

Moshi Co-operative University

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LAW OF CONTRACTS II IN TANZANIA

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MOSHI CO-OPERATIVE UNIVERSITY

(MoCU)

LAW OF CONTRACT II



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❖ **TOPIC ONE: VITIATING ELEMENTS OF A CONTRACT**

❖ **FACTORS AFFECTING CONTRACTS**

➤ **What are the VITIATING factors?**

A '**vitiating element of contract**' is the technical term for the things which make a contract void or voidable. Vitiating factors in a contract are those factors the existence of any of which will cripple or invalidate the contract.

Vitiating elements of contract such as **mistake, duress, misrepresentation, undue influence, incapacity and illegality**, are determinants of the validity of a contract. They are various factors which can affect the validity of a contract once it has been formed. The implication of which is that the validity of a contract is normally unquestioned when vitiating elements are absent.

In other words, the **vitiating factors** are circumstances which interfere with the enforceability of a contract. They have a negative effect on contracts. They may render a contract **void or avoidable**. A void contract is unenforceable while avoidable contract is enforceable unless avoided¹.

- These factors include:-

1. Incapacity
2. Lack of Free consent
3. Illegality

❖ **LACK OF FREE CONSENT**

- It's an elementary and established rule of law in contract that for a contract to be valid and legally enforceable before the court of law, among other things it must be concluded with a free consent. The aforesaid rule is enshrined in the provision of section 10 of the Law of Contract Act². Therefore this provision seems to suggest that a free consent is an essential element of any valid contract without which the contract is said to be vitiated

¹See Section 2(1) (i) and (g) of Law of Contract Act

²[Cap 345 R.E 2002]

are and more precisely void and as a consequence the parties to contract cannot legally enforce it the court of law³.

❖ Consent and Free Consent defined.

- **Consent**, is concurrency of wills or alternatively, Consent can be defined as an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side⁴. The provision of section 13 of Law of Contract Act⁵, is to the effect that, parties to the contract are said to have consented when they actually agree on the same thing and in the same sense. Also the meaning of consent can be inferred from the provision of section 2 (1) (b) of the said law⁶. To consent to something, generally, means to voluntarily agree to it.
- **Free consent** means that a person was to conclude a contract out of his own will or volition⁷. Free consent has its special meaning in the law of contract. According to the provision of Section 14 of Law of Contract Act, a consent is deemed to be free when is not obtained by either **coercion, undue influence, fraud, misrepresentation, or mistake** as defined under section 15, 16, 17, 18, 20 of the law of Contract Act⁸ respectively.
- Contracts which are made with taints of the above factors are voidable contracts that is the affected party known as the innocent party may avoid it if he so wishes as per section 19 (1) of the Law of Contract Act⁹. However, according to the same section the contract is not voidable if the innocent party had the means to discover the truth by due diligence.
- ***The major elements that constitute lack of Free consent are coercion, Undue influence, Fraud, misrepresentation and mistake as discussed hereunder:-***

❖ MISREPRESENTATION

- **Introduction**

³Monahan, G., (2001). *Essential Contract Law (2ndEd)*. Cavendish Publishing (Australia) Pty Limited: London.

⁴Black's Law Dictionary, Sixth Edition, p. 305

⁵[Cap 345 R.E 2002]

⁶Law of Contract Act [Cap 345 R.E 2002].

⁷Nditi, N.N., (2004). *General Principles of Contract Law in East Africa*. Dar es salaam University Press Ltd: Dar es salaam at p. 109

⁸[Cap 345 R.E 2002].

⁹Ibid

- At the time when the parties to contract are negotiating so much is spoken. Some of these statements which make part of contract will be termed as misrepresentation if they are intended to induce the other to enter into a contract and they are not but false.
- This is a false representation. It is a false statement made by a party to induce another to enter into a contractual relationship. It renders the contract avoidable at the option of the innocent party.
- The Law of Contract Act is a bit more specific on the meaning of misrepresentation. The import of Section 18 of the said law is that misrepresentation may mean any one of the following:-

- **Three limbs of misrepresentation**

- (a) **Positive assertion (statement of fact) of anything that is not true but which the person making it believes it to be true.** These statements are usually unwarranted by the information of the person making it. This is innocent misrepresentation.
- (b) **Breach of duty [falls under fraudulent misrepresentation];** an instance of breach of duty is when there is a breach of duty to speak which may arise in the course of negotiations. According to Section 18 of Law of Contract Act, the breach of duty to be effective must be such that i. it benefits either the person who commits it or anyone under him ii. the benefit is gained by misleading another either to his prejudice, or to the prejudice of any one claiming under him.
- (c) **Causing however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.** This is when you induce a mistake to the other party about the subject matter of the contract. Here the words the thing which is the subject of the agreement refers to the thing for which the parties enter into contract. It is sometimes referred to as subject matter of the contract.

If a party to contract does not disclose one or more facts about the subject matter so much so that the other party thinks the subject matter is what it is not. Here the party must actually have been induced and must have acted on that inducement to his detriment.

- **Can silence amount to misrepresentation?**

- Generally silence cannot amount to misrepresentation. Section 17 (2) of the LCA provides,.....mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that regard being had to them it is the duty of the person keeping silence to speak, unless his silence is, in itself, equivalent to speech.

➤ **When a duty to speak arises silence can be a misrepresentation?**

- This duty may arise in the following circumstances: i. if you later discover that the statement you have made is not true, though when you gave it, it was true. You have the duty to say the truth. ii. When you have made a true statement but later circumstances make it false. iii. When the nature of contract requires utmost good faith eg. Insurance contract. One who takes life insurance must disclose if he has aids. iv. When there is a fiduciary relationship eg. Lawyer-client, this is when one party is in a position of trust with regard to the other. The lawyer, on being asked for legal advice must disclose everything to his client. v. when you have given half truth. Example you are selling a car whose engine you are expecting to break down any time for some problem, the buyer asks if the car is running perfectly you say yes. Here you have given a half truth and under this circumstance you are supposed to tell him that though it is running the engine has problems.

❖ **Fraud and Misrepresentation distinguished**

1. Both in fraud and misrepresentation the statement is false, but in fraud the false statement is made by a person, who knows that it is false or does not believe in its truth, where as in misrepresentation the person making the statement believes the same to be true.
2. In fraud the intention of the person making a false statement is to deceive the other party and induce him to enter into the contract on that basis. There is no such wrongful intention in case of misrepresentation. It has been noted in **Derry v Peek** that when the statement, although false, was made without any intention to deceive it did not amount to fraud.
3. According to section 19, when the consent of a party to the contract has been obtained either by fraud or by misrepresentation, the contract is voidable at the option of the party whose consent has been so obtained. In other words the contractual remedy for both is the

same. In case of fraud, however, there is an additional remedy available to the victim of fraud, i.e., an action for damages under the law of torts, because fraud is also a tort. No remedy under the law of torts is available if it is an innocent misrepresentation. Contract Act, however, provides that “a person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract” This remedy of damages is available in every kind of rescission, whether on ground of misrepresentation or fraud, or on other ground and it is not similar to the remedy of damages available to a victim of the fraud under the law of torts.

4. Although when there is misrepresentation by one party the contract is voidable at the option of the other party, but no such remedy is available if the party seeking to avoid the contract had the means of discovering the truth with ordinary diligence. But except in case of fraudulent silence, a person obtaining the consent of the other party by fraud cannot be allowed to say that the other party could have discovered the truth with ordinary diligence.

❖ **Elements necessary in establishing misrepresentation**

- For the innocent party to avoid the contract, it must be proved that:-
 1. The statement in question was false in a natural particular i.e. it was untrue in whatever it referred to.
 2. The statement was more than a mere puff or sales talk. Whether a statement is a puff or a misrepresentation depends on what a reasonable person could deem it to be.
 3. The statement was one of fact not opinion. As a general rule **opinion does not amount to misrepresentation**. It was so held in **Edgington v Fitzmaurice**¹⁰, where the claimant purchased some shares in the defendant company. The company prospectus stated the shares were being offered in order to raise money to expand the company. In fact the company was experiencing financial difficulty and the money raised from the sale of the shares was going to be used to pay the company debts. It was held that despite the fact that the statement related to a statement of future intent, it was an actionable

¹⁰[1885] 29 Ch D 459

misrepresentation as the defendant had no intention of using the money to expand the company.

▪ **However an opinion may amount to misrepresentation if:-**

- a. The maker does not honestly hold that opinion
 - b. The opinion purports to be based on certain facts within the maker's knowledge but whose truthfulness he does not verify.
4. The false statement was intended to be relied upon by the recipient.
 5. The false statement was in fact made by the other party to the contract. As a general rule, omission, silence or non-disclosure does not amount to misrepresentation. However it may if the statement was true when made but turns false due to changes in circumstances before the contract is concluded but the maker does not disclose its falsity.
 6. The false statement influenced the party's decision to enter into the contract. The party must show that the false statement was made before or when the contract was concluded. However the false statement need not have been the only factor the party is considered. In **Andrews v. Mockford**¹¹, where the plaintiff had relied on untrue statement in a company's prospectus, issued by the defendants it was held that the defendants were liable in damages for the statements as the plaintiff had relied on them.
 7. The false statement was innocently, fraudulently or negligently made.

❖ **KINDS OF MISREPRESENTATION**

A) INNOCENT MISREPRESENTATION

A statement is deemed to be innocently misrepresented if the maker honestly believed in its truth though it was false and had no means of ascertaining that it was false as was the case in **Oscar**

¹¹[1896] 1 Q.B 372.

Chess v. Williams¹², where the defendant had no means of ascertaining that the year of registration of the vehicle was incorrect.

- In **Alkerhielm v. De Mare**¹³, where the defendants who were directors of a company issued a prospectus stating that 1/3 of the company shares had been taken up in Denmark which was not true at the time. It was held that the shares would be taken up in Denmark.

- **Remedies available**

- **If innocent misrepresentation is proved, the innocent party may either:-**

1. Apply for rescission of the contract
2. Sue for indemnity for any direct financial loss occasioned by the representation as was the case in **Whittington v. Seale-Hayn**¹⁴, where the defendant had innocently misrepresented the sanitary condition and habitation of his premises to the plaintiff who as a consequence took a lease to carry on the business of poultry breeding. The premises were not in a sanitary condition and mere unfit for human habitation. Some of the defendant's poultry died while others lost value this farm manager was taken ill and the premises were declared unfit for habitation. The defendant spent money putting it in a habitable condition, and paid outstanding rates. It was held that we could only recover the direct financial loss suffered.

B) FRAUDULENT MISREPRESENTATION.

- **A statement is deemed to be fraudulently misrepresented if the maker:-**

- a) Has knowledge that it is false
 - b) Makes it carelessly and recklessly
 - c) Does not believe in its truth
- This test of fraud was formulated in **Derry v. Peek**¹⁵. In *Andrew v. Mockford* where the defendants had issued a prospectus containing untrue statements and the plaintiff applied for 50 shares and was allowed the same but subsequently sued the defendants in damages for fraudulent misrepresentation. It was held that the defendants were liable as they were

¹²[1957] EWCA Civ 5

¹³[1959] AC 789 (PC).

¹⁴[1900] 82 LT 49

¹⁵[1889] 14 AC 337 at 374

aware of the falsity of the statements. A similar holding was made in *Bartholomew v. Petronilla*.

▪ **Remedies for fraudulent misrepresentation are either:-**

- i. Action for rescission of contract.
- ii. Damages for the tort of deceit.

C) NEGLIGENT MISREPRESENTATION.

- A statement is deemed to be negligently misrepresented if the maker has both means of capacity of ascertaining its falsity but fails to do so. The maker is deemed negligent as a reasonable person in such circumstances would have so ascertained.

▪ **However for negligent misrepresentation to be relied upon, it must be proved that:**

1. There was a special relationship between the maker and recipient of the statements hence the maker owed the recipient a legal duty of care.

- It was so held in **Hedley Byrene and Co. Ltd. V. Heller and Partners Ltd**¹⁶. A customer of the defendant bank approached the plaintiff bank for some guarantees. The plaintiff bank wrote to the defendant seeking to show the credit worthiness of the defendant customers. The defendant bank in 2 letters written on a 'without responsibility basis' confirmed that their customer was credit worthy. The plaintiff extended the guarantee but due to the customer does un credit worthiness; the plaintiff suffered loss of £19,000. The plaintiff sued. It was held that though the defendant bank was negligent it was not liable as the information had been given on a 'without prejudice or responsibility basis'.

2. That the party suffered loss of a financial nature.

In **Kirimu Estate (UG) Ltd. v. K.G. Korde**, the plaintiff company instructed the defendant a lawyer to value a piece of land for it. The defendant gave a figure without the assistance of a proper valuation of the estate. The figure was far above the market value and the company sued

¹⁶[1964] AC 464

in damages for negligent misrepresentation. It was held that the defendant was liable to pay the difference in value by reason of negligence.

❖ **Effects of Misrepresentation**

- In case of misrepresentation, the aggrieved party has two alternative courses open to him, (i) he can rescind²³ the contract, treating the contract as voidable; or (ii) he may affirm the contract and insist that he shall be put in the position in which he would have been, if the representation made had been true (Sec. 19). Misrepresentation does not entitle the aggrieved party to claim damages by way of interest or otherwise for expenses incurred.
- **Illustration.** *A*, innocently in good faith tells *B* that his T.V. set is made in Japan. *B*, thereupon buys the T.V. set. However, it comes out to be an Indian make. *A*, is guilty of misrepresentation. *B*, may either avoid the contract or may insist on its being carried out. In the latter case, *B* may either ask for replacing the set by Japanese make set or may keep the Indian make set and claim the difference in price between that set and Japanese make set.
- **Exception.** The above remedy is lost, if the party whose consent was caused by misrepresentation, had the means of discovering the truth with ordinary diligence.
- **Illustration.** *A*, by a misrepresentation, leads *B* erroneously to believe that 500 maunds of indigo are made annually at *A*'s factory. *B* examines the accounts of the factory, which show that only 400 maunds of indigo have been made. After this *B* buys the factory, the contract is not voidable on account of *A*'s misrepresentation (Illustration (b) to Section 19).

