. For example a taxi driver agrees to take a passenger to an agreed destination for an agreed amount of money. On the way the driver sees his girl friend and decides not to proceed with the trip. The passenger promises an extra amount of money whereupon the driver takes him to the agreed destination. Should the passenger pay extra amount of money he promised? The taxi driver in this case, performed what he was contractually bound to do. It appears, therefore, that for the passenger's promise of extra money the taxi driver did not provide consideration.

To illustrate the legal position there is the case of Stilk v.Myrick (1809) 170 E.R. 94. In the course of voyage from London to the Baltic and back two seamen deserted, and the captain, being unable to supply their place, promised the rest of the crew that, if they would work the vessel home, the wages of the two deserters

should be divided amongst them. The promise was held not binding for want of consideration. The Court said at page 319:

> "The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port."

The rationale behind this decision appears to be based on public policy in. that enforcement of such promises would lead to extortion. But where there is change of circumstances the decision may be different. In Turner y. Owen (1862)3 F & F 176) a seaman had signed articles of agreement to help navigate a vessel home from the Falkland Isles. The vessel proved to be unseaworthy. A promise of extra reward to induce him to go on with his agreement was held to be binding. Or, where sailors refused to complete a. voyage because of war risks not originally contemplated a promise of extra reward to induce them remain on duty was held to be binding (Lisbon v. Owners of S.S.Carpathian [1952]2 K.B. 42, See also Williams v. Roffey Bros & Nicholls (Contractors) Ltd. [1990]1 All E.R. 515).

Where the promisee has done, does or promises to do more than •he is contractually bound to do that would constitute sufficient consideration for the promisor's promise.

(ii). Performance of an existing contractual duty with a third party.

The question is whether performance of or a promise to perform an existing contract with a third party constitutes consideration. Divergent where an uncle promised to pay his nephew 150 Sterling pound yearly during his life-time or until

the nephew got a substantial income from his profession, if he married Miss “N” to whom he was engaged, the court differed as to existence of consideration for the uncle’s promise. Two of the three judges thought that there was consideration because the marriage of the nephew to Miss N was a plaintiff, nephew, had done no more than he was legally bound to do. His marriage to Miss N was benefit to the uncle since it was an object of interest to a near relative. The two judges also thought the marriage was a detriment to the nephew as it might have made a substantial change in his way of living. The other judge, Byles, J., dissenting, held that the plaintiff, nephew, had done more than he was legally bound to do. His marriage to Miss. “N”, was therefore, no consideration for the uncles’ promise.

And in Scotson v.Pegg (1861) 158 E.R.121:

> **“S”** promised to deliver to a third party X, or to his order, a cargo of coal then on board a ship belonging to himself. X made an order in favour of “P”. “P” made an agreement with “S” that if “S” would deliver the coal to him, he would in return unload and discharge the coal at a fixed rate each day from the date when the ship was ready to discharge. This he failed to do, and when sued by “S”, pleaded that “S” was already under contract with “X” to deliver the coal so that he had promised no more than he was bound to perform in any case. There was therefore, no consideration for his promise to unload in the manner specified.

The Court held Pegg liable. Martin, B. found consideration in the possibility of there being some dispute as to the defendant’s right to have the coals or that the plaintiffs might have' a right to detain the goods for demurrage. In either case he said, there would be good consideration "that the plaintiffs, who were in possession

of the coals, would allow the defendant to take them out of the ship. Wilde, B., said:

> "…If a person chooses to promise to pay some money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a premise should not be binding…".

Both the above cases seem to establish that the performance of an existing contractual duty to a third party is a good consideration (See Pao On v. Lau Yiu Long (1979) 3 W.L.R. 435).

(e) **Rescission, Variation and Waiver**

(i) Rescission

Parties to a contract are free to rescind, waive or vary the terms of the contract.

Rescission is aimed at releasing the parties from the contract. The law requires the parties to agree on the rescission. The rescinding agreement based on reciprocal promises generates its own consideration. Where the rescinding agreement does not generate its own consideration then it must be not only accord (i.e. agreement to rescind) but also satisfaction (i.e deserving party to get what is due to him). For example where B agrees to release S who has liability in damages for non-delivery if he pays a specified amount of money, the agreement to release amounts to an accord and the payment of the amount a satisfaction.

(ii) Variation:

Variation involves a definite alteration as a matter of contract, of contractual obligations by the mutual agreement of both parties. In most cases consideration

for the variation can be traced in the mutual undertaking by both parties to perform the contract as varied (See Anson: Law of, Contract, p. 447) Variation may take the form of rescission of the old contract. There may also be a simple variation, for example, agreement to vary the currency of payment.

(iii) Waiver

Where for the convenience and at the request of one party, the other forbears to insist on the precise mode of performance or time of performance fixed by the contract, this does not constitute variation because the contract itself remains unaffected; there is merely a waiver by the party who accedes to the request (See Anson: pp. 447-448). In W.J. Alan 'Co. Ltd. v. El Nasr Export and Import Co ([1972]2 All E.R. 127). Lord Denning, M.R. explained the principle of waiver thus:

> "…If one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights where it would be inequitable for him to do so…There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice I that

behalf, or otherwise making it plain by his conduct that he will thereafter insist on them."

His lordship went on to point out that there are cases where withdrawal is not •possible either because it is too late to withdraw or that withdrawal cannot be done without injustice to• the other party. In both these cases a person will not be allowed to revert to his strict legal rights.

(iv). Rescission, variation and waiver under the Law of Contract Act

The Ordinance by its section 62 provides that where parties to a contract agree to substitute a new contract need not be performed. And section 63 provides that every •promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of, it any satisfaction which he thinks fit. A party who rescinds a contract has to restore any benefits received there under from the other party (S. 64 L.C.A.). And, where a party has waived his rights the Court will not allow him to enforce the waived original terms of the contract. In Nanji Trading Co. Ltd. v. Survakant & Bros ([1967] H.CD. No. 427) the appellant required large amounts of petrol every month. The respondent agreed that the appellant should have a discount of 20% on every gallon he purchased from the plaintiff provided each month's account was settled by the l0th day of the succeeding month. After slightly less than a year, the respondent ended the agreement and sought to recover the discount for each month in .which the defendant had failed to pay by the l0th of the next month. Saidi-, J. (as he then was) held that the respondent by accepting payment as made (i.e. with 20% subtracted from the usual retail 'price of petrol)• after the l0th of several months, had thereby waived the original terms of payment.