❖ **MISTAKE (Section 20, 21, 22 of LCA)**

- Mistake may be defined as an erroneous belief concerning something. It may be of two kinds: 1. **Mistake of law**. 2. **Mistake of fact**. Mistake happens if both the parties had not entered into an agreement except for a mistake as to a matter of fact that is essential to an agreement.

▪ **MISTAKE GENERALLY**

- A mistake of fact occurs when a person believes that a **condition or event** exists when it does not. **Or** a mistake is said to be misapprehension of a fact or factual situation. It is an erroneous assumption.
- Mistake when exist makes a contract void, **BUT** for a mistake to affect the validity of a contract it must be an **"operative mistake"**, i.e., that which operates to make the contract void.
- The effect of a mistake is, At common law, when the mistake is operative the contract is usually void *ab initio* i.e. Void from the beginning.
- As a general rule a **mistake of law** does not affect a contract however, a mistake of foreign law may affect a contract. **Mistakes of facts** affected contractual relationships.

❖ TYPES OF MISTAKES

- Mistake of fact that effect contracts are generally referred to as operative mistakes and the law recognizes various types of operative mistakes:
 - a) **Common**
 - b) **Mutual**
 - c) **Unilateral**
 - d) **Mistakenly signed documents**
 - e) **Mistake as to quality of subject matter**

A) COMMON MISTAKE

- A common mistake happens when both parties to an agreement make the same error with regard to a matter of fact that is essential to the agreement. Common mistake is provided by section 20 (1) of the LCA.
- Where both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void. This is a mistake as to the existence or ownership of the subject matter. Both parties make the same mistakes. Each party understands the others intention but both are mistaken about some underlying fundamental fact.
- **Common mistake rendered the contract void in two circumstances:-**

- **RES EXTINCTA**, this is the situation where both parties do not know that the subject matter does not exist. A contract will be void at common law if the subject matter of the agreement is, in fact, non-existent. In the case of **Couturier v Hastie**¹⁷, The case concerned the contract to sell a cargo of wheat/maize which did not at the time of this contract exist. Parties entered into contract for sale of maize. Both the parties knew the maize was on a ship from a place called Solaninka to England where they were. In fact, before they so made the agreement, the maize had begun to deteriorate and so it had been unloaded and sold at Tunis.
- The issue was whether the seller was entitled to recover the purchase price of the maize from the buyer as agreed in the contract. The court held that since both parties had contemplated the existence of the subject matter (maize) to be sold and bought respectively; the seller had nothing to sell and the buyer had nothing to buy. Thus the contract was held to be void *abi initio*.
- In addition, **section 8 of the Sales of Goods Act**¹⁸, provides that: Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.
- Other relevant cases include: **Griffith v Brymer**¹⁹, At 11am on 24 June 1902 the plaintiff had entered into an oral agreement for the hire of a room to view the coronation procession on 26 June. A decision to operate on the King, which rendered the procession impossible, was taken at 10am on 24 June. Wright J held the contract void. The agreement was made on a miss-supposition of facts which went to the whole root of the matter, and the plaintiff was entitled to recover his £100.
- In **Lessie Anderson V. Vallabdos Khalidas Company**, where parties had contracted to buy and sell a quality of gunny bags but unknown to them the bags

¹⁷[1856] 5 HL Cas 673

¹⁸[Cap 214 R.E 2002]

¹⁹[1903] 19 TLR 434

had been destroyed by fire. It was held that the contract was void for common mistake.

- **RES SUA**, this is common mistake as to title in the subject matter of the contract, Where a person makes a contract to purchase that which, in fact, belongs to him, the contract is void. This usually when both parties are mistaken on the fact that ownership of the goods is to the seller.
- These are circumstances in which parties are mistaken about the ownership of the subject matter. The party purporting to buy is the legal owner but both are unaware of the fact. The purported seller has no title to pass hence the purported contract is void. It was so held in **Bingham v. Bingham**.
- In **Cooper v Phibbs**²⁰, An uncle told his nephew that he owned a fishery. The nephew believed him and after his uncle's death, he entered into an agreement to rent the fishery from the uncles daughters. However, the fishery actually belonged to the nephew himself, it had only been left in the uncle's custody after the boy's father died.
- Lord Westbury said: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake".
 - **EFFECT OF COMMON MISTAKE TO TANZANIA**
 - When it is evident that there has been a mutual mistake between the parties to contract section 20 states that the contract is void. Section 65 of the LCA requires the party who gained advantage under that void contracts to: i. to restore that advantage ii. Or to compensate the innocent party for it.

(B) MISTAKE AS TO QUALITY²¹

²⁰[1867]] LR 2 HL 149

²¹See: Solle v Butcher [1949] 2 All ER 1107 Leaf v International Galleries [1950] 1 All ER 693 Harrison & Jones Ltd v Buntin & Lancaster Ltd [1953] 1 All ER 903 Associated Japanese Bank Ltd v Credit du Nord [1988] 3 All ER 902 BCCI v Ali and others [1999] 2 All ER 1005

- This mistake arises when one of the parties to the contract is mistaken about the quality of the subject matter of the contract. Such a mistake renders the contract voidable at the option of the innocent party. A mistake as to the quality of the subject matter of a contract has been confined to very narrow limits. According to Lord Atkin: "A mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be." In cases like **Bell v Lever Bros Ltd**²², The courts have not been over-ready to find a mistake as to quality to be operative.

(C) UNILATERAL MISTAKE

- Unilateral mistake is said to be present where only one party to the agreement is mistaken. **The categories of mistake may be as follows:**
 - **MISTAKE AS TO THE TERMS OF THE CONTRACT** (nature of the contract) Where one party is mistaken as to the nature of the contract and the other party is aware of the mistake, or the circumstances are such that he may be taken to be aware of it, the contract is void. For the mistake to be operative, the mistake by one party must be as to the terms of the contract itself.
 - In **Hartog v Colin & Shields**²³. The defendants, Colin & Shields, were London hide merchants who were sued by a Belgian furrier, Herr Hartog. They had discussed selling him 30,000 Argentinian hare skins at "10d per skin" (which would have come to £1,250), but when they put the final offer in writing they mistakenly wrote "30,000 skins @ 10d per lb". As hare skins weigh around 5oz, this was a third of the price previously discussed and orally agreed upon. Hartog tried to hold them to it. A mere error of judgment as to the quality of the subject matter will not suffice to render the contract void for unilateral mistake. (See for instance: **Smith v Hughes (1871) LR 6 QB 597**)

²²[1931] All ER 1

²³[1939] 3 All ER 566

➤ **REMEDY:** Equity follows the law and will rescind a contract affected by unilateral mistake or refuse specific performance as in: Webster v Cecil (1861) 30 Beav 62

- **MISTAKE AS TO IDENTITY**, Section 2 (1) (a) and (b). Here A, one party makes a contract with a C, second party, believing him to be A, third party (ie, someone else). If you refer to Section 2 (1) (a) and (b) of the LCA there will be no contract between A and C since his acceptance has no effect in law. The law makes a distinction between contracts where the parties are inter absentes and where the parties are inter presentes.
- Contract made **inter absentes**, Where the parties are not physically in each other's presence, eg, they are dealing by correspondence, and one party is mistaken as to the identity, not **the attributes**, of the other and intends instead to deal with some identifiable third party, and the other knows this, then the contract will be void for mistake. Usually this happens when there is a thief who poses as a different identity.
- In **Cundy v Lindsay**²⁴, The rogue here was a man called Blenkarn. He sent an offer to buy something from Cundy which was accepted. The name that appeared in the offer was Blenkiron and Co., 37 Wood Street. There existed in the same street, a famous company known as Blenkiron & Co. Blenkarn received the goods and quickly sold them to Lindsay. Having discovered the trick Cundy sued Lindsay for recovery of goods. He argued that he made a mistake as to the identity of the person with whom they were dealing. Held: since the plaintiffs never knew Blenkarn before, they never intended to deal with him and between them there is no contract since there was no consensus ad idem (meeting of the minds).
- **Mistake as to attributes of a person does not render the contract void but voidable.**

²⁴[1878] 3 App Cas 459

- **In King's Norton Metal Co Ltd v Edridge Merrett Co Ltd²⁵**, The rogue under this case was one Mr. Wallis. He sent an offer to buy some goods in which he described himself as the owner of a very reputable company going by the name of *Hallam & Co.* in fact there was no Co. in the area with that name. Having believed him *King's Norton Metal Co Ltd* accepted his offer and sent him goods. Hallam sold the goods to Edridge Merrett Co Ltd. The plaintiffs claimed that there was no contract since they dealt with Hallam and Co. under a mistake as to identity.
- The court held that: There was a contract between King's and Hallam; this decision was based on the following two conclusions by the court. Two conclusions are commonly drawn from these two cases: i. that to succeed in the case of a mistake as to identity there must be an identifiable third party with whom one intended to contract; and (here there was none: if you cannot prove there was an identifiable third party with whom you intended to deal then you are presumed to have intended to deal with this rogue) ii. The mistake must be as to identity and not to attributes. (Kings here were so impressed by the attribute).
- **Contract made inter praesentes**, Where the parties are inter praesentes (face to face) there is a presumption that the mistaken party intends to deal with the very person who is physically present and identifiable by sight and sound, irrespective of the identity which one or other may assume. For such a mistake to be an operative mistake and to make the agreement void the mistaken party must show that: (i) he intended to deal with someone else apart from the one present; (ii) The party they dealt with knew of this intention; (iii) he regarded identity as a matter of crucial importance; and (iv) he took reasonable steps to check the identity of the other person²⁶. Even where the contract is not void, it may be voidable for fraudulent misrepresentation but if the goods which are the subject-matter

²⁵[1897] TLR 98

²⁶See Cheshire & Fifoot, *Law of Contract*, p 257-263).

have passed to an innocent third party before the contract is avoided, that third party may acquire a good title. The main cases are as follows²⁷.

- The exception to the above rule is that if a party intended to contract only with the person so identified, such a mistake will render the contract void²⁸.
- **In unilateral mistake, the party must prove that:-**
 - i. It dealt with a person other than the one it intended to deal with.
 - ii. The person it dealt with was aware of that fact.
 - iii. The identity of the person, the party intended to deal with was fundamental to the contract.

(D) MUTUAL MISTAKE.

- A mutual mistake is one where both parties fail to understand each other. This is provided by s. 13 of the LCA. Two or more persons are said to consent when they agree to the same thing and in the same sense. When two persons do not agree to the same thing in the same sense they are said to be at cross purposes and this is what is referred to as mutual mistake.
- **Where the parties are at cross purposes**
- In cases where the parties misunderstand each other's intentions and are at cross purposes, the court will apply an objective test and consider whether a 'reasonable man' would take the agreement to mean what one party understood it to mean or what the other party understood it to mean: Here there are two effects. i. If the test leads to the conclusion that the contract could be understood in one sense only, both parties will be bound by the contract in this sense. ii. If the transaction is totally ambiguous under this objective test then there will be no consensus ad idem (agreement as to the same thing) and the contract will be void²⁹.

²⁷Phillips v Brooks [1919] 2 KB 243 Ingram v Little [1960] 3 All ER 332 (a controversial case), Lewis v Avery [1971] 3 All ER 907s

²⁸Lake v Simmons [1927] AC 487, A more recent case is: Citibank v Brown Shipley [1991] 2 All ER 690

²⁹Wood v Scarth (1858) 1 F&F 293, Raffles v Wichelhaus (1864) 2 H&C 906, Scriven Bros v Hindley & Co [1913] 3 KB 564

▪ **REMEDY**

- If the contract is void at law on the ground of mistake, equity "follows the law" and specific performance will be refused and, in appropriate circumstances, the contract will be rescinded. However, even where the contract is valid at law, specific performance will be refused if to grant it would cause hardship. Thus the remedy of specific performance was refused in **Wood v Scarth**.
- Mutual mistake, this is a mistake to the subject matter of contract. It arises when parties misunderstand each other or at cross purposes. No agreement arises between them for lack of consensus ad idem.
- However, not every misunderstanding constitutes a mutual mistake; it depends on what a reasonable person would deem the circumstances to be.
- In **Raffle V. Wichelhouse**³⁰, the parties enter into a contract for the sell of cotton to be shipped to the U.K. on board the peerless from the port of Bombay. Unknown to the parties there were two ships by the name peerless at the port of Bombay. One sailed in October and the other in December.
- While the buyer meant the October ship the seller referred to the December one. The cotton was shipped by the December vessel and the buyer refused to take delivery. It was held that he was not bound as the contract was void for mutual mistake.

(E) DOCUMENTS MISTAKENLY SIGNED

- This is a mistake as to the nature of the contract; it arises when a party to a contract signs the wrong document. Such a mistake does not render the contract void but avoidable at the option of the party.
- **NON EST FACTUM (it was not my deed)**
- As a general rule, a person is bound by their signature to a document, whether or not they have read or understood the document: *L'Estrange v Graucob* [1934] 2 KB 394. However, where a person has been induced to sign a **contractual document by fraud or misrepresentation, the transaction will be voidable**. Sometimes, the plea of non est factum, namely that '**it is not my deed**' may be available. A successful plea makes a document void. The plea was originally used to protect illiterate persons who were

³⁰[1864] EWHC Exch J19

tricked into putting their mark on documents. It eventually became available to literate persons who had signed a document believing it to be something totally different from what it actually was. See, for example: *Foster v Mackinnon* (1869) LR 4 CP 704. The use of the rule in modern times has been restricted.

- For a successful plea of non est factum two factors have to be established: **(i) the signer was not careless in signing; and (ii) there is a radical (fundamental) difference between the document which was signed and what the signer thought he was signing.** The following decision of the House of Lords is the leading case on this topic: ***Saunders v Anglia Building Society (Gallie v Lee)* [1970] 3 All ER 961. Note: Because of the strict requirements, it may be better for the innocent party to bring a claim based on undue influence.**
- **To avoid the contract, the party must prove that:-**
 - a. The document signed was fundamentally different from the one the party thought it was signing.
 - b. The party was neither careless nor negligent when it signed the document.
- By proving these facts, the party establishes the plea of *non-est factum* which literally means this is not my deed. Unless these facts are proved, the contract cannot be avoided as was the case in **Gallie V.Lee and Anor.**

❖ **FRAUD**

- **Definition**
- According to Section 17, ‘fraud means and includes any of the following acts committed by a party to a contract,’ or with his connivance, or by his agent, with intent to deceive or to induce another party thereto or his agent, to enter into the contract:

1. **The suggestion that a fact is true when it is not true by one who does not believe it to be true.** Thus a false statement intentionally made is fraud. An absence of honest belief in the truth of the statement made is essential to constitute fraud. If a representor honestly believes his statement to be true, he cannot be liable in deceit no matter how ill-advised, stupid, or even negligent he may have been. In order to be called fraudulent representation the false statement

must be made intentionally. Lord Herschell gave the definition of fraud in **Derry vs Peek**³¹ as, “*a false statement made knowingly, or without belief in its truth, or recklessly careless whether it be true or false.*”

2. The active concealment of a fact by a person who has knowledge or belief of the fact.

Active concealment of a material fact is taken as much a fraud as if the existence of such fact was expressly denied or the reverse of it expressly stated. Mere non-disclosure is not fraud, where there is no duty to disclose. *Caveat Emptor* or ‘Buyer Beware’ is the principle in all contracts of sale of goods. As a rule the seller is not bound to disclose to the buyer the faults in the goods he is selling.

- **Illustrations.** (A) *A*, a horse dealer, sells a mare to *B*. *A* knows that the mare has a cracked hoof which he fills up in such a way as to defy detection or on enquiry from *B*, *A* affirms that the mare is sound. The defect is subsequently discovered by *B*. There is ‘fraud’ on the part of *A* and the agreement can be avoided by *B* as his consent has been obtained by fraud.
- (B) *A*, sells by auction, to *B* a horse, which he knows to be unsound. *A* says nothing to *B* about the horse’s unsoundness. This is not ‘fraud’ because *A* is under no duty to disclose the fact to *B*, the general rule of law being ‘let the buyer beware’ [Illustration (a) to Section 17].

3. A promise made without any intention of performing it. If a man while entering into a contract has no intention to perform his promise, there is fraud on his part.

- **Illustrations.** (a) *X* purchases certain goods from *Y* on credit without any intention of paying for them as he was in insolvent circumstances. It is a clear case of fraud from *X*’s side. Note that mere failure to pay, where there was no original dishonest intention, is not fraud.
- Where a man and a woman went through a ceremony of marriage without any intention on the part of the husband to regard it as a real marriage, it was held that the consent of the wife was obtained by fraud and that the marriage was mere pretence (*Shireen Mal v John J. Taylor*²⁵).

³¹(1889), 14 A.C. 337.

4. Any other act fitted to deceive. ‘The fertility of man’s invention in devising new schemes of fraud is so great that it would be difficult, if not impossible, to confine fraud within the limits of any exhaustive definition. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered fraud and Section 17 (1) (d), is obviously intended to cover all those cases of fraud which cannot appropriately be covered by the other subsections.

5. Any such act or omission as the law specially declares to be fraudulent. This subsection refers to the provisions in certain Acts which make it obligatory to disclose relevant facts. An omission to make such a disclosure amounts to fraud. Thus, in order to allege fraud, the act complained of must be brought within the scope of the acts enumerated above. A mere expression of opinion or commendatory expression is not fraud. “The land is very fertile” is simply a statement of opinion or “our products are the best in the market” is merely a commendatory expression. Such statements do not ordinarily amount to fraud.

▪ **Can silence be fraudulent?**

The Explanation to Section 17 (2) deals with cases as to when ‘silence is fraudulent’ or what is sometimes called ‘constructive fraud.’ The explanation declares that “mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, *unless*-(i) the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or (ii) silence is, in itself, equivalent to speech.” It therefore follows that:-

1. **As a rule mere silence is not fraud**, because there is no duty cast by law on a party to a contract to make a disclosure to the other party, of material facts within his knowledge.
 - **Illustration.** A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B’s willingness to proceed with the contract. A is not bound to inform B.
2. **Silence is fraudulent, if the circumstances of the case are such that ‘it is the duty of the person keeping silence to speak’.** In other words, silence is fraudulent in contracts of ‘utmost good faith’ *i.e.*, contracts ‘*uberrimae fidei*.’ These are contracts in which the law imposes a duty of abundant disclosure on one of the parties thereto, due to peculiar relationship of the parties or due to the fact that one of the parties has peculiar means of

knowledge which are not accessible to the other. The following contracts come within the class of ‘uberrimae fidei’ contracts.

3. **Fiduciary relationship**, when the parties stand in a fiduciary relation to each other, the person in whom confidence is reposed is under a duty to act with utmost good faith and to make a full disclosure of all material facts concerning the transaction known to him. Examples of a fiduciary relationship include those of principal and agent, solicitor and client, guardian and ward, and trustee and beneficiary.
 - **Illustrations.** (i) Where a broker who was employed to buy shares for the client, sold his own shares to the client, without disclosing this fact to him and without obtaining his consent therefore, it was held that the sale can be avoided by the client.
 - Where solicitor purchased certain property from his client nominally for his brother, but really for himself, it was held that the sale can be avoided by the client, even if the transaction was perfectly proper one.
4. **Contracts of insurance**, In contracts of marine, fire and life insurance, the insurer contracts on the basis that all material facts have been communicated to him; and it is an implied condition of the contract that full disclosure shall be made, and that if there has been non-disclosure he shall be entitled to avoid the contract. The assured, therefore must disclose to the insurer all material facts concerning the risk to be undertaken *e.g.*, disease *etc.*, in case of life insurance. A concealment or misstatement of a material fact will render the contract void.
5. **Silence is fraudulent where the circumstances are such that “silence is, in itself, equivalent to speech.”** Where, for example, *B* says to *A* “If you do not deny it, I shall assume that the horse is sound.” *A* says nothing. Hence *A*’s silence is equivalent to speech. If the horse is unsound *A*’s silence is fraudulent [Illustration (c) to Section 17].
 - **To constitute fraud these acts must have been committed either;**
 - i. By a party to a contract, or
 - ii. (By any person but) with his connivance (participation/involvement)
 - iii. Or by his agent.
 - **The intention of the party doing these acts must be directed to either;** i. **deceives** that other party (i.e. to the contract) or his agent, or
 - ii. Induce him to enter into the contract.

The mind of the High Court of Tanzania represented by Msumi J, *in Joseph Mapama v. Republic (1986)* at pg. 155, on the meaning of the word “**deceive**” concurred with that of

- Buckley, J. in *Re London and Globe Finance Corporation [1903]*, in which the meaning of the mentioned word was referred to as: “...to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows and believes to be false...” Having put forward a variety of authorities as to the meaning of fraud, it is sensible at this juncture, to bring forth the meaning of forgery.

❖ SPECIAL POINTS TO NOTE

➤ **For giving rise to an action for deceit, the following points deserve special attention:-**

- (i) Fraud by a stranger to the contract does not affect contract. It may be recalled that ‘coercion’ as well as ‘undue influence’ by a stranger to a contract affect the contract.
- (ii) Fraudulent representation must have been instrumental in inducing the other party to enter into the contract *i.e.*, but for this, the aggrieved party would not have entered into the contract.
- (iii) The plaintiff must have been actually deceived by fraudulent statement. A deceit which does not deceive gives no ground for action.
- (iv) The plaintiff must be thereby damnified. Unless the plaintiff has sustained a damage or injury, no action will lie. It is a common saying that “there is no fraud without damages.”
- (v) In cases of fraudulent silence, the contract is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence (Exception to Sec. 19 given in the Act). Note that in other cases of fraud, this is no defence *i.e.*, the contract is voidable even if the fraud could be discovered with ordinary diligence.

❖ Distinction between Fraud and Misrepresentation

➤ **The following are the points of distinction between the two:**

1. Fraud implies an intention to deceive; it is deliberate or willful; whereas misrepresentation is innocent without any intention to deceive.
2. Fraud is a civil wrong which entitles a party to claim damages in addition to the right of rescinding the contract. Misrepresentation gives only the right to avoid the contract and there can be no suit for damages.
3. In case of misrepresentation, the fact that the aggrieved party had the means to discover the truth with ordinary diligence will prevent the party from avoiding the

contract. But in case of fraud, excepting fraud by silence, the contract is voidable even though the party defrauded had the means of discovering the truth with ordinary diligence.

❖ Effect of Fraud

- A party who has been induced to enter into a contract by fraud, has the following remedies open:-

1. He can rescind the contract *i.e.*, he can avoid the performance of the contract; being voidable at his option (Sec. 19).
2. He can ask for restitution and insist that the contract shall be performed, and that he shall be put in the position in which he would have been, if the representation made had been true (Sec. 19). **Illustration**, A, fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage debt redeemed. [Illustration, (c) to Section 19].
3. The aggrieved party can also sue for damages, if any. Fraud is a 'civil wrong' hence compensation is payable. For instance, if the party suffers injury because of unsound horse, which was not disclosed despite enquiry, compensation can be demanded. Similarly, where a man was fraudulently induced to buy a house, he was allowed to recover the expense involved in moving into the house as damages (in addition to rescission of the contract).

❖ UNDUE INFLUENCE

- Definition
- Section 16 (1) of LCA defines the term 'Undue influence' as follows: "A contract is said to be induced by undue influence where, (i) the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and (ii) he uses the position to obtain an unfair advantage over the other.
- When can a person be said to be in a position to dominate the will of another?
- The phrase "in a position to dominate the will of the other" is clarified by the same section under subsection (2), thus a person is deemed to be in a position to dominate the will of another; (a) where he holds a real or apparent authority over the other, *e.g.*, the relationship between master and the servant, police officer and the accused; or (b)

where he stands in a fiduciary relation to the other. Fiduciary relation means a relation of mutual trust and confidence. Such a relationship is supposed to exist in the following cases: father and son, guardian and ward, solicitor and client, doctor and patient, Guru (spiritual adviser) and disciple, trustee and beneficiary, *etc.*; or (c) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress, *e.g.*, old illiterate persons.

- It is to be observed that for proving the use of undue-influence both the elements mentioned above, *namely*, (i) the other party was in a position to dominate his will, and (ii) the transaction was an unfair one, must be established.
- Generally undue influence it is said to exist where a party dominates the others wills thereby inhibiting its exercise of independent judgments on the contract. One party thus exercises overwhelming influence over the other. Undue influence was developed by equity with a fairly wide scope. It renders a contract voidable at the option of the innocent party.
- Undue influence renders a contract voidable in the following circumstances:-
 - Where parties have a special relationship
- For example parent-child, advocate-client, doctor-patient, trustee-beneficiary, religious leader-disciple; undue influence is **presumed** in favor of the weaker party. It is the duty of the stronger party to show that the weaker party made an independent decision on the contract. *e.g.* he had an advocate of his own.
- In Ottoman Bank Co. Ltd. v. Mawani³², the plaintiff bank extended a loan to a business owned by the defendant's father and the defendant guaranteed the amount. The father's business was unable to pay the loan and the bank sued so to enforce the guarantee. Evidence that the defendant was still under the control of the father; He worked in the father's firm and had no independent source of income, it was held that he wasn't liable on the guarantee as it was voidable at his option for the father's undue influence.

³²[1965] E.A. 464

▪ **When parties have no special relationship.**

- The party pleading undue influence must **prove** it by evidence. The circumstances must be such that the party did not make independent judgments on the transaction, as was the case in **Williams v. Bayley**³³, where the defendant entered into a contract promising to pay monies withdrawn from a bank by the son. The banker had made it clear that if no arrangement was arrived at, the defendant's son would be prosecuted for the offence, when sued the defendant pleaded the banker's undue influence. It was held that he was not liable as the contract was voidable at his option.

▪ **Unconscionable bargains.**

- These are unfair bargains. They are transactions entered into in circumstances in which one party takes advantage of its position to procure the deal. Such transactions are voidable at the option of the innocent party. The concept of unconscionable bargains was developed by equity courts as an extension of the doctrine of undue influence and was explained by Lord Denning in *David C. Builder Ltd. v. Rees*. In **Lloyds Bank Co. Ltd v. Bundy**³⁴, the plaintiff bank extended a loan to a business owned by the defendant's son. The defendant guaranteed the loan to the tune of £1,000 but the bank required further guarantee. He extended it to £6,000. His lawyer informed him that it would be unwise to extend the guarantee further. The defendant owned a house with £10,000. An official of the plaintiff bank visited the defendant and procured a further guarantee of up to £11,000. The son's business collapsed and the bank sought to enforce the guarantee against the father who pleaded that it was unconscionable. It was held that the guarantee was voidable at the option of the defendant as it was unfair.

❖ **Effect of Undue Influence**

- "When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit there under, upon such terms and conditions as the court may seem just." (Section 19). Thus, it will be noticed that Section 19 (4) of LCA also declares a contract brought

³³[1866] LR 1 HL 200

³⁴ [1974] EWCA 8

about by undue influence *voidable* at the option of the aggrieved party, just as Section 19 (2) and (3) so declares in case of a contract brought about by coercion, misrepresentation or fraud.