The Appellant• was held entitled to his discount despite the late payment in earlier months.

On the other hand a person who rightly rescinds a contract is entitled to compensation for any damage which he may have sustained through the non-fulfilment of the contract (See s. 75 L. C. O. Joseph Marco 'v. Pascal RweyemamU[1977] L.R.T. 59).

14.3 Exercise:

(a) Supposed Matsushita Electric Co. (T) Ltd. advertised as follows:

> Yours for Shs. 2,500/= only - Dudu Proof National Radio set 1 Band. Offer open to anyone who has bought 10 dry-cells of National. make. To prove one qualifies he has to submit to Matsushita specially designed wrappers of the dry cells. Ten wrappers of dry cells plus Shs. 2,500/= can buy a Dudu Proof radio set. Could the "-Trappers without the consideration?

14.4 Further readings:

(a) Your casebook

(b) Treitel: Law of Contract

(c) A. Singh: Law of Contract

LECTURE 15: PART PAYMENT OF A DEBT AND THE DOCTRINE OF PROMISORY ESTOPPEL

Objectives (a) To explain an intricate aspect of consideration relating to part payment of a debt which gives rise to a general rule.

Study strategy: Read the lecture with utmost care and concentration. Read it through again and again until you get some light. If you cannot start by reading the cases.

Introduction: This lecture is again a follow up to lectures on consideration. It deals with one aspect of consideration. And this is whether part payment of a debt can amount to sufficient consideration. The lecture also covers exceptions to the general rule that part payment of a debt cannot constitute consideration for full settlement of it.

15.1 The'rule in Pinnel's case.

The general rule at Common Law is that a creditor is not bound by an undertaking to accept part-payment in tull settlement of a debt. This rule, enunciated in earlier years, was adopted in 1602 in Pinnel's case ((1602)5 Co. Rep. 117a). Pinnel sued Cole in debt for £8 105 due on a bond on 11 November, 1600. Cole's defence was that, at Pinnel's request, he had paid him £ 5 25 6d on 1 October and that Pinnel had accepted this payment in full satisfaction of the whole. 'The Court held that payment of a lesser sum on the day in satisfaction of a greater was no satisfaction of the whole because by no means can a lesser sum be a satisfaction for a greater sum. The debtor would not be allowed to enforce the creditor's undertaking to accept part-payment in full settlement of debt because he furnished no consideration for the creditor's promise.

In 1884, in Foakes v. Beer (1884) 9 App. Cas. 605). the House of Lords considered whether or not to reject the rule in Pinnel'scase. They decided to uphold it as it "has been accepted as part of the law of England for further agreed that Mrs

Beer was not to "take any proceedings whatever on the judgment". The agreement did not mention payment of interest customarily paid on a judgment debt. After Dr. Foakes had paid the debt Mrs. Beer claimed interest on the judgment debt which Dr Foakes refused to pay. When sued he pleaded the agreement whereupon Mrs. Beer replied that for her promise not to sue on the judgment he furnished no consideration. The House of Lords, upholding the rule in pinnel's case decided in favour of Mrs. Beer on the ground that payment of a lesser sum on the day in satisfaction of a greater sum cannot be any satisfaction for the whole.

15.2 Exceptions to the rule

(i) Doing something different

The general rule in Pinnel's case admitted exceptions from the date of its adoption. In Pinnel's case the Court pointed out that the gift of a horse, hawk or robe, etc. in satisfaction is good because the thing given might be more beneficial to the plaintiff than the money in respect of some circumstance. It followed that payment and acceptance of part of the money before the day of satisfaction would be good consideration for the promise to discharge the debt. On this ground Pinnel should have failed in the suit. He won on, however on a technical ground of pleading. Payment of a lesser sum at a different place amounts to doing something different and may satisfy the whole debt. Giving of a negotiable instrument does not amount to doing something different.

In D. & C. Builders Ltd. v. Rees ([1966) 2 Q.B. 617) Lord Denning remarked:

> "…No sensible distinction can be taken between payment of a lesser sum by cash and payment of it 'by cheque. The cheque, when given, is conditional

payment. When honoured, it is actual payment. It is then just the same as cash. If a creditor is not bound when he receives a payment by cash, he should not be bound when he receives payment by cheque.

Lord Denning's• .remarks were directed at two previous cases which had decided that payment by a negotiable instrument amounted to doing something different. One of the decisions was by the Court of Appeal in Sibree v. Tripp (1846) 15 M & W 23) and the other by a divisional court in Goddard v. O'Brien (1882) 9 Q.B.D. 37). The Court of Appeal in De & Co Builders Ltd case overuled the decision in Goddard's case and distinguished the Court of Appeal decision in Sibree v. Tripp on the ground that in that case the promissory notes were taken in absolute discharge of the debt.

(ii) Application of the doctrine of promissory estoppels

Promissory estoppel as an exception to the Rule in Pinnel's case was suggested by Denning, J. in 1947 in Central London Property Trust Ltd. V. High Trees House Ltd ([1947J K.B. 130). He said:

> "a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration, and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in Foakes v. Beer."

In September 1939 the plaintiffs leased a block of flats to the defendants so that they could let them. The rent agreed upon was £ 2500 a year. In January 1940, due to war conditions there were many vacancies in the flats. !he plaintiffs agreed in writing to reduce rent, by half, to £ 1250 per annum. The agreement did not set the

time limit for the operation of the reduction. From 1940 until 1945 the defendants paid the reduced rent. In 1945 the flats were full again. The receiver of the "plaintiffs then decided to claim full rent both retrospectively and for the future. They tested the claim by suing for rent at the original rate for the last two quarters of 1945 when the flats were full.