▪ **The following points must also be noted in this connection**

- Lack of judgment, lack of knowledge of facts or absence of foresight is generally not by themselves sufficient reasons for setting aside a contract on the ground of undue influence. Persuasion and argument are also not in themselves undue influence. Undue influence implies mental and moral coercion so as to make the consent of one of the parties to the contract unfree.
- Undue influence by a person, who is not a party to the contract, may make the contract voidable. In other words, it is not necessary that the person in a position to dominate the will of the other party must himself be benefited. It is sufficient if the third person in whom he is interested is benefited.

❖ **Distinction between Coercion and Undue Influence**

- Both, coercion and undue influence vitiate consent and make the consent of one of the parties to the contract unfree. But the following are the points of distinction between the five:-
- In coercion, the consent of the aggrieved party is obtained by committing or threatening to commit an act forbidden by Penal Code *or* detaining or threatening to detain some property unlawfully. While in undue influence, the consent of the aggrieved party is affected from the domination of the will of one person over another.
- Coercion is mainly of a physical character involving mostly use of physical or violent force, whereas undue influence is of moral character involving use of moral force or mental pressure.
- There is no presumption of coercion by law under any circumstance. The burden of proof that coercion was used lies on the party whose consent was so caused. In the case of undue-influence, however, there is presumption as to the same in the case of certain relationships. In these cases there is no need of proving the use of undue-influence by the party whose consent was so caused.

- While in the case of rescission of a contract procured by coercion, any benefit received by the aggrieved party has to be restored under Section 64 of the Contract Act; in the case of rescission of a contract procured by undue influence, as per Section 19-A, the Court has discretion to direct the aggrieved party for restoring the benefit whether in whole or in part or set aside the contract without any direction for refund of benefit.
- The party exercising coercion exposes himself to criminal liability under the Penal Code, besides an action on contract. There is no criminal liability in case of undue influence.

❖ **COERCION**

• **Definition**

- Section 15 (1) of the Contract Act defines ‘Coercion’ as follows: “Coercion is the committing or threatening to commit, any act forbidden by the Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.” The **Explanation** to the Section 15 (2) further adds that “it is immaterial whether the Tanzania Penal Code is or is not in force in the place where the coercion is employed.”

➤ **The above definition can be analyzed as follows:**

1. Coercion implies (a) committing or threatening to commit any act forbidden by the Tanzania Penal Code; or (b) unlawful detaining or threatening to detain any property, with the intention of causing any person to enter into an agreement.

- **Illustrations.** (i) A Madrasi gentleman died leaving a young widow. The relatives of the deceased threatened the widow to adopt a boy otherwise they would not allow her to remove the dead body of her husband for cremation. The widow adopted the boy and subsequently applied for cancellation of the adoption. It was held that her consent was not free but induced by coercion, as any person who obstructed a dead body from being removed for cremation, would be guilty of an offence under Penal code.
- (ii) *L* threatens to shoot *M*, if he does not let out his house to him. *M* agrees to let out his house to *L*. The consent of *M* has been induced by coercion.
- (iii) An agent refused to hand over the account books of the business to the new agent sent in his place, unless the Principal released him from all liabilities. The Principal had to

give a release deed as demanded. *Held* that the release deed was voidable at the instance of the Principal who was made to execute the release deed under coercion.

2. the act constituting coercion may be directed at any person, and not necessarily at the other party to the agreement. Likewise it may proceed even from a stranger to the contract.

- **Illustrations.** (A) A, threatens to shoot B, a friend of C if C does not let out his house to him. C agrees to do so. The agreement has been brought about by coercion. (b) A, threatens to shoot B if he does not let out his house to C. B agrees to let out his house to C. B's consent has been caused by coercion.

3. It does not matter whether the Tanzania Penal Code is or is not in force in the place where the coercion is employed. If the suit is filed in Tanzania, the above provision (i.e., Sec. 15) will apply.

- **Illustration** (Appended to Sec. 15). A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code. A, afterwards sues B for breach of contract at Calcutta. A, has employed coercion, although his act is not an offence by the law of England and although Section 506 of the Indian Penal Code was not in force, at the time when, or place where, the act was done.
- **Threat to file a suit.** To threaten a criminal or civil prosecution does not constitute coercion because it is not an act forbidden by Penal Code. But a threat to file a suit on a *false charge* constitutes coercion, for such an act is forbidden by the P.C
- **Threat to commit suicide.** Neither 'suicide' nor 'threat to commit suicide' is punishable under the Tanzania Penal Code; only 'an attempt to commit suicide' is punishable under it. In **Chikkam Ammiraju v. Chikkam Seshamma**³⁵, there arose a question as to whether 'a threat to commit suicide' amounts to coercion, and their Lordships of the Madras High Court answered the question in the affirmative holding that this amounts to coercion. In that case a person, by a threat to commit suicide, induced his wife and son to execute a release deed in favor of his brother in respect of certain properties which they claimed as their own. The transaction was set aside on the grounds of coercion. It was stated by the majority of judges that though 'a threat to commit suicide' was not

³⁵(1918), 41 Mad. 33.

punishable under the Indian Penal Code, it must be deemed to be *forbidden* by that Code, as ‘an attempt to commit suicide’ was punishable under Section 309 of that Code. Their Lordships observed: “The term ‘any act *forbidden* by the Indian Penal Code’ is wider than the term ‘*punishable* by the Indian Penal Code.’ Simply because a man escapes punishment, it does not follow that the act is not forbidden by the Penal code. For example, a lunatic or a minor may not be punished. This does not show that their criminal acts are not forbidden by the Penal Code.”

▪ **Effect of Coercion**

- A contract brought about by coercion is *voidable* at the option of the party whose consent was so caused (Sec. 19). This means that the aggrieved party may either exercise the option to affirm the transaction and hold the other party bound by it, or repudiate the transaction by exercising a right of rescission. As per Section 64, if the aggrieved party opts to rescind a voidable contract, he must restore any benefit received by him under the contract to the other party from who received. The burden of proof that coercion was used lies on the party who wants to set aside the contract on the plea of coercion.

❖ **DURESS**

- The term ‘duress’ is used in English Law to denote illegal imprisonment or either actual or threatened violence over the person (body) of another party or his wife or children with a view to obtain the consent of that party to the agreement. In short, for ‘duress’ the act or threat must be aimed at the life or liberty of the other party to the contract or the members of his family. A threat to destroy or detain property will not amount to ‘duress.’ Thus the scope of the term ‘coercion,’ as defined in Section 15, is wider, because it includes threats over property also.
- At common law duress means actual violence or threats thereof. It exists where a contractual relationship is procured by actual violence on the person or threats thereof. The party is compelled or coerced to contract. For the most part, duress consists of threats. Duress was developed by the common law with a very narrow scope. It renders a contract voidable at the option of the innocent party.
- **For the contract to be avoided, the innocent party must prove that:-**
 - The threat was intended to cause fear, injury or loss of life

- The threat was directed to his person or body as opposed to his property. It was so held in **Altee v. Backhouse**³⁶. A threat directed at the body of a member of the party's household amounts to duress.
- The threat was illegal e.g. a threat to sue, prosecute or cause imprisonment for no reasonable cause. A threat to enforce once legal rights does not amount to duress. It was so held in **Hassan Ali Issa v. Jeraj Produce Shop**³⁷ where the defendant had alleged that the cheque had been written under duress in that the plaintiff had threatened to sue if repair and storage charges were not paid. It was held that the threat did not amount to duress.

❖ TEST QUESTIONS

1. "For giving rise to a valid contract, there must be *consensus ad-idem* among the contracting parties." Explain this statement and discuss the meaning of 'free consent.'
2. When is consent said to be given under coercion? What is the liability of a person to whom money has been paid or goods have been delivered under coercion? How coercion differs from undue influence?
3. "It is an essential condition for challenging a contract on the basis of undue influence that one of the parties should be in a position to dominate the will of the other." Examine this statement and explain the effect of undue influence on the validity or otherwise of a contract.
4. Define the term 'misrepresentation. 'What is its effect on the validity of a contract? Distinguish it from fraud.
5. Define fraud and point out its effects on the validity of a contract. Give suitable examples to illustrate your answer.
6. "Mere silence as to facts is not fraud." Explain with illustrations.
7. Discuss the remedies available for coercion, undue influence, misrepresentation and fraud.
8. Discuss the law relating to the effect of 'mistake' on contracts.
9. "A contract caused by unilateral mistake may be valid, voidable or void." Explain.

³⁶(1838), 3 M.&W. 633,

³⁷(1967) HCD 52.

2.0 INCAPACITY

- Incapacity of contracting parties may vitiate a contract. Capacity to contract refers the legal ability of a party to enter into a contractual relationship. For an agreement to be enforceable as a contract the parties must have had the requisite capacity.
- As a general rule, every person has a capacity to enter into any contractual relationship as per section 11(1) of LCA. According to **section 11** a person who is legally allowed to enter into a contract is he who belongs to the age of majority and who is not insane and who is not disqualified by any law from contracting. In Tanzania, the age of majority Ordinance, cap 431 age of majority is 18 years.
- However, in practice, the law of contract restricts or limits the contractual capacity of certain classes of persons namely;
 1. Infants or minors.
 2. Drunken persons.
 3. Persons of unsound mind.
 4. Corporations.
 5. Undischarged bankrupts.

2.1 CONTRACTUAL CAPACITY OF INFANTS OR MINORS

(Section 4 of Cap 214 and Section 68 of Cap 345)

- Under Section 2 of the Age of Majority Act, an infant or minor is any person who has not attained the age of 18. Contracts entered into by an infant are binding, voidable or void depending on their nature and purpose.

2.1.1 BINDING CONTRACTS

- These are legally enforceable contracts; the infant can sue or be sued on them. Both parties are bound to honor their obligations. These contracts fall into 4 categories;

2.1.2 Contracts for the Supply of “Necessaries”

- Under section 4 (2) of the Sale of Goods Act necessities mean goods suitable to the condition in life of such an infant or minor and to his actual requirement at the time of

sale and delivery. In **Nash v. Inman**³⁸, the defendant was an infant college student. Before proceeding to college, his father bought him all the necessary clothing material. However, while in college, he bought additional clothing material from the plaintiff but did not pay for them and was sued. His father gave evidence that he had bought him all the necessary clothing material. The court held that, though the clothes were suitable to the minor's condition in life, these goods were not necessities because the minor was well provided with clothes by his rich father.

2.1.3 Contracts for the Supply of "Other Necessaries"

- These are necessities other than those covered by Section 4 (2) of the Sale of Goods Act. E.g. Legal services transport to and from work, lodging facilities etc. An infant is bound by any contract for the supply of such necessities. Under the Sale of Goods Act, whenever an infant is supplied with necessities, he is liable to pay not the agreed price but what the court considers as reasonable.

2.1.4 . Educational Contracts

- An infant is bound by a contract whose purpose is to promote his education or instruction.

2.1.5. Contracts for Beneficial Service

- These are beneficial contracts of service. Case law demonstrates that an infant can sue or be sued and is bound by contracts whose object is to benefit him as a person. In **Doyle v. White City Stadium**,³⁹ the plaintiff was a qualified infant boxer. He applied to join the British Boxing Board and was granted a license. One of the rules of the body empowered it to withhold payment of any prize money won if a boxer was disqualified in a competition. The plaintiff was disqualified on one occasion and the Board withheld payment. The plaintiff sued. Question was whether the plaintiff was bound by the contract between him and the Board. It was held that he was as in substance it was intended to benefit him hence the money was irrecoverable.

³⁸ (1908) 2 KB 1

³⁹ [1935] 1 KB 110

- A similar holding was made in **Chaplin V. Leslie Fremin (Publishers) Ltd.**⁴⁰ Where the plaintiff, an infant had engaged the defendant to write a book for him. He subsequently discontinued the transaction. It was held that the contract was binding as it was intended to benefit him.

2.2.2 VOIDABLE CONTRACTS

- Certain contracts entered into by an infant are voidable i.e. the infant is entitled to repudiate the contract during infancy or within a reasonable time after attaining the age of majority.
- By avoiding the contract, the infant escapes liability on it. The infant cannot be sued on the contract during infancy. These contracts confer upon the infant a long term benefit. Examples include: Partnership agreements, lease or tenancy agreement and contract for the purchase of shares.

2.2.3 VOID CONTRACTS

- These are contracts which the law treats as nonexistent. They confer no rights and impose no obligations on the parties. These contracts are; all accounts stated with infants: These are debts admitted by an infant. The infant cannot be sued on such admission.
- Contracts for the supply of goods other than necessities. Money lending contracts: An infant is not bound to repay any monies borrowed from a 3rd party as the contract is void. However if the infant repays, the amount is irrecoverable.

2.2 CONTRACTUAL CAPACITY OF DRUNKEN PERSONS

- A contract entered by a drunken person is voidable at his option by establishing that: 1. He was too drunk to understand his acts. 2. The other party was aware of his condition.
- By avoiding the contract, the person escapes liability on it. In **Gore v. Gibson**⁴¹, the defendant was sued on a bill of exchange he had signed and endorsed. He pleaded that when he did so he was too drunk to understand what he was doing and that the plaintiff was aware of his condition. It was held that he was not liable as the contract was voidable at his option by reason of the drunkenness.

⁴⁰[1966] Ch. 71.

⁴¹[1845] 13 M & W 621; 153 ER 260

- If a contract entered into by a person when drunk is ratified by him when sober it is no longer voidable as was the case in **Mathews v Baxter**⁴², where the defendant had contracted to sell a house to the plaintiff. When sued he pleaded drunkenness. However it was held that he was liable as the plaintiff proved that he had subsequently ratified the transaction while sober. Under Section 4 (2) of the Sale of Goods Act, if a drunken person is supplied with necessities he is liable to pay a reasonable price.