Denning, J. was of the view that the January, 1940 19reement was intended as a temporary expedient only and that it had ceased to operate early in 1945 when the flats were full. He decided, therefore, that the rent originally fixed was payable and gave judgment for the plaintiffs in the sum of E 625 being arrears of rent for 'the last two quarters of 1945. The learned judge was .also of the view that had the plaintiffs sued for arrears of rent from 1940 to 1945 the agreement made in January 1940 would have operated to defeat their claim. His reasoning needs some consideration.

For the plaintiff's defendants furnished no promise to reduce rent consideration. Since the defendants had furnished no consideration for the plaintiff's promise the (defendants) could not enforce it. But the defendants did not seek to enforce a contract and therefore; they did not need to prove consideration. The judge then considered whether there ~s a rule in common law which could prevent the plaintiffs from enforcing their claim of arrears of rent from 1940-1945. He first examined the doctrine of estoppel:

> “If a person makes to another a clear and unambiguous representation of fact intending that other to act on it, if the representation turns out to be untrue, and if that other does act upon it to his prejudice, the presenter is prevented or "estopped" from denying its truth. He cannot, as it were, give himself the lie and leave the other party to take the consequences".

The judge could not invoke this doctrine given the facts of the High Trees case because in 1854 in Jorden v. Monev (1854)5 H.L. cas. 185) the majority of the House of Lords held that estoppel could operate only on misrepresentation of an existing fact. In the High Trees case the promise was as to the future.

Having failed to find a rule at Common Law• he looked for authority from equity. He considered Hughes v Metropolitan Railway Co. (1877) App. Cas. 439) whose acts were as follows: In October 1874 a landlord gave a tenant a six months' notice to repair the premises, and II he failed the lease was to be forfeited. In November 1874 the landlord and the tenant started negotiations in which the •landlord was "to sell the reversion "to the tenant. In December, 1874 the negotiations broke. The tenant had done nothing to repair the premises. On expiry of the six months, from October,1874, the landlord claimed to treat the lease as forfeited. The House of Lords observed that the opening of negotiations amounted to a promise by the landlord that so .long as they (the negotiations) continued he would not enforce the notice, and, that the tenant had remained quiescent on reliance upon this promise. The House of Lords decided that the six months' notice was to run from the date the negotiations broke. The House of Lords suspended, but, did not extinguish, the landlord's right to enforce his notice to repair the premises.

On the strength of Hughes cases the decision in the High Trees case would be that the landlord suspended payments from 1940 to 1945; that the tenant I•S obligation to pay the balance was not extinguished, but that the landlord was to give the tenant more time within which to pay the arrears of rent. But Denning, J. said he would be prepared to hold that the landlord's balance of the rent was extinguished. By doing that the judge sought to take the principle in Hughes case a step further. The• principle suggested by Denning J. came to be known as representation is

made, whether the matter of fact or of• law, present or future, which is intended. to, be binding, intended to induce a person_ to act on it and he does act on it.

The judge was prepared to hold in the High Trees case that the promise by the landlords to accept a smaller rent in discharge of the larger rent was binding notwithstanding absence of consideration because that promise was intended to be acted upon and was in fact acted upon by the tenants.

The principle of promissory estoppel operates only by way of defense and this was made clear in Combe v.Combe (1951) 2 K.B. 215). A wife started divorce proceedings and obtained a decree nisi against her husband. The husband then promised her 100 Sterling pounds per annum tax free as permanent maintenance. As a result, although not requested by the husband the wife did not apply to the divorce court for maintenance. Then the decree was made absolute. The husband did not make the annual payments and the wife sued him on the promise. The trial judge decided in favour of the wife on the ground that although for the husband's promise the wife furnished no consideration, the principle in the High Trees case enabled the wife to succeed because the husband made an unequivocal promise to pay the annuity intending the wife to act on it and the wife did in fact act on it. The decision of the trial judge meant that the principle in the High Trees case could be used as a cause of action and not as a defence. The principle thus extended would ignore the necessity of, consideration. When this case reached the Court of Appeal Lord Denning used the opportunity to restate the principle. He said:

> "…The principle in the High Trees case does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties.

Brikett and Asquith, L.JJ, stated that the principle must be "used as a shield and not as a sword". The above position seems to suggest that only defendants may be availed of the principle. A contrary view has also been suggested to the effect that there is no reason why a plaintiff should not rely on the principle provided he has an independent cause of action.

"So, if upon the facts of Hughes v. Metropolitan Railways Co. the landlord had gone into possession, putting the tenant into the position of the plaintiff, the result would surely be the same" (See Furmston: Cheshire & Fifoot, p. 87).

The doctrine of promissory estoppel has some of its aspects settled and others are not yet settled. It is settled that there must be a promise, either by words or by conduct and that its effect must be clear and unambiguous (Woodhouse v. Nigeria Produce [1972] A.C. 741).

Some aspects of the doctrine are not yet settled. Firstly, it is not settled whether or not the doctrine has the effect of merely suspending or completely extinguishing an obligation.

In the High Trees case Denning, J. thought the doctrine would operate to extinguish the landlord's right to the balance of the rent. In Tool Metal Mfg. Co. Ltd. v. Tungsten Electric Cornpany Ltd. ([1955] 2 All E.R. 657) the House of Lords held that estoppel only serves to suspend and not wholly to extinguish the existing obligation. The promisor may, on giving due notice, resume the right which he suspended and reverted to the original terms of the contract. The Privy Council shared the views of the House of Lords in Emmanuel Ayodeji Ajayi v. R.T. Briscoe (Nigeria) Ltd (1964) 3 All ER 553. Lord Hodson stated that the doctrine of promissory estoppel was subject to qualifications one of which is that the promisor can resile from his promise on giving reasonable notice, which need

not be formal notice, giving the promisee a reasonable opportunity of resuming his position. The promise becomes final and irrevocable only if the pronouncements by the House of Lords, in 1966 Denning, L.J. repeated his view that promissory estoppel can operate to extinguish a debt after part payment (in D & C. Builders, Ltd. v. Rees (1966]2 Q.B. 617).