2.3 CONTRACTUAL CAPACITY OF PERSONS OF UNSOUND MIND

(Section 12 (1) (2) (3) of LCA)

- A contract entered into by a person of unsound mind is voidable at his option by establishing that: 1. He was too insane to understand his acts. 2. The other party was aware of his mental condition.
- By avoiding the contract the party escapes liability on it. In **Imperial Loan Co. Ltd v Stone**⁴³, the defendant was sued on a promissory note he had signed. He argued that at the time, he was insane and therefore incapable of comprehending the nature or effects of his acts and that he was not liable on the promissory note as the contract was voidable by reason of insanity. In the words of Lopes L.J. “In order to avoid a fair contract on the ground of insanity, the mental capacity of the one contracting must be known to the other contracting party. The defendant must plead and prove not merely his insanity but the plaintiff’s knowledge of that fact and unless he proves these 2 things he cannot succeed.”
- If a contract entered into by a person of unsound mind is ratified by him when he is of sound mind it ceases to be voidable. Under Section 4 (2) of the Sale of Goods Act, if a person of unsound mind is supplied with necessities, he is liable to pay a reasonable amount.

2.4 CONTRACTUAL CAPACITY OF UNDISCHARGED BANKRUPTS

(Section 3 of Bankruptcy Act)

- These are persons who have been declared bankrupt by a court of competent jurisdiction. Their capacity to contract is restricted by the provisions of the Bankruptcy Act⁴⁴.

2.5. CONTRACTUAL CAPACITY OF CORPORATIONS

⁴² [1873] LR 8 Exch 132

⁴³ [1892] 1 QB 599

⁴⁴ Section 3

- These are artificial persons created by law, either by the process of registration or by statute. The capacity of the corporations to contract is defined by law e.g. a statutory corporation has capacity to enter in transactions set out in the statute as well as those reasonably incidental thereto.
- Other transactions are **ultra vires** and therefore null and void. The contractual capacity of a registered company is defined by the object clause of the memorandum. At common law a registered company has capacity to enter into transactions set forth in the objects and those that are reasonably incidental to the attainment or pursuit of such objects.
- It was so held in **Ashbury Railway Carriage and Iron Co. v. Riche as well as in Attorney General v. Great Eastern Railway Co**⁴⁵. Other transactions are *ultra vires* (beyond the powers of) the company and void. Transactions within the powers of a company are said to be *intra vires* a company. An *ultra vires* transaction cannot be ratified and any purported ratification has no legal effect. It was so held in *Ashbury's Case*.

3.0 ILLEGALITY

- The term illegality does not necessarily mean that a criminal offence is involved. It means that the contract in question is unenforceable as it is injurious to the public or is inconsistent with the public good. (See Section 23 of LCA)
- An illegal contract is un-enforceable. This is because for an agreement to be enforceable, it must have been entered into for a lawful purpose. A contract may be declared, illegal by statutes or a court of law.

3.1 Contracts declared illegal by Statutes.

- Under the employment Act, wages or salaries are payable in money or money's worth. A contract to pay wages or salary in kind is illegal and void. Such a contract is said to be illegal as formed and is unenforceable. Land laws of particular countries restrict on sale or lease of land to a foreigner, Restriction put by trade laws, no license no trade. Section 26 of LCA declares all agreements in general restraint of the marriage of any person other than the minor is void.

⁴⁵[1875] LR 7 HL 653

3.2 Contracts declared illegal by courts of law (contracts illegal at common law)

- Long before statutory intervention, courts had declared money contracts illegal for being contrary to public policy, this includes the followings:-

3.2.1 a contract to commit a crime, tort or fraud.

- Such a contract is illegal and unenforceable as it is a contrary to public policy to commit crimes, torts or fraud in **Bigos v. Boustead**⁴⁶, where the object of the contract was to violate the English Exchange control regulations; it was held that the contract was illegal and unenforceable.

3.2.2 Contracts prejudicial to public safety.

- These are contracts which promote harmful activities in a country or its neighbors. E.g. a contract to finance rebels in a country or coup plotters, assisting alien enemies.

3.2.3 Contracts prejudicial to the administration of justice.

- These are contracts which interfere with the judicial process e.g.
 - a. A contract to stifle prosecution of an alleged crime.
 - b. **Champerly agreements**: This is a contract whereby a party provides financial assistance to another involved in a civil case so as to share the amount awarded by the court. Such a contract is illegal and unenforceable.
 - c. **Maintenance**: this is a contract whereby a party provides financial assistance to another to enable him sue a 3rd party for no reasonable cause. Such a contract facilitates the harassment of a party by another through the courts. It is illegal and unenforceable.

3.2.4 Contracts to defraud state revenue.

- A contract whose object is to deny the state whether central government or local government revenue by way of evading tax is illegal and unenforceable.

⁴⁶[1951] 1 All ER 92

- In **Miller v. Karlinski**⁴⁷, the plaintiff who was an employee of the defendant a £10 per week had agreed that the amount deducted from the salary as tax was refundable as an allowance. In an action to recover the refund, it was held that it was irrecoverable as the object of the contract was to defraud the state revenue.

3.2.5 Contracts liable to promote corruption in public.

- Such a contract is unenforceable as corruption is contrary to public policy. In **Parkinson v. College of Ambulance and Another**⁴⁸, the secretary of a charitable organization informed that plaintiff that it was on to it. The plaintiff gave £3,000 but was not knighted as only the King could bestow the title. In an action to recover the sum, it was held that it was irrecoverable as the contract was illegal.

3.2.6 Contracts liable to promote sexual immorality.

- These are contracts *contra bonos mores* (contrary to good morals). Such a contract is unenforceable on account of illegality. The contract may be illegal as performed. In **Pearce v. Brooks**⁴⁹ the plaintiff owned a beautiful horse drawn carriage which he lent to the defendant for 12 months at stated charges. The plaintiff knew that the defendant was a prostitute and intended to use the carriage to solicit influential customers. In an action to enforce payment of the hiring charges, it was held that that contract was unenforceable as it was illegal as performed as its purpose was to promote sexual immorality.

❖ EFFECTS OF ILLEGALITY

- An illegal contract is said to be ‘beyond the pale of law’. Such a contract is unenforceable it creates no rights and imposes no obligations on the parties. Neither party is bound to perform. Money or assets changing hands under an illegal contract is irrecoverable as gains and losses remain where they have fallen.
- **However such money or assets may be recovered in certain circumstances;**
 - i. Where either party repents/regrets the illegality before the contract is substantially performed.

⁴⁷[1945] 62 TLR 85

⁴⁸[1925] 2 KB 1.

⁴⁹[1866] LR 1 Ex 213

- ii. Where the parties are not in *pari delicto* (not equally to blame for the illegality), the less blameworthy party may recover.
- iii. If the owner of the money or asset establishes title thereto without relying upon the illegal contract. As was the case in **Amar Singh v. Kulubya**⁵⁰, where a piece of land had changed hands under an illegal; contract but the plaintiff established his title.

❖ TOPIC TWO: DISCHARGE OF A CONTRACT

▪ Introduction

- Once it has been made the contract is not infinite: it can be brought to an end by various ways. This is what is referred to as discharge of a contract. In more explicit terms discharge of a contract happens when the rights and obligations accrued under a contract are extinguished. There are, thus, various ways by which the contract can be discharged.

▪ Meaning of discharge of a contract

- In simple terms a discharge of a contract means a contract comes to an end and the parties thereto are relieved from their obligation under the contract. A contract is said to be discharged, when the obligation created by it ceases to bind the parties who are now freed from performance.

▪ Methods of discharging a contract

- A contract may be discharged in the following ways:-

1. **By Agreement (Part V of the LCA)**
2. **Performance**
3. **Breach**
4. **Impossibility or Doctrine of Frustration**
5. **Operation of Law.**

A) DISCHARGE BY PERFORMANCE.

- A contract becomes discharged through performance where both parties have fully performed their contractual obligations. If one party does not fully perform the contract

⁵⁰[1964] AC 142

this will amount to a breach of contract and the other party may have a claim for damages unless the contract has been frustrated.

- **The general rule of contract law is that** parties must **completely and precisely** perform what they have undertaken to do (promises) or not to do under a particular contract, unless there is a reason not to so perform it (**s. 37 (1) of the LCA**), “*The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or any other law*” If the party performs a contract in a different way from that by which he promised to perform, the contract will not be discharged. Performance must be complete and precise.
- In **Re Moore & Co. and Landauer & Co. (1921)**, the agreement was to deliver a consignment of canned fruits in cases of 30 tons each. The seller delivered instead mixed cases packed in 30 tins and others in 24 tins. The court held that: the buyer was entitled to reject the whole consignment. If it is rejected, a contract is not discharged.
- Death of the promisor does not excuse him from performance unless the contract itself suggests so; otherwise his representatives will have to finish up his obligations (see s. 37 (2) of the LCA). Only once a contract is performed correctly the parties are thus discharged from their liabilities under such contract.
- The act you promised under a contract must be done *at the right time and place* as agreed, short of that the contract of this kind is voidable at the option of the promisee and the promisor will not be discharged. (See s. 55 (1) (2) of the LCA).
- Medieval common law insisted that discharge by performance was only possible if parties had performed their obligations precisely and exactly. This is the common law **Doctrine of Precise and Exact** which is to the effect that parties must however their contractual obligations to the letter. Every aspect of the contract must be performed. It has been to observe that it is a fundamental principle of law that contractual obligations be performed precisely and exactly.
- The Doctrine of precisely and exact is exemplified by the decision in **Cutter V. Powell**⁵¹, Mr. Cutter agreed to assist Powell, a ship captain as a second matter on a journey from Jamaica to Liverpool, the ship sailed on August 2nd, and Cutter died on September 20th,

⁵¹[1795] EWHC KB J13

19 days before the ship was due at Liverpool. Mrs. Cutter sued for compensation for the work done by Mr. Cutter, it was held that nothing was payable by the defendant as Mr. Cutter had not performed the contract precisely and exactly. This case demonstrates that strict application of the doctrine of precise and exact occasion's unjust enrichment.

▪ **Discharge by Performance Is of two types**

1. **Time Performance**-The contract must be performed within the stipulated time, if the time of performance isn't stipulated the contract should be performed within the reasonable time. In **Panesar v. Poppet**, where the Defendant ordered furniture to be delivered on April 30th, However it was not ready by this date, the defendant extended the delivery date to may 10th, but the furniture was not ready, where up on he canceled the transaction, the furniture was delivered on may 12th, the defendant refused to take delivery and was sued. It was held that he was not bound to do so as time was of the essence (nature) of the contract and the plaintiff failed to perform.
2. **Precise performance**-This rule must be done exactly with any condition agreed up on.

❖ **EXCEPTIONS OF THE DOCTRINE PRECISE AND EXACT PERFORMANCE**

- Common Law admitted exceptions to the doctrine of precise and exact to mitigate its harshness. These are circumstances in which parties will be compensated for work done (*quantum meruit*) or discharged even though they have not performed precisely and exactly. This rule of Precise performance has the following exception;-
 - Substantial performance
 - Divisible/Several contracts
 - Performance prevented by the promisee
 - Acceptance of partial performance
 - Tender of performance
- **SUBSTANTIAL PERFORMANCE.**
 - If a party has substantially performed its part of the contract, it is entitled to payment for work done. Whether a contract is substantially performed is a question of fact.
 - An exception exists where a court is satisfied that substantial performance is present. The court may then award the contractually agreed price and deduct sums to reflect the amount not performed. If however, the performance is not held to amount to substantial

performance the claimant is entitled to nothing. Difficulty arises as to what amounts to substantial performance. There is no precise (exactly, correct) limit set down but is to be determined on the facts of individual cases.

- In **Mershides Mehta and Co. v. Baron Verhegen**,⁵² the defendant engaged the plaintiff to construct a house for him and the contractual price was payable by installments. After completion of the house, the defendant refused to pay the last installment on the ground that the house has some structural defects. The plaintiff sued. It was held that the plaintiff was entitled to the installment less the amount due defendant may likely to spend to correct the defect. This decision was based on the fact the plaintiff had substantially performed its part of the contract.
- **Bolton v. Mahadeva**⁵³, where the claimant installed central heating in the defendant's home. The agreed contract price was £560. The defendant was not happy with the work and refused to pay. Defects (weakness) in the work amounted to £174. The action by the claimant to enforce the payment failed since the court held that there was no substantial performance.
- **In Hoenig v. Isaacs**⁵⁴, The claimant agreed to decorate (make look more attractive) and furnish (provide a house with furniture) the defendant's flat for £750 payable by two installments and the balance on completion. The claimant completed the work but the defendant was unsatisfied some of the furnishings and refused to pay the all the final installment. The cost of the defects in the furniture came to £56. The claimant had substantially performed the contract and was therefore entitled to the contractually agreed price minus the cost of the defects.

▪ **PARTIAL PERFORMANCE IF ACCEPTED**

- If a party to a contract has expressly or by implication agreement to pay for partial performance, the party performing is entitled to payment for work done.
- In **Sumpter v. Hedges**⁵⁴, defendant engaged the plaintiff to construct 2 houses and stables at cost of £565. The plaintiff abandoned the house after putting up structures valued at £333, the defendant was compelled to complete the houses, subsequently, the

⁵² [1972] 1 WLR 1009

⁵³ [1952] 2 All ER 176

⁵⁴ (1898) 1 QB 673

plaintiff sued for compensation work done. It was held that he was not entitled to payment as the defendant had not expressly or by implication agreed to pay for partial performance.

▪ **PREVENTED PERFORMANCE.**

- If a party is ready and willing to perform its part of the contract is prevented from doing so or by the other or the others fault, such party is entitled to payment on *quantum meruit*.
- In **Planche v. Colburn**⁵⁵, the defendant engaged the plaintiff to write a book for him about himself for £100. After the plaintiff had done the initial research and written part of the book, the defendant discontinued the writing, the plaintiff sued. It was held that he was entitled to £50 for work done.

▪ **DIVISIBLE CONTRACTS.**

- Although there is a presumption that the contract ought to be viewed in its entirety, some contracts are by their nature divisible and performance of part thereof entitles the party to payment for work done. E.g. Contract of carriage of goods payable per tonne. The carrier is entitled to payment for the quantity carried but may be sued for not carrying the entire quantity.
- **Ritchie v. Atkinson**⁵⁶, where by contract the claimant agreed to carry a cargo of specified quantity of hemp (plant) and iron. The price agreed was £5 per ton for the hemp and 5 shillings per ton of iron. The claimant only carried part of the agreed quantity. The defendant argued the contract had not been fully performed and therefore no payment was due. It was held that the contract could be divided into separate parts as the parties had agreed a price per ton. The claimant was thus entitled to payment for the amount carried although the defendant was entitled to damages for non performance in relation to the amount not carried.

▪ **TENDER OF PERFORMANCE**

- This is an offer or attempt to do what is required under a contract or under the law. Where a party is willing to perform and tries to tender performance but the other party does not accept the performance then the party seeking to tender performance is

⁵⁵[1831] EWHC KB J56

⁵⁶(1808) 10 East 295

discharged from the contract and the non accepting party is liable in damages for non acceptance:

- **In Startup v MacDonald⁵⁷**, A contract stated that 10 tons of oil was to be delivered to the defendant within the last 14 days of March. The claimant delivered the oil at 8.30pm Saturday March 31st. The defendant refused to accept the delivery because of the lateness (delay) of the hour. The claimant had tendered performance within the agreed contractual period and was thus entitled to damages for non acceptance.

B) DISCHARGE BY AGREEMENT

- A contract may be discharged by agreement if the parties thereto expressly agree to discharge the contract. The mutual promises constitute consideration to support the discharge. Discharge by agreement justified on the premise that whatever is created by agreement may be extinguished by agreement.
- **Discharge by agreement may be bilateral or unilateral**

a) Bilateral Discharge

- If neither performs its part of the contract, the obligation are said to be executory and the discharge is bilateral as both parties agree not to perform. The mutual promises constitute consideration.

b) Unilateral Discharge

- If either of the parties has wholly or partially performed its part of the contract, the obligations are said to be executed and the discharge is unilateral. The party that has performed discharges the other from performance.
- **Unilateral discharge may take any of the following 3 forms:-**
- **Contract under Seal;** Such a contract binds the parties and does not require consideration.
- **Novation;** This is the substitution of the old contract with a new one. The old contract is thereby discharged.

⁵⁷(1843) 6 Mann & G 593

- **Accord and satisfaction;** This is the purchase of a release from an obligation whether contractual or otherwise not by performance but the provision of new or extra consideration which is accepted by the other party to discharge the contract. The party that has not performed provides the new consideration which is accepted by the other party. The new consideration is the satisfaction and its acceptance by the other party is accord.

- **Rules Of Discharge By Agreement**

- **Novation**-the substitution of a new contract in place of an old one. In contract law and business law, novation is the act of either: Replacing an obligation to perform with a new obligation; or adding an obligation to perform; or replacing a party to an agreement with a new party.
- **Conditions or elements of Novation;**-There must consent of all parties involved and There must a consideration for the extinguishment of all obligations.
- In **Settlementfund trustee v. Nurai**⁵⁸, N bought the bark of wattle and obtained the right to remove more within a certain period from land owned by S, during that period S sold to the appellant who had knowledge of the N- S agreement. The appellant resold the land to Y who had no knowledge of the right of N and therefore prevented him from taking the wattle. N argued that the appellant had been substituted for S by novation and were now liable for N's failure to secure the bark. The court while allowing N's claim on other grounds refused to recognize the transaction as one of novation.
- Lutta, J. A. said *“considered that the two vital elements to support novation were missing. Those elements were firstly, that there must be consent of all the parties involved and secondly, there must be consideration for the extinguishment of the old obligation. The outcome would have been different”*.
- **Waiver;**-A waiver is the voluntary relinquishment or surrender of some known right or privilege.
- In, **Hughes v. Metropolitan Railway**⁵⁹, a landlord gave a tenant 6 months notice to carry out repairs failure to do so would result in forfeiture (penalty for wrongdoing) of the

⁵⁸[1970] E.A 562

⁵⁹[1876-77]LR 2 App Cas 439

lease. The landlord and tenant then entered into negotiations for the tenant to purchase the freehold of the property. It was thought by both parties that a conveyance (transportation) of the property would take place. The tenant had not carried out the repairs as he believed he would be purchasing the freehold and the repairs required by the landlord were not essential to his use of the property. At the last minute negotiations broke down and the Landlord gave the tenant notice to quit for failure to carry out the repairs. It was held that the time limit imposed for carrying out the repairs was suspended during the negotiations.

▪ **Generally, There are two ways by which a contract can be discharged by agreement in one of the following ways:**

- i. By inclusion of a clause in the contract to that effect. For instance parties may agree that if either of them wishes to terminate the contract he may do so within an advance of a stipulated time. Take an example of leases.
- ii. If there is a new contract entered by the same parties which is to the effect that it discharges the former contract. This other contract must, however be supported by consideration. Discharge of this kind is called discharge by accord and satisfaction (accord refers to agreement and satisfaction refers to consideration)
 - See **D&C Builders Ltd v Rees [1966]**, Rees was under an obligation to pay some money to D&C for the construction work carried out by him. When Rees refused to pay D&C accepted less amount of the money owed in full satisfaction of the whole debt. Later D&C claimed the arrears and Rees relied on the agreement by D&C accepting the lesser some in satisfaction of the whole debt. The court held that: since the agreement was not supported by consideration D&C could claim the arrears.
 - See also s. 62 of the LCA, if the parties to a contract agree to i. substitute a new contract for it or ii. To rescind (cancel/annul) or iii. Alter (change) it the original contract need not be performed.

C) DISCHARGE BY FRUSTRATION OR IMPOSSIBILITY

- Medieval common law was based on the principle of absolute contractual obligations. Under this principle, parties to a contract must perform their obligations failing which damages are payable by the party in the default.
- In **Paradine v. Jane**⁶⁰, the plaintiff leased a piece of land to the defendant for purposes of farming, however, after the contract, a hostile German army invaded the country and occupied the region in which the land was situate. The defendant could not across the land or put it into any economic use. When sued for the lease charges, the defendant pleaded his inability to use the land.
- However, he was held liable since the contract had not provided that he would be discharged if it became impossible to use the land. This case demonstrates that the Common Law did not originally recognize the doctrine of frustration. The Doctrine is an exception to the principle of absolute contractual obligations
- A contract may be frustrated where there exists a change in circumstances, after the contract was made, which is not the fault of either of the parties, which renders the contract either impossible to perform or deprives the contract of its commercial purpose. Where a contract is found to be frustrated, each party is discharged from future obligations under the contract and neither party may sue for breach.
- The contract can be discharged if it is frustrated; by frustration it means it is physically impossible for a party under the contract to perform his obligations. It is physically impossible for a party to perform his obligations under a contract if there is an occurrence of an outside event not caused by any party and which renders the original agreement radically different from what it was agreed.
- **Section 56 (2) of the LCA incorporates the doctrine of frustration**; it reads “a contract to do an act, which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

⁶⁰[1647] EWHC KB J5

▪ **FRUSTRATION OF CONTRACT**

- A contract is said to be frustrated if performance of the obligation is rendered impossible, illegal or commercially useless by unforeseen or extraneous circumstances for which neither party is to blame. When a contract is frustrated, it terminates and the parties are discharged
- **The Doctrine of Frustration may be justified on various grounds:-**
 1. **Implied Term Theory,** It is argued that in every contract, there is an implied term that should such an event occur the parties will be discharged
 2. **Just and Reasonable solution Theory,** It is only fair that the parties will be discharged.
 3. **Disappearance of Foundation Theory,** It is argued that when a contract is frustrated, its foundation disappears.
 4. **Change of Obligation Theory,** It's argued that when a contract is frustrated, the obligations of the parties change hence the need to discharge the contract.

❖ **CIRCUMSTANCES IN WHICH A CONTRACT MAY BE FRUSTRATED**

- **The events which may possibly frustrate contract are as follows:-**

1. Destruction of Subject Matter

- If the subject matter of the contract is destroyed before performance and neither of the parties is to blame, the contract is frustrated. It must be evident that the subject matter was the foundation of the contract. The destruction need not be total but must affect the commercial characteristics of the subject matter.
- In **Taylor v. Caldwell**⁶¹, the defendant had hired the plaintiff's hall to conduct a musical concert at specified charges, before the day of the first concert, the hall was destroyed by fire and neither of the parties was to blame. In an action by the plaintiff to recover hiring charges, it was held that they were irrecoverable as the destruction of the hall frustrated the contract and thereby discharged the parties.

⁶¹[1863] 3 B & S 826

▪ **2. Non-occurrence of an event.**

- If a contract is based on a particular event or state of affairs to obtain at a particular time, its non-occurrence frustrating the contract and discharges the parties.
- However, for the contract to be frustrated, it must be evident that the event or state of affairs was the only foundation of the contract.
- In **Krell v. Henry**⁶², the defendant had hired a room in the plaintiff house to enable him view Royal Procession of the coronation of King Edward VII. However, the king was taken ill before the coronation and the ceremony was cancelled.
- It was held that the hiring charges were irrecoverable as the cancellation of the ceremony frustrated the contract and discharged the parties.
- However, if a contract has more than one foundation the disappearance of one does not frustrate it as the other is capable of performance. As was the case in **Herne Bay Steamboat Co. v. Hutton**.

▪ **3. Death or Permanent Incapacitation.**

- In contracts of personal service or performance e.g. Employment, the death or permanent incapacitation of a party frustrates the contract and discharges the parties as the obligations are not generally transferable.
- In a contract for personal services the death or illness of the parties who is to render the personal services discharges the contract, thus Pianist who contract to give a concert performance but fails on the date of the concert will be excused if too ill to perform. The contract is frustrated. The illness must be sufficiently serious to go to the roots of the contract.
- **Condor v Baron Knights**⁶³, A 16 year old agreed by contract to play the drums for the defendant band for 7 nights per week for 5 years. The claimant suffered a mental breakdown and was told by his doctor that he should not perform more than 4 nights per week. The band dismissed him. He brought a claim for wrongful

⁶²[1903] 2 KB 740

⁶³[1966] 1 WLR 87

dismissal.

Held: The claimant's action was unsuccessful as his medical condition made it impossible for him to perform his contractual obligations and the contract was thus frustrated.

▪ **4. Illegality.**

- If performance of contractual obligations becomes illegal by reason of change of law or otherwise the parties are discharged as there is no obligation to perform that which has become illegal.
- **Fibrosa Spolka v Fairbairn**⁶⁴, English company which manufactured textile machinery agreed by contract dated 12th July 1939 to supply some machines to a Polish company. The machines were to be delivered in 3-4 months. £1,600 was payable up front and the balance of £3,200 payable on delivery. The Polish company paid £1000 on 18th of July on account of the initial payment due. On 1st Sept Germany invaded Poland and on 3rd Sept Great Britain declared war on Germany. On 23rd of September Orders in Council made Poland an enemy territory making it illegal for British companies to trade with Poland. It was held that the contract was frustrated as it was no longer possible to perform the contract because of the supervening (interruption or change) illegality.

▪ **5. Government Intervention.**

- If a policy act or regulation make it impossible for a party to complete its contractual undertaking the contract is frustrated and the parties discharged e.g. refusal to grant a license as was the case in **Karachi Gas Company v. Isaaq**⁶⁵, where the government refused to grant an export license in respect of certain pipes to be exported to Karachi. When sued, the defendant relied on the government refusal to grant the license. However, it was held that the contract had not been made to obtain the license.
- A contract would be frustrate if a government takes possession of the subject matter or stops the transaction, as was the case in **Metropolitan Water Board V.**

⁶⁴[1943] AC 32

⁶⁵ [1965] EA 42

Dick Kerr and Co⁶⁶. In July 1914, the respondent entered into a contract to construct a dam for the appellant within 6 years subject to an extension. However, sometimes in early 1916, a government minister ordered the respondent to stop the contract and dispose of its equipment and the respondent complied. It was held that the minister's act frustrated the contract and thereby discharged the respondent.

6. Supervening Events.

- These are events that delay performance and thereby change the commercial characteristics of the contract. The change must be fundamental. As a general rule, additional expenses do not frustrate a contract; however, they may if they render the transaction commercially useless.
- In **Tsakiroqlou and Co. Ltd v. Noble Thorl GMBH**⁶⁷, the parties entered into a contract for the purchase of a large quantity of Groundnuts to be shipped from Port Sudan to Hamburg, the supplier contemplated using the Suez Canal but which by the time of performance had been closed as a consequence the groundnuts were not supplied. When sued, the supplier argued that the alternative route was too expensive and hence the contract had been frustrated. It was held the contract had not been frustrated as; - The additional expenses were recoverable from the buyer The, contract had no time limit and The longer route could not damaged the commercial characterizes of the groundnuts. The supplier was liable in damages.
- In **Victoria Industries Ltd V. Lamanbhai Brothers**⁶⁸, the parties contracted to buy and sell a quantity of corn maize to be shipped from Jinja to Mwanza and transported by rail to Dar-es-salam for export. The East Africa Railways and Harbours Corporation had agreed to ship and rail the maize to Dar. However, subsequently, the corporation decline to do so and the seller were unable to supplier the maize. When sued, the seller pleaded that the contract had been frustrated by the change of heart of the corporation as there was no alternative route to the coast.