Secondly it is• not settled whether or not the promisee must have acted to his detriment. In the Common Law doctrine of estoppel the representee must have acted on the representation to his deteriment. In promissory estoppels two views have been expressed on this aspect. estoppel two views have been expressed on this aspect. In some cases it has- been pointed out that the representee must have acted on the representation to his detriment. See Hughes v. Metropolitan Rlys Co. (1877) 2 App. Cases 439; Marrow v. Carty [1957] N.I. 174; Emmanuel Ayodeji Ajayi v. R.T. Briscoe (Nigeria) Ltd. (1964) 3 All E.R.556. In two cases Lord Denning maintained that there need be proved no' detriment on the part of the promisee; what• is required is that the promisee must prove he has' been led to act differently from what he otherwise would have done. (W.J: Allan & Co. Ltd. v. ElNasr Export & Import Co. [1972]2 W.B. 189 and Bricom Investments Ltd. v. Carr [1979]1 Q.B. 467.

15.3. The Doctrine of Promissory' Estoppel in East Africa

The doctrine of promisory estoppel was imported into East Africa in 1963 by virtue of the case of Nurdin Bandali v. Lombank Tanganyika. Ltd. ([1963] E.A. 304).In importing the doctrine the Court of Appeal for Eastern Africa' had to interpret section 115 of the Indian Evidence Act. (Than applied Act. The relevant sections now are s.123 Evidence Act (T); s.120 Kenya Evidence Act and s. 113

Uganda Evidence Act). The Court did not consider the provisions of the contract legislation.

Nurdin Bandali (of Njombe) entered into a hire purchase agreement with Lombank Tanganyika Ltd (of Dar es Salaam) to purchase a Mercedes Benz truck. He paid a down-payment of Shs. 14,300/= and was to pay the balance of Shs. 46,008/= in 17 equal installments plus the last installment which included Shs. 20/= payable on exercise following terms, among others: Clause 4-prcvided that if Nurdin Bandali made any default in the due or punctual payment of any installment, Lombank was entitled to terminate the hiring and repossess the vehicle without notice. By clause 7 the Vehicle was to remain the property of Lombank until all sums due were paid and an option to buy was exercised. Clause 9 was to the effect fuat no forbearance, indulgence or relaxation shown or granted to Nurdin Bandali was• in any way to affect, diminish, restrict or prejudice the rights and powers of Lombank or constitute a waver of any breach of the agreement. Nurdin took posssesion,and had use of the truck. Out of 16 installments Nurdin was.late and paid in arrears 14 installments. In all the 14 installments Lombank used to send Nurdin reminders, notice to terminate and repossession of the vehicle. The 17th installment fell due on 17/10/1961. Nurdin was reminded as usual. The last installment (i.e. 18th) fell due on 17/11/1961. On 18/11/1961 Lombank sent a letter of termination to Nurdin stating the amount due as Shs. 5,132/= (i.e. two installments plus Shs. 20/= option to purchase. On 29/11/1961 Lombank saw the truck in Dares Salaam, seized it and instructed the driver to tell Nurdin to pay the amount. On being informed Nurdin, by telegram, instructed his agent in Dar es Salaam to send Lombank a cheque for shs. 2,500/= and to tell him that he himself had posted a cheque for shs. 2,500/= on 30th November, 1961. The agent wrote a note on the telegram and sent it to Lombank saying, “Lombank can I send you a cheque for shs. 2,500/=. Lombank

replied, yes please do". When, on the same day the agent sent the cheque Lombank refused it and the agent was informed that Lombank had already sold the vehicle. When Nurdin was informed about the sale he filed a suit alleging fraud, waiver and estoppels. He lost in the lower court and appealed. One of the grounds of appeal was that Lombank by its conducted stopped itself from asserting its right to reposses because Lombank by its conduct made a representation, that time was not of the essence of the contract by accepting payments in arrears.

The Court of Appeal for Eastern Africa having ruled out the application of the English doctrine of estoppels because Lombanks representation was not as to matter of fact but one of legal relationship, considered whether or not the doctrine of equitable or promissory estoppel could be invoked to prevent Lombank from enforcing his strict legal rights. The doctrine, the Court noted, has three elements which must be present. First, a clear and unequivocal representation; secondly, an intention that it should be acted upon; and thirdly, action upon it in the belief of its truth. Having failed to find authority of the application of the doctrine in Tanganyika the court sought assistance from section 115 of the Indian Evidence Act which provided:

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit, or proceeding between himself and such person or his representative to deny the truth of that thing.

Because the word representation did not appear in the provision. The Court interpreted the, word "thing" as capable of embracing either an existing fact or a present or .future relationship. This broad interpretation of the word "thing•"

engulfed a representation as to a legal relationship. Reading through section 115 the Court felt the English doctrine of equitable estoppel could fall within its ambit of strict legal rights. The doctrine, the Court noted, has three elements which must be present. First, a clear and The Court then considered! given the facts of the case, whether the doctrine of promissory estoppel could be invoked to prevent Lombank from denying .the truth of .his representation that he would not enforce his strict• legal rights - demand punctual payment and repossession of the truck on default).t (See Clause 4). On as to whether Lombank's representation was clear and unequivocal and intended to be acted upon by Nurdin the Court held that in the light of clause 9 and Nurdin's previous experience (when serving as Lombank's agent to repossess vehicles from those who delayed payments) the representation was clear and unequivocal, but that there was nothing which could have induced Nurdin to believe that LomoanK would not enforce his rights. The doctrine could not be invoked in favour of Nurdin Bandalibecause the Court found that• there was no intention. on the part or Lombank that Nurdin should rely and act on it.

Nurdin's case was applied in Century Automobiles v. Huchings Biemer Ltd.([1965)E.A. 304). In that case an agreement had been made between the parties to lease premises, the lease being terminable with three months' notice. No alterations were to .be made without toe prior permission of the respondent landlord. Alterations were proposed and shown to the managing director of the respondent company who said that he had no objection to the proposed alteration$ provided that it was done at the appellant’s expenses, that the tenancy would not be disturbed unless plans for building a supermarket on the site were successful, and that it would take three or four years to obtain permission from the city council. Relying on this, the alterations were made, to be followed shortly by a notice to quit and deliver vacant possession, which the appellant refused to do. Invoking the

doctrine of equitable estoppels the Court held that the remarks made by the managing director of the respondent company amounted to a sufficiently clear and unequivocal assurance as between business that the appellant company could regard itself as secure for three years except in the event of the supermarket project materializing at an earlier date; and the assurance was intended to be acted upon. The appellant company acted on the faith of it.