⁶⁶[1918] AC 119

⁶⁷[1962] AC 93

⁶⁸[1961] E.A. 11

- It was held that the supplier was not liable as the contract had been frustrated. However, a contract is not frustrated if:-Either of the parties is to blame for the occurrence or non-occurrence of an event and the event is expressly provided for in the contract.

7. Specified Manner (Way, Method, Means)

- Where a contract cannot be performed in the specified manner, in Nicholl and Knight v Ashton, Eldridge & Co⁶⁹, By contract the parties agreed that a cargo of cotton seed was to be shipped from Egypt to England. The contract specified the ship, The Orlando, which was to carry the cargo. This ship became damaged and was in for repairs when the contract was due to be performed. **Held:** By naming the exactly ship which was to carry the cargo, the contract was frustrated as it was impossible for this ship to carry the cargo within the contractually agreed period.

❖ SITUATIONS WHERE CONTRACT WILL NOT BE FRASTRUATED

- More Difficult or Expensive to Perform, This is explained the case of Davis Contractors v Fareham UDC⁷⁰, where Davis Contractors agreed to build 78 houses for Fareham Council within 8 months for an agreed price of £85,000. Due to a shortage in skilled labor and material the contract took 22 months to complete and was much **more expensive than anticipated(expect, foreseen)**. Davis Contractors were paid the contractually agreed price but bought an action arguing for more money based on the fact that the contract had become frustrated and therefore they were entitled to further payment based on a quantum meruit basis. **It was held that the contract was not frustrated.** The fact that a contract becomes more difficult to perform or not so profitable is not sufficient to amount to frustration, it was still possible to perform the contract.
- The fault is of either of the Parties, this is sufficiently explained in the case of Maritime National Fish v Ocean Trawlers⁷¹, where the claimant owned five fishing vessels one of which was chartered (authority) to the defendants. The fishing vessels were all fitted with otter trawler nets. New legislation was introduced requiring licenses to be held by those using otter trawl nets. The claimant applied for five licenses but was only granted three. He had to name which vessels the license would be used on. He

⁶⁹[1901] 2 KB 126

⁷⁰[1956] AC 696

⁷¹[1935] AC 524

named his own vessels and excluded the vessel which the defendant was using. This meant that the defendant was unable to use the vessel for fishing.

- The claimant sued the defendant for the price of hire and the defendant in his defense stated the claimant had committed a breach in not providing a license so he was not obliged to pay for the cost of hire. The claimant argued there was no breach as the failure to provide a license was a frustrating event in that the decision to grant licenses rested with the secretary of state.
- **Held: The contract was not frustrated** since the claimant had chosen to keep the three licenses granted for himself rather than using one to fulfill his contractual obligation. He had therefore induced the frustrating event and was therefore in breach of contract.
- **If the Event Should Have Been Foreseen,** In **Walton Harvey Ltd v Walker & Homfrays Ltd**⁷², A hotel owner entered a contract with an advertising agency enabling them to put illuminated(brighten) advertisement on the roof of their hotel. The hotel owner was then compulsorily purchased by the Local Authority and demolished. The advertising agency sued for breach of contract and the hotel argued the contract had become frustrated. **The contract was not frustrated** as the hotel owners were aware that the Local Authority was looking to purchase the hotel at the time they entered the contract. They should have foreseen the fact that this could happen in the life time of the contract and made provision in the contract for such an eventuality.

- **EFFECTS/CONSEQUENCES OF FRUSTRATION**

- A frustrated contract is a void contract; thus frustration brings a contract to an end. **The general rule is that, once a contract is frustrated** i. All the sums paid by both parties before the frustration are recoverable ii. All the sums not yet paid should not be paid.
 - Section 65 of the LCA provides for the effects of frustration. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to i. **restore it** or ii. **Make compensation** for it to the person under the agreement from which he received it.

⁷²[1931] 1 Ch 274

- Provided that where a contract becomes void by reason of the provisions of subsection 2 of s, 56 and a party thereto incurred expenses before the time when that occurs in, or for the purposes of the performance of the contract, the court may if it considers it just i. **allow such part to retain the whole or any part of any such advantage as aforesaid received by him or** ii. **Discharge him wholly or in part from making compensation therefore or** iii. **May make an order that such party recover the whole or any part of any payments or other advantage which would have been due to him under the contract if it had not become void.**
- The advantage or the payment should not be greater than the expenses incurred by that part.

D) DISCHARGE BY BREACH OF CONTRACT.

- Breach of a contract does not discharge it; it gives the innocent party an opportunity to treat the contract as repudiated or as existing.
- If it treats the contract as existing, it is bound to honor its part however, if treats it as repudiated it is not bound to do so.
- Breach of a contract happens when one side repudiates (rejects) his liabilities under that contract. There are two types of breach classified according to the time the liabilities are repudiated. (a) if the repudiation is done at the time when performance of such liabilities is due it is referred to as **actual breach** and (b) if the repudiation is done at the time before performance of such liabilities is due it is referred to as **Anticipatory breach.**
- **Therefore, Breach of contract may be:- a)** Anticipatory b) Actual.

a) ANTICIPATORY BREACH OF CONTRACT.

- This is a situation where a party to a contract expressly or by implication intimates to the other in advance its intention not to perform on the date of performance. Evidence must clearly suggest breach of contract.
- **Hochster v De la Tour⁷³**, claimant agreed to be a courier (messenger) for the defendant for 3 months starting on 1st June 1852. On the 11th May the defendant wrote to the claimant stating he no longer wanted his services and refused to pay compensation. The

⁷³ (1853) 2 E & B 678

claimant obtained a service contract elsewhere but this was not to start until 4th July. The claimant brought an action on 22nd May for breach of contract. The defendant argued that there was no breach of contract on 22nd May as the contract was not due to start until 1st of June.

- **Held:** Where one party communicates their intention not to perform the contract, the innocent party need not wait until the breach has occurred before bringing their claim. They may sue immediately or they can choose to continue with the contract and wait for the breach to occur.
- **The innocent parties take any of the following steps:-**
 - a) **Sue in Damages,** The party must prove the anticipatory breach of the contracts well as its willingness to perform its part of the contract. In **Frost v. Knight**⁷⁴, where the defendant had contracted to marry the plaintiff after his father's death but married another person during the lifetime of the plaintiff's father, it was held that the defendant was liable in damages for anticipatory breach of the contract.
 - b) **Wait for the party to perform by the due date,** The innocent party may opt to afford the other party a chance to perform its part of the contract, however, if the contract is in the meantime frustrated, the innocent party loses all remedies as was the case in **Avery v. Bowden**⁷⁵, By contract the claimant was to carry cargo for the defendant. The claimant arrived early to collect the cargo and the defendant told them to wait as they did not have any cargo for them to carry and would not have by the agreed date. The claimant decided to wait around in the hope that the defendant would be able to supply some cargo. However, before the date the cargo was supposed to be shipped the Crimean war broke out which meant the contract became frustrated. **Held;-**The claimant therefore lost their right to sue for breach. Had they brought their action immediately they would have had a valid claim.
 - c) **Sue for the Decree of Specific Performance,** The innocent party may apply for the equitable remedy of specific performance to compel the other party to for the equitable remedy of specific performance to compel the other party to perform its part of the

⁷⁴(1872) LR 7 Ex 111, 41 LJEx 78

⁷⁵(1856) 5 E & B 714

contract and the same may be granted if circumstances justify as was the case in **Hasham Jiwa v. Zenab**, where parties entered into a contract for the sale of a piece of land but the defendant repudiated the same before the date of completion and the plaintiff applied for specific performance. The court granted the order and the defendant were compelled to perform.

b) ACTUAL BREACH OF CONTRACT.

- This entails the non-performance of a party's obligation on the due date or tendering defective performance.
- The innocent party may treat the contract as repudiated if the breach is fundamental to the contract as was the case in **Poussard v Spiers**⁷⁶, where Madame Poussard entered a contract to perform as an opera singer for three months. She became ill five days before the opening night and was not able to perform the first four nights. Spiers then replaced her with another opera singer.
- **Held:** Madame Poussard was in breach of condition and Spiers were entitled to end the contract. She missed the opening night which was the most important performance as all the critics and publicity would be based on this night.
- In **Bettini v Gye**⁷⁷, Bettini agreed by contract to perform as an opera singer for a three month period. He became ill and missed 6 days of rehearsals. The employer sacked him and replaced him with another opera singer.
- **Held:** Bettini was in breach of warranty and therefore the employer was not entitled to end the contract. Missing the rehearsals did not go to the root of the contract.

▪ **Effects of breach**

- A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule established by a long line of authorities is that the right of a party to treat a contract as discharged arises only in three situations.
- The breaches which give the innocent party the option of terminating the contract are: (a) **Renunciation** is expressed where a party refuses to perform his obligations under the contract. Example in **Hochster v De la Tour (1853) 2 E & B 678.** (b) **Breach of**

⁷⁶(1876) 1 QBD 410

⁷⁷(1876) QBD 183

condition, the second repudiator breach occurs where the party in default has committed a breach of condition. Thus, for example, in **Poussard v Spiers (1876) 1 QBD 410 (c)** **Fundamental breaches**, The third repudiatory breach is where the party in breach has committed a serious (or fundamental) breach of an innominate term or totally fails to perform the contract. A repudiatory breach does not automatically bring the contract to an end. The innocent party has two options: He may treat the contract as discharged and bring an action for damages for breach of contract immediately. This is what occurred in, for example, in *Hochster v De La Tour*. He may elect to treat the contract as still valid, complete his side of the bargain and then sue for pay.

- See the consequences of breach of contract at s. 73-s. 75 of the LCA

E) DISCHARGE BY OPERATION OF LAW.

- Discharge of the operation of law entails the discharge of parties from their contractual obligations at the instance of the law. The parties are freed by law. Such a discharge may take place in the event of:-
 1. **Merger**, This is the incorporation of the items of a simple contract into a subsequent written agreement between the parties. The simple contract is discharged by the operation of the law.
 2. **Death**, In contract of personal service or performance, the death of a party discharges the contract.
 3. **Lapse of Time**, If time is of the essence of the contract and a party fails to perform within the prescribed time, the contract is terminated as was the case in **Panesar v. Popat**.

❖ TOPIC THREE: REMEDIES FOR BREACH OF CONTRACT

- When a contract is breached, the innocent party's contractual rights are violated and the party has a cause of action known as breach of contract which entitles it to a remedy.
- Remedies for breach of contracts are:-**Common Law and Equitable**. Whereas **Common Law remedies comprise damages only**, **Equitable remedies include; Injunction, Rescission, Specific performance, Account, Tracing, Quantum Meruit, Winding Up and Appointment of Receiver.**

- Before 1873, Common Law remedies could only be availed by the Common Law Courts while equitable remedies were only available in the Lord Chancellors Courts. The two categories of remedies differ in that whereas **common law remedies are awarded “as right” equitable remedies are awarded as discretionary.**

- **DAMAGES**

- These are legal remedies available for breach of contract; also Damages are an award of money to compensate the innocent party (plaintiff). The primary purpose of damages in contract law is to place the injured party (plaintiff) in the position they would have been in had the contract been performed.
- In **Addis v Gramophone**⁷⁸, The claimant was employed as a manager by the defendant. The defendant in breach of contract dispensed with his services and replaced him with a new manager. The claimant brought an action for breach of contract claiming that the level of damages should reflect the circumstances in which he was dismissed damaged his reputation and ability to find suitable employment.
- **Held:** That he is to be paid adequate (satisfactory) compensation in money for the loss of that which he would have received had his contract been kept, and no more. Contract law seeks to put the parties in the position they would have been in had the contract been performed. He was therefore limited to claiming wages and loss of commission during the contractually agreed notice period. There was no right to exemplary (perfect) damages or damage to reputation (opinions) in contract claims. Such claims would have to be actioned in the law of tort.
- Damages for breach of contract may **nominal or substantial.**
- **Nominal Damages,** This is an amount awarded by the court to show that a party's rights have been violated but no loss was occasioned or the party was unable to prove loss.
- In **Brace v. Calder**⁷⁹, B was employed by partnership for two years. After six months two partners died leaving two serving partners, a changing partnership having taken place these by law, operated to dismiss all employees the two remaining partners offered B re-

⁷⁸ [1909] AC 488

⁷⁹ [1895]

employment on the previous term but B denied re-employment and sued for wrongful dismissal.

- **Held:** Although the dismissal was irregular and was technical a breach of contract, B was entitled to nominal damages only.
- **Substantial Damages,** This is an amount by the court as the actual loss suffered or as the amount the court is willing to recognize as direct consequences of the breach of the contract. (See the case of *Addis v Gramophone* [1909] AC 488)

❖ **RULES ON THE ASSESSMENT AND PAYMENT OF DAMAGES**

- **Remoteness (Faraway) Of Damages**-Under the rules of remoteness of damage in contract law set out in **Hadley v Baxendale**, a claimant may only recover losses which may reasonably be considered as arising naturally from the breach or those which may reasonably be supposed to be in the contemplation of the parties at the time the contract was made.
- **The loss or damage suffered by the plaintiff must be proved, the plaintiff must show that but for the defendant's breach the loss would not have been occasioned.** There must be a *nexus* or link between the breach of contract and the plaintiff's loss failing which the damages are said to be too remote and therefore irrecoverable.
- In ***Hadley v. Baxendale***⁸⁰, the plaintiff owned a mill whose crankshaft was broken and required replacement the following day, however there was undue delay by the defendant during which time the mill remained closed. The plaintiff sued for loss of profit. It was held that the defendant was not liable for the lost profit as the same could not be traced to the delay in the delivery of the crankshaft. The plaintiff's loss was too remote and irrecoverable.
- This case is authority to the proposition that the defendant is only liable for such loss or damage as is reasonably foreseeable in the ordinary course of events.
- **If a party has special knowledge in relation to the contract but fails to act on it and the other party suffers loss, the party is liable for the loss**, as was the case in

⁸⁰ [1854] EWHC Exch J70

Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd⁸¹, where the plaintiff Company wanted to expand its business as well as take advantage of certain lucrative. To do so it required a large boiler which the defendant company agreed to deliver in June. The plaintiff had by letter notified the defendant the urgency with which the boiler was required. The boiler was not delivered until November by which time the plaintiff company lost money from the contract. In an action against the defendant for the loss, it was held that the defendant was liable.