It appears that in Tanzania the legal problems relating to part-payment of a debt and the doctrine of promissory estoppels are taken care of by section 63 of the Law of Contract *Act* which provides:

> "Every promise may dispense with or remit, wholly or in part the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

A similar provision in the Indian Contract Act has illustration to the effect:

(a) A owes B Shs .. 5,000/=. A pays to Band B accepts, in satisfaction of the whole debt, Shs. 2,000/= paid at the time and place at which the Shs. 5,000/= were payable.' The whole debt is discharged.

(b) A owes B Shs. 5,000/=. C pays to B Shs. 1,000/= and B accepts them, in satisfaction of his claim on A. This payment is discharge of the whole claim.

(c) A owes B under a contract, a sum of money, ,the amount of which has 'not been ascertained. A, without ascertaining the amount gives to Band B, in satisfaction thereof, accepts the sum of Shs. 2,000/=. This is a discharge of the whole debt whatever may be its amount.

(d) A owes B Shs. 2,000/=, and is also indebted to other creditors. A makes an arrangement with his creditors, including B,to pay them a composition of 50

cents in a shilling upon their respective demands. Payment to B of Shs. 1,000/= is a discharge of B's demand.

15.4. Exercises:

(a) What is "promissory estoppel"? What bearing does it have on the doctrine of consideration? Is it necessary to invoke such an estoppel in view of section 63 of the Contract Act?

15. 5. Further Readings

(a) Your case book

(b) Treitel: Law of Contract

(c) A. Singh: Law of Contract

LECTURE NO. 16: UNENFORCEABLE, VOIDABLE, VOID AND ILLEGAL CONTRACTS (EXPLAINED)

Objectives: (1) To define terms often used to connote certain types. of contract but whose meaning may be confusing;

(2) To briefly state the legal effect of each of the contracts so defined,

Study strategy:You need to be careful when reading this lecture so that! you do not end up by confusing use of the terms.

Introduction: This lecture is confined to defining often used terms in contract: unenforceable, voidable, void and illegal contracts. The effects of each of these types of contract will be mentioned briefly.

As for illegal contracts the next chapter will cover them in detail. Note that the intention of the parties to a contract is to perform it according to the terms as agreed. Most contracts end up in their due performance. Most contracts end up in their due performance. Some contracts however, give rise to problems and the assistance of courts of law may be sought. In examining the contract the court may find that for reasons or another, it is either valid but unenforceable or voidable or void or illegal.

16.1. UNENFORCEABLE CONTRACTS

There are some contracts whose enforceability is conditional upon fulfillment of certain requirements. Failure to comply with a requirement may render the contract, which is otherwise valid, unenforceable; that is to say the court will not call upon a party or the parties to fulfill his or their obligations under the contract. For example section 6 of the Sale of Good Act Cap. 214 (T) Provides:

6(1) A contract for sale of any goods of the value of two hundreds shillings or upward shall not be enforceable by action unless so sold and actually received the same, or give something the party to be charged or by his agent in that behalf.

You need to note, therefore, that enforceability by action of a contract of sale of goods of the value of Shs. 290/= or above is conditional upon either

(i) acceptance and actual receipt by the buyer of part of the goods so sold; or

(ii) giving something in earnest to bind the contractor in part-parent; or

(iii) In the contract be evidenced in writing.

The effect of unenforceability by action of a contract may be to render it void. Section 2 (1) (g) and (j) of the L.C.A. provides that an agreement not enforceable by law is void. Section 2 (2) is however, is a saving provision in that it provides that not all unenforceable contracts are void. The sub-section provides:

2.-(1) Notwithstanding the provisions of paragraphs (g) and (j) of sub-section (1) of this section, where any written law in force in Tanganyika on the date on which this Ordinance comes into operation provides that an agreement (howsoever described), of the kind specified therein, shall not be enforceable by action unless or until certain requirements therein specified are complied with, or certain consents are obtained, no such agreement shall be void by reason only that it is not enforceable by action under the provisions of that law for want of compliance with any such requirement or of the obtaining of any such consent.

The effect of s. 2 (2) is to render certain contracts whose requirements have not been fulfilled simply unenforceable and not void. This means:

(i) as between the parties to the contract it remains valid, only that they cannot seek assistance of the court unless and until the requirement has been met;

(ii) the party or parties after meeting the requirement may seek the assistance of the court, e.g. I after obtaining, the requisite consent;

(iii) the court may be willing to assist the parties even if it means stretching the law. (See Kanti Printing• Works v.Tanga Municipal Council [1970] HCD 253).

16.2 ILLEGAL CONTRACTS

To 'qualify as contracts agreements must be made for a lawful consideration and with a lawful object, (s.l0 L.C.O.). Where the object or consideration of a contract is unlawful or is contrary to public policy it will be declared illegal. The effect of illegality is to render the contract void. Section 23 (2), L.C.O. provides that every agreement of which the object or consideration is unlawful is void. As rule a general rule a contract which becomes void for illegality becomes unenforceable by action.

16.3. VOIDABLE CONTRACTS

A voidable contract is an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others (s.2 (1) (i) L.C.A).

A voidable contract is, therefore, a contract with full legal force unless and until one of the parties, who is entitled to bring it to an end does bring it to an end. The party entitled to rescind the contract has an option either to rescind the contract has an option either to rescind or affirm the contract. The right to rescind, however, has got limitations: a party must exercise his right within a reasonable time otherwise estoppel may apply; where the entitled party has taken a benefit under the contract and cannot return it then he may not avoid the contract; and, where third parties have acquired under it, the right to rescind ends.

The Law of Contract Act touches on instances where a contract may be treated as voidable. For example where consent of a party was not given freely the contract

becomes voidable at the option of the party whose consent was not freely given (see ss.15-19 L.C.A).

16.4. VOID CONTRACTS

An agreement not enforceable by law is said to be void (s. 2(1) (g) L.C.A. The term void contract is, therefore, an agreement which the court holds to be contract at all, a nullity from the beginning. The Act expressly declares certain types of agreement to be void (e.g. ss.2(1)(g); 2(1)(j); 11(2); 20; 23(2); 24; 25, 26,27,28,28,29,30,32,35,36,56,57.

The effect of declaring a contract as void is to make it unenforceable, being a nullity from the beginning. Since there was no contract at all no property would pass under such a contract. And, if money was paid in pursuance of a void contract it becomes recoverable. The parties are restored to their original positions. Courts will not enforce a void contract but may assist the parties to revert to their original positions. In a case where a contract has been declared void for illegality, as a general rule, no suit may be brought for the recovery of any money paid or thing delivered or for compensation for anything done under any such agreement (s.23 (2) L.A.C. There are exceptions which shall be examined later. In the case of wagering contracts which are declared void under s.30 of the L.C.A no suit may be brought to recover whatever has been won or deposited.

16.5. RATIONALES FOR TREATING CERTTAIN CONTRACTS AS UNENFROCEABLE , ILLEGAL, VOIDABLE OR VOID

(1). to limit enforceability of actions with a view to ensuring fair play in contractual transactions.

(2). To protect two divergent types of interest;

(a) proprietary interests of an owner of property. N can acquire a better title than that of the

(b) proprietary interests of a bonafide purchaser for value without notice of any defect in the sellers title protected.

- As between two innocent parties which is to bear the loss?

16.6. EXERCISES

:(a) What is the difference between a voidable and a void agreement?

(b) What is the legal effect of an unenforceable contract?

16.7 FURTHER READINGS:

(a) Your casebook

(b) A. Singh: Law of Contract (c) Treitel: Law of Contract

(d) Furmston: Cheshired & Fifoot's Law of Contract

LECTURE 17: ILLEGAL CONTRACTS AND THEIR CONSEQUENCES

Objectives: (1) To discuss what factors make contracts illegal.

(2). To explain the consequences of illegal contracts.

Study strategy: Red the lecture and cases in it. Then supplement what you have read with further readings on illegal contracts.

Introduction: This lecture is supposed to be a follow up to the previous lecture in as far as it touches on illegal contracts. It explains what contracts will be declared illegal and for what reasons. You will You will also learn the consequences of illegality in a contract.

17.1 ILLEGAL CONTRACTS

Parties to a contract are free to agree on whatever terms they please subject to certain limitations. One of such limitations is that consideration for the promise must be lawful and the object of the contractual arrangement must also be lawful.

In some cases both the consideration for and the object of the contract are unlawful. For example, where A employs B to kill Y for a consideration of Shs. 20,006/=. The object of the agreement is to kill Y and B's consideration for the Shs. pay the Tshs. 20,000/= then B cannot enforce the agreement because both the object and the consideration, that is the killing, are unlawful.

There are instances where the object may be lawful but the consideration unlawful and vice versa. For example where S sells to B three bags of sugar at a lawful-price so that B may sell the sugar in contravention of the Regulation of Prices Act (No. 19 of 1973) by hiking the prices, consideration for the contract is lawful but the object is not lawful.

Some contracts may be said to be contrary to public policy. Treitel writes;

> "Contracts are said to be contrary to public policy when they have a tendency to bring about a state of affairs which the law regards as harmful". (See Treitel: An Outline of the Law of Contracts 1984, p. 151).

What the law regarded as harmful some fifty years ago may be so regarded today, and what may be said to be against public policy today may be an acceptable way of doing things in future .The doctrine of public policy, therefore admits much flexibility and as a result it is a source of uncertainty. Some judges, therefore, take a restrictive view of the doctrine. Their attitude was summed up long a go in the statement that public policy is a very unruly horse, and when once you get astride it you never know where it will carry you.

A contract will be declared illegal if lawfully concluded in one country but intended to be executed in another country contrary to the laws of that country. In Regazzoni v. K,C. Sethia ([195612Q.B. 49G) Denning, L.J. said that if two people knowingly agree together to breach the laws of a friendly country or to procure someone else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement (at pp. 514-515). In Foster v. Driscoil ([1928] All ER Rep. 130) the parries entered into a sale agreement whereby whisky was to be bought in Britain and smuggled into the United States of America against the law of that country The Court of Appeal held the agreement illegal because it involved commission of an offence in a foreign and friendly country and so a breach of international comity

(c) Where the agreement may cause injury to the person or property of another [s.23(1)(d)L.C.A.

]Agreements to commit crimes or torts against other persons are illegal because they may cause injury to the person or damage to his property. Such agreements are conspiratorial, e.g., an agreement to kill or injure another person, steal, defame, maliciously prosecute or unlawfully imprison another person.

(d). Where the agreement is for a fraudulent purpose

(s. 23 (1) (c) L.C.A

Parties may conclude a contract with the intention of defeating lawful claims of a third person. Such a contract is illegal. For example where a debtor enters into an agreement with one of his several creditors in order to defeat. There are certain things, however of •which are universally regarded as immoral. For example dealings with prostitutes are regarded as immoral. An agreement to pay a prostitute for these cannot be enforced by action on the ground of immorality. Agreements to sell or hire articles to prostitutes to enable them carryon with their profession are immoral; neither the price of the article nor rent for the

II Contracts which are contrary to public Policy (s. 23 (1) (e)

(a) Immoral contracts

(b) Contracts which are contrary to public policy

(i) Interference with marital relations

An agreement to marry after a married woman procures a divorce against her husband is immoral. In like manner an agreement to marry after the husband f s death is immoral. An agreement between husband and wife providing for terms of a possible future separation is invalid; and the same is true where such an agreement is made before marriage (See Treitel: Outline. 154).

(ii) Contracts which pervert the course of justice

The state enforces criminal law. Where a person has committed a crime against another and they compromise by a private agreement between them so that the criminal may not be prosecuted, the agreement is against public policy because it is contrary to public interest.