- **Mitigation of Loss (make something bad less serious or painful)**
- This principle is to the effect that when a breach of a contract occurs, it is the duty of the innocent party to take reasonable steps to reduce the loss it is likely to suffer from the breach .This duty is imposed upon the innocent party by law.
- If the party fails to mitigate its loss the amount by which loss ought to have been reduced is irrecoverable. In **Harris v.Edmonds**, it was held that where the charterer of a ship failed to provide cargo in breach of contract, the ship captain was bound to accept cargo from other person's at competitive rates. Whether or not the innocent party has acted reasonably in mitigating its loss is a question of fact.
- In **Musa Hassan v. Hunt and Another**, the appellant had contracted to buy all the milk produced by the respondent for one year. On one occasion, the appellate refused to take delivery of the milk on the ground that it was unfit for human consumption; the respondent proved that it was fit for human consumption. After the refusal the respondent converted the milk to ghee and casein which fetched a lower price than milk. The appellant argued that the respondent had not acted reasonably in mitigating the loss. It was held that the respondent had reasonably.
- **Liquidated damages and penalties (Also referred to as liquidated and ascertained damages)**
- Liquidated damages-Are damages whose amount the parties designate during the formation of a contract for the injured party to collect as compensation upon a specific breach (e.g., late performance).

⁸¹ [1949] 2 K.B 528

- Parties to a contract may beforehand specify the amount payable to the innocent party in the event of a breach. The sum specified may be: Liquidated damages or a Penalty
- In *Wallis v. Smith*, it was held that liquidated damages are an amount which represents almost the actual loss occasioned and is awarded irrespective of the actual loss.
- If the sum has no relation to the actual loss, but is intended to compel performance or it is a sum to be forfeited by the party in default it is regarded as a **penalty**. A penalty is generally extravagant it covers but does not access loss. Penalties cannot be awarded by the court, the court assess the amount payable by applying the rules of assessment of damages.
- Whether the sum is liquidated damages or penalties depends on the intention of the parties. In making the determination, court are guided by certain presumptions and rules.

❖ **Presumptions or rules for distinguishing liquidated damages and penalties**

- According to Lord Dunedin in *Dunlop Pneumatic Tyre Co.Ltd v. New Garage and Motor Co.* The following presumptions assist in the determination:
 1. If the sum specified by the parties is extravagant and unconscionable it is deemed to be a penalty.
 2. If the sum payable for the non-payment of another is greater it is deemed to be a penalty.
 3. If a single lump sum is payable on the occurrence of one or several or all events, some of which occasion serious or minor loss it is deemed to be a penalty.
 4. If the sum is payable on the occurrence of only one event it is deemed to be liquidated damages.
 5. The categorization of the sum by the parties as “liquidated damages” or “Penalty” ‘is not binding the court.
 6. The fact that a precise pre-estimation of loss is problematic does not necessarily mean that the sum specified is a penalty.

▪ **EQUITABLE REMEDIES (DISCRETIONAL)**

1. SPECIFIC PERFORMANCE

- The decree of specific performance is a court order which compels a party to perform its contractual obligations as previously agreed. It compels a party to discharge its contractual obligation.
- Is an order of a court which requires a party to perform a specific act, usually what is stated in a contract.
- **Specific performance** is an equitable remedy available at the discretion (care) of the judge. It is an order by the court requiring one party to perform their contractual obligation. Whilst it is often said that contracts are made to be performed and parties should be held to their contractual obligations, the courts are often reluctant (unwilling) to order a party to unwillingly perform the contract and **specific performance is only available in limited circumstances**.
- In considering whether to grant specific performance the courts look to where damages inadequate (unsatisfactory) remedy, the type of contract and whether equity requires such an order.

▪ **CONDITIONS OF SPECIFIC PERFORMANCE**

- **Where damages are inadequate (unsatisfactory) remedy**, if the claimant could adequately be compensated by an award of damages for the breach of contract, the courts are unlikely to order specific performance.
- In **Nutbrown v Thornton**⁸², The claimant entered a contract to purchase some machinery from the defendant. The defendant, in breach of contract, refused to deliver(bring) the machines. The defendant was the only manufacturer of this type of machinery. The claimant brought an action for breach of contract seeking specific performance of the contract.
- **Held: Specific performance of the contract was granted**. Whilst an award of damages would ordinarily be given for non-delivery of goods, damages would be inadequate (unsatisfactory) to compensate the claimant because he would not be able to buy the machines elsewhere.

⁸²[1805] 10 Ves 159

- **The type of contract**, Specific performance is most commonly ordered for contracts for the sale of land, the courts are unlikely to order specific performance for contracts for personal services and things which are ordinary.
- In **Cohen v Roche**⁸³, The claimant owned a furniture shop and entered an agreement to purchase a quantity of Hepplewhite chairs to sell in his shop. The defendant, in breach of contract, refused to deliver (bring) the chairs. The claimant sued for breach of contract and sought specific performance for delivery of the chairs.
- **Held: The court refused to grant specific performance.** The claimant would be adequately compensated by an award of damages. The chairs were considered 'ordinary articles of commerce and of no special value or interest'. The claimant could have purchased the chairs elsewhere.
- **Clean hands**:-He who comes to equity must come with clean hands. The innocent Party must approach the court free from blame as he who comes to equity must do so with clean hands. Evidence of mistake misrepresentation or duress disentitles the party the remedy
- In **Walters's v Morgan**⁸⁴, The defendant purchased some land. The claimant wished to mine the land and produced a draft lease (rent) and pressured the defendant into signing the lease before he realized the value of the land. Once the defendant had discovered the true value, he refused to allow the defendant to mine the land. The claimant sued for breach of contract and sought specific performance. The defendant sought to have the contract rescinded (revoked) for misrepresentation.
- **Held:** There was no misrepresentation since the claimant had not said anything to mislead the defendant as to the value of the land. Silence cannot amount to misrepresentation. However, the court refused an order of specific performance as the claimant had sought to take advantage of the defendant's ignorance by rushing him into signing the lease.

⁸³[1927] 1 KB 169

⁸⁴[1861] 3 DF & J 718

- **Delay (Laches)**, the innocent party must seek judicial redress at the earliest possible instance as delay defects equity. The remedy is not available if the innocent party has slept on its rights for too long. **Laches** is unreasonable delay pursuing a right or claim, which may result in its dismissal. In **Mzee bin Ally v. Allybhoy Nurbhoy**, The remedy was refused on the ground that he (plaintiff) had slept on his right.
- **Hardship to the dependent**, Specific performance will not be decreed if it is likely to subject the defendant to undue hardship as he who seeks equity must do equity and equality is equity.
- In **Patel v Ali**⁸⁵, Mr and Mrs Patel contracted to sell their house to Mr Ali. Completion of the sale was delayed by Mr Patel's bankruptcy. At the time that they agreed to sell, Mrs Patel was healthy and had one child. However, during the delay, Mrs Patel contracted bone cancer and had to have a leg amputated (cut off). She also had to further children and she became heavily reliant (Dependant) on friends and neighbors to assist her with day to day activities. Mr Ali sought specific performance of the contract.
- **Held: Specific performance was denied** on the grounds that it would cause hardship on Mrs Patel if she was required to move out. Whilst the hardship was not the fault of Mr Ali, Goulding J held that it would be 'hardship amounting to injustice' if specific performance was ordered.
- **Generally a court of law may decline to decree Specific Performance if;**
 - The contract is one of personal service e.g. employment.
 - The contract is revocable by the party against whom an order of specific performance is sought.
 - The contract is specifically enforceable in part only. Where the court cannot grant specific performance of the contract as a whole, it will not interfere.
 - The contract is incapable of being performed i.e. impossibility. Courts are reluctant to make ineffectual orders.
 - Performance of the contract requires constant supervision.

⁸⁵[1984] 1 All ER 978

- The decree is likely to subject the defendant to severe or undue hardship.
- The contract in question was obtained by unfair means.

2. INJUNCTION

- This is a court order which either restrains a party from doing or continuing to do a particular thing or compels it to undo what it has wrongfully done. It is an equitable remedy whose award is discretionary and may be granted in circumstance in which, Monetary compensation is inadequate and it is necessary to maintain the *status quo*.

▪ TYPES OF INJUNCTION

- They may be classified as:- **Prohibitory and Mandatory, Interim or temporary and permanent**
- **Prohibitory injunction**, This is a court order which restrains a party from doing or continuing to do a particular thing. **Mandatory injunction**, It is a court order which compels a party to put right what it has wrongfully done. It is restorative in character, **Temporal or Interim Injunction**; it is court order whose legal effect is restricted to a specified duration on the expiration of which it lapses. However, it may be extended by the court on application by the plaintiff but can also be lifted on application of the defendant. **Permanent or Perpetual Injunction**, this is a court order whose legal effect is permanent.
- **Lumley v. Wagne**⁸⁶, The defendant Johanna Wagner, an opera singer, was engaged by the claimant to perform in his theater for a period of three months. There was a term in the contract preventing her from singing for anyone else for the duration of the contract. She was then approached by the manager of Covent Garden Theater, Frederick Gye, who offered her more money to sing for him. The claimant sought an injunction preventing her from singing at Covent Garden Theater. The defendant argued that to allow an injunction would in effect amount to specific performance of the contract in circumstances where specific performance would not be available.
- **Held: The injunction was granted** despite it having the effect of forcing the defendant to sing for the claimant.

⁸⁶(1852) 42 ER 687

- **Page One Records v Britton**⁸⁷, The claimant record company, owned by Larry Page, was the manager of the pop group, The Troggs. By contract, The Troggs agreed that Page One Records would be their manager and sole agent for 5 years in return for 20% of their profits. By a term of the contract The Troggs agreed not to appoint anyone else for the duration. However, their relationship with Larry Page broke down and The Troggs wrote a letter to the claimant seeking to terminate the contract. The claimant sought an injunction to prevent The Troggs appointing a new manager.
- **Held:** The injunction was refused. To grant an injunction would be akin to ordering specific performance of a contract for personal services since the effect of the injunction would be to compel The Troggs to continue to employ the claimant or not work at all.
- Whether or not an injunction is awarded is the court's discretion, in light of which the court takes into consideration certain principles e.g. delay, clean hands, hardship to defendant etc.
- However for the order to be granted, the plaintiff must prove that:- It has a *Prima Facie* case with a high probability of success and If the order is not granted the plaintiff is likely to suffer irreparable injury.

3. RESCISSION.

- The essence of this remedy is to restore the parties to the position they were before the contract. It is an equitable remedy whose award is discretionary. The remedy may be availed whenever a contract is vitiated by misrepresentation.
- **However the right to rescind a contract is lost in various ways:** -
 1. **Delay:** A contract cannot be rescinded if a party has slept on its right for too long as “delay defeats equity”. In **Leaf v. International Galleries Ltd.**, where the plaintiff purported to rescind a contract after 5 years, it was held that the remedy was not available on account of delay.
 2. **Affirmation:** A party loses the right to rescind a contract if it expressly or by implication accepts the contract.

⁸⁷[1968] 1 WLR 157

3. **Third party rights:** A contract cannot be rescinded after 3yrs party rights have arisen under it, as this would interfere with the rights of a person who was not privy to the original contract.
4. **Restitution in interim not possible:** Rescission is not available if the parties cannot be restored to the position they were before the contract. E.g. if one of the parties is a company and it has gone into liquidation.

4. QUANTUM MERUIT

- This literally means “**as much as is earned or deserved**”. This is compensation for work done. The plaintiff is paid for the proportion of the task completed.
- The remedy has its origins in equity and its award is discretionary. It may be granted where:-
 1. The contract does not specify the amount payable.
 2. The contract is divisible
 3. The contract is substantially performed
 4. Partial performance is accepted
 5. A party is prevented from completing its undertaking.
- In **Planche v Colburn⁸⁸**, The claimant agreed to write a book on costume (a set of clothes) and armour (the metal coverings formerly worn to protect the body in battle) for the defendant as part of a series called 'the Juvenile Library'. The agreed contract price was £100 to be payable on completion. The claimant commenced (began) writing and had completed a great deal of it when the defendant canceled the series. The defendant refused to pay the claimant despite his undertaking and the fact that the claimant was still willing to complete. The claimant brought an action to enforce payment.
- **Held:-** The claimant was entitled to recover £50 because the defendant had prevented the performance.

⁸⁸[1831] EWHC KB J56

- In **Sumpter v Hedges**⁸⁹, The claimant agreed to build two houses and stables for the defendant. It was agreed that £565 would be payable on completion. The claimant commenced (began) performance and then ran out of money and was unable to complete. He had performed just over half of the contract. The defendant completed the work himself. The claimant sought to recover £333 representing the value of the work he had completed. He argued that in completing the work himself, the defendant had thereby accepted partial performance and prevented the claimant from completing the contract.
- **Held:** The claimant's action failed. The court held that the defendant had no choice but to accept partial performance as he was left with a half completed house on his land.

END

WABILLAH TAWFIQ

ALL THE BEST

⁸⁹[1898]1 QB 673