There are many other types of contract which are contrary to public policy such as (iii) contracts to deceive public authorities (they also amount to criminal conspiracies), (iv) trading with an enemy, (v) undue restrictions of personal liberty, (vi) contracts in restraint of trade (See Giella v. Gassman Brown & Co. Ltd.[19 ...] EA 358 (U).

17.2 CONSEQUENCES OF ILLEGAL CONTRACTS

The most common effect of illegality is to prevent the enforcement of the contract, either wholly or in part. It may also prevent a party who has transferred money or property under the contract from getting it back; it may invalidate collateral transactions. The law relating to enforcement of illegal contracts is however, in a complex and not very satisfactory state (Treitle; Outline, p.168.)

Under the law of contract Act, consequences of illegal contracts are provided for under section 23 (2) which states:

> 23 (2)….Every agreement of which the object or consideration is unlawful is void, and no suit shall be brought for the recovery of any money paid or thing delivered, or for compensation for anything done, under any such agreement, unless-

(a). the court is satisfied that the plaintiff was ignorant of the illegality of the consideration or object of the agreement at the time he paid the money or delivered the thing sought to be recovered or did the thing in respect of which compensation is sought, and that the illegal consideration or object had not been effected at the time when the plaintiff became aware of the agreement; or

(b). the court is satisfied that the consent of the plaintiff to the agreement was induced by fraud, misrepresentation, coercion or undue influence., or

(c) the agreement is declared to be illegal by any written law with the object of protecting a particular class of persons of which the plaintiff is one.

And, section 24 provides:

24. If any part of a single consideration for one or more objects, or anyone or any part of anyone of several considerations for a single Object is unlawful, the agreement is void.

These provisions are, in substance, common law principles developed through case law. In examining the principles three factors will be taken into account:

- The state of mind of the parties;
- Illegality of a contract when formed;
- Illegal performance of contract lawfully concluded.
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(1). The State of mind of the parties.

In determining consequences of illegality the state of mind of the parties is relevant:

(i) where a contract is illegal in its inception to the}"knowledge of both parties or where contract is prohibited by statute or at common law [everyone is presumed to know the law *ignorantia juris haud (neminem) excusat)* no allowance is made for innocence.

(ii) where the contract is, on the face of it [ex facie] lawful but both parti.es intend to exploit if for an illegal purpose it becomes illegal in its inception despite its innocuous appearance. Both parties become remediless. For example letting a house to a woman who intends, to the knowledge of the land lord, to use it for immoral purposes.

(iii) where the contract is lawful in its inception but one of the parties, without the knowledge of the other, intends to exploit it for illegal purposes, innocence of the other party becomes relevant. The innocent party is not to be adversely affected by the guilty intention of the other. The test of innocence is whether or not a party is himself implicated in furtherance of the illegal intention. Evidence has to be led to that effect. In Pearce v.Brooks (1886) LR 1 Ex 213) the plaintiffs agreed to supply the defendant with a new miniature brougham on hire until she paid the purchase money by installments within twelve months. The defendant was a prostitute. She undoubtedly intended to use the carriage as an attraction to hesitant clients. One of the two plaintiffs was aware of the mode of life of the defendant but there was no direct evidence that either of the plaintiffs

know to what use the defendant intended to put the carriage. The court observed that the plantiffs knew that the defendant was a prostitute and applying an objective test held that the woman hired the carriage for the purpose of display, that is, for the purpose of enabling her to pursue her calling, and that the plaintiffs knew about it (Note: Even prostitute has a tight to a home. What is forbidden is the use of the house for immoral purposes).

(2). Illegality of the contract when formed.

Where a contract is illegal in its inception then the Latin maxim *"Ex turpi causa non oritur actio",* which means no action can arise out of an illegal cause, applies. The court will not offer its assistance to either party. The court may know about the illegality from whatever source including the defendant who may plead illegality.

There are consequences running with the rule *Ex turpi causa non oritur action.*

(a) No title can pass:

A contract which is illegal in its inception becomes *void ab initiopressure* . No action can be brought to enforce such a contract. Nor will the court lend its assistance to set aside an illegal contract. In one case the court held that the plaintiff could not rely on illegality of his own conduct as a ground for setting aside an illegal transaction to which he himself was a party unless he proved pressure or undue influence (See Nathalal R. Lakhani v. H.J. Vaitha (1965) E.A. 452 (U). Because the contract is treated as void ab intitio no title can pass under it.

In sales contracts this means title will not pass from the seller to the buyer. Before the case of Belvioir Finance Co. Ltd v. Stapleton (1971) 1 QB. 210 the legal position was this: Since an illegal contract is totally void, the inescapable conclusion would seem to be that the ownership of movables cannot pass by virtue of the contract itself if this arises **"ex turpi causa"** and if both parties to it are **in pari delicto** (i.e. they are equally to blame). Nil Posse creari de nilo (i.e is not possible to create a thing out of nothing). (Se Furmston: Cheshire & Fiffot, p. 332).

In 1971, the Stapleton case threw doubts into the above legal position. In that case the plaintiffs bought three cars from dealers, paid for them and let them on hire-purchase terms to Belgravia Car Company (B.C.Co.) who kept a fleet of cars for letting out on hire to the public. The plaintiffs never took delivery of the three cards in question, which went directly from the dealers to B.C. Co. Both the contract of sale between the dealers and plaintiffs and the hire purchase contracts between the plaintiffs and B.C. Co. were illegal to the knowledge of all the three parties as contravening statutory provisions. B.C.Co. fraudulently and in breach of the hire purchase contracts sold the three cars to bonafide purchasers. One of these sales was effected by the defendant as an assistant manager of B.C.Co. The plaintiffs sued him personally in conversion. The trial court made the following findings:-

(i). That the hire purchase agreements for the cars were illegal having contravened a statutory provision.;

(ii). That the contracts of sale by the dealers to the plaintiffs were tainted with illegality;

(iii)That the contracts of sale were executed and carried out.

On the basis of finding the Court held that since the contracts of sale were executed and the plaintiffs had a right to possession of the cars when the defendant sold them, subject only to hire purchase agreement, the defence of illegality failed. The defendant was held liable for conversion of the car. He appealed. Dismissing the appeal the Court of Appeal held that since the contracts were fully executed the tile to the cars had passed to the plaintiffs. Accordingly, B.C.Co. were bailee of the cars and the defendant as their agent was liable in conversion for their sale. Lord Denning, M. R. observed that the court will look into an illegal contract whenever it is just and proper to do so.

Perhaps the rationale behind the decision in the Stapleton case is the need to protect bonafide

purchasers of goods. If the court decided that no title passed to the plaintiffs then the ultimate

purchasers could not get legal title to the cars (Note: to maintain a case in conversion the

question of ownership is immaterial. What is material is possession or right to possession, of

goods).

(b) <u>Money paid and chattels or land transferred are irrecoverable</u>

The general rule is that what has been given under an illegal contract cannot be recovered if in order to substantiate the claim one has to disclose the illegality. This general rule presupposes that both parties are equally guilty and that the claim

cannot be substantiated except by disclosing the illegality of the transaction (1965J E.A. 452 (U). For example, S has sold goods and delivered them to B under an illegal contract. B has refused to pay the price. S can recover neither the goods nor the price if the basis of his action is the illegal contract. This rule means that gains and losses lie where they have accrued or fallen. The rule was rationalized in Singh v, Ali ([1960] A.C. 167 (P.C.) (from Malaya» by Lord Denning who said:

> ….the transferor having fully achieved his unworthy end, cannot be allowed to turn round and repudiate the means by which he did it, he cannot throw over the transfer. And the transferee, having obtained the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it. The court does not confiscate the property because of the illegality ¬it has no power to do so.

So, the party who is in possession of the goods or the money is in a better position.

In pari delicto potior est conditio possidentis (defendentis).

To the general rule there are exceptions

(i) Property or price becomes recoverable where the plaintiff need !not base his claim on the illegal contract.

Where money or chattel or land transferred under an illegal contract is to be recovered at all then the claim should not be based on the illegal agreement. In Amar Singh v. Kulubya([1964]A.C. 143; see also Harii v. Harji(1971] HCD No. 104) there was a statutory Prohibition of sale or lease of ‘mailo’ land by an African to a non-African without a written consent of the governor. In contravention of the law, kulubya, an African leased his ‘mailo’ land to Amar Singh, an Asian. When the Asian was given notice to quit he refused. Kulubya

sued him to recover the land. He could not base his action on the lease agreement because it was, to his knowledge, illegal. He based his claim on the ground that he was the registered owner of the land and succeeded.

The basis for recovery of property, subject matter of an illegal contract, provided the claim does not disclose illegality was stated by Parcog, L.J.

> :….prima facie a man is entitled to his own property, and it is not a general principle of our law (as suggested) that when one man's goods have got into another's possession in consequence of some unlawful dealing between them, the true owner can never be allowed to recover those goods. The necessity of such a principle to the interests and advancement of public policy is certainly not obvious. (See Bowmakers Ltd, v. Barnet Instruments Ltd. (1943) K.B. 65).

(ii) <u>Monev or chattel or land is recoverable even on the basis of the illegal contract under two circumstances</u>

(A) Where the parties are not in pari delicto

Parties to an illegal contract may differ in the extent of blameworthiness. First, where a party has been victim of fraud, duress or oppression at the bands of blameworthy may recover what he may have transferred to the other (See Nathalal v. Vaitha, above).

(B) Where a party to an executory contract repents before performance:

The law allows locus poenitentiae, i.e., time for repentance. A party to an illegal contract which is still executory may repent before performance. If he repents he

becomes less blameworthy compared with the other party and he may recover what he has transferred under the illegal transaction.

(iii) Severance

In some cases an agreement may be partly lawful and partly unlawful. Where it is possible to sever the lawful part from that which is unlawful, the court will enforce the lawful part of the agreement. Section 27(1) L.C.O., for example, provides that every agreement in restraint of trade will be void to that extent. So where one of the clauses in the agreement restrains a party from exercising a lawful profession, trade or business that clause will be struck off and the remaining part of the agreement will be enforced. (Nordenfelt v. Maxim Nordfelt Guns & Ammunition Co. Ltd (1894) AC. 525).

(C). **A subsequent or collateral contract which is founded on or springs from an illegal transaction becomes illegal and void.**

The subsequent or collateral or collateral contract may be innocuous but in the eye of the law it will be illegal because it is linked with the illegal contract. For example, A has borrowed Shs. 20,000/= from B and has given a promissory note as security. If the loan contract is illegal the collateral contract, i.e the security agreement becomes illegal contract, i.e the security agreement becomes illegal as well (see Fisher v. Bridges (1854)3 E & B 642.

3. Illegal performance of a contract lawfully concluded

Where a contract was lawfully formed but later one of the parties exploits if for an unlawful purpose the following consequences follow. To the guilty party the rule ex turpi causa non oritur action will apply with full force. He will be remediless. To the innocent party his rights will not affect, but only before he becomes aware of the illegal design of the other party. If after he has acquired knowledge of the illegality he continues with the contract he will not be protected.

17.3 Exercises:

(a). Explain the maxim in pari delicto potior est conditio defendentis and state the exception to it, if any.

(b) Can a prostitute conclude a contract to rent a room for her residence?

(c). The Contract Act declares an agreement to be unlawful if the consideration for, or the object of, the agreement is opposed to public policy in the opinion of the court. The Act however, gives no guidance to the court as to when it should regard a consideration or object as opposed to public policy. Some judges have warned that public policy is a "very unruly horse., and when one you get astride it, you never know where it will carry you." Others have cautioned that the courts ought only to expand the doctrine and not expand it by recognizing new heeds of public policy. Yet others have exhorted that with a good man in the saddle, the unruly horse can never be in control. It can jump over obstacles. What is public policy? What is the controversy about its application? Illustrate how the courts have in fact applied the doctrine.

17.4 Further readings:

(a). Your casebook

(b)Treitel: Law of Contract.

(c). A.Singh: Law of Contract