TASLIM ELIAS CHAMBER NOTE SERIES

LAW OF CONTRACT I

Taslim Elias Chamber presents the first edition of its note series and casebook. The note series is divided into five separate documents for the five different courses in 200 level first semester. Then there is a casebook which combines cases from the five different courses in a general document. It is expected that using this note series, along with the regular textbooks and attending lectures should give the student an upper hand in their studies.

May the odds be ever in your favour.

Aliu Funmilola

Academic Secretary

Taslim Elias Chambers

For the 2016/2017 Executives

Recommended Texts

1. Sagay, The Nigerian Law of Contract
2. Yerokun Olusegun, Modern Law of Contract

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INTRODUCTION TO THE LAW OF CONTRACT

A contract is a voluntary arrangement between two or more parties that is enforceable at law as a binding legal agreement. It is an agreement which is legally recognizable as affecting the rights of the parties involved. A contract arises when the parties agree that there is an agreement. Not all contracts are actually enforceable by law, for example, social and domestic agreements are not binding in law. There can be no contract between more than two parties. If it appears that there are more than two parties involved, then either group of parties belong to one side, or there is more than one contract involved. For example, in tripartite agreements, there are usually two contracts. So also in contracts of guarantee where there's one contract between the lender and the guarantor, and the other contract between the lender and the debtor whose debt is being guaranteed. Distinguishing factor between a contract and a mere agreement is the badge of enforceability a contract possesses.

Points to note about Contracts

1. **Contract is consensual in nature**: A contract is all about 'consensus ad idem' that is, a meeting of the minds. There must be mutual agreement between the two parties involved. If the parties do not agree, or the agreement is tainted with some vitiating element such as fraud or illegality, the contract will be unenforceable.
2. **Freedom of Contract**: Contracts are based on the will theory of law. Parties associated with the contract made agreements as per their own terms and will. You are free to determine what you want, who to contract with and on what terms.
3. **Principle of objective interpretation**: To determine whether or not there is a contract is not dependent on the subjective intentions of the partoes but what they have manifested physically in writing, orally or by conduct. In general, what matters today is not what meaning a party actually intended to convey by his words or conduct, but what meaning a reasonable person in the other party's position would have understood him to be conveying. This is known as the process of 'objective interpretation'.
4. **Sanctity of contract**: Sanctity of contract refers to the principle that the parties to a contract, having duly entered into it, must honour their obligations under it. Failure to perform obligations attracts legal consequences.

CLASSIFICATION OF CONTRACTS

1. Formal and Simple Contracts

A formal contract is one whose terms are embodied in a document which is then signed, sealed and delivered. It is a contract made by deed, that is, a contract that is made under seal. It must be in writing or may be typed on paper or parchment. Initially, sealing meant imprinting in wax, the executing party's coat of arms and each seal was distinctive and peculiar to the owner. But now seals are commonly affixed beforehand and they consist of small red and round adhesive wafers

attached to the document. Thus, with the seal now having a merely a symbolic value, the signature has become the vital component of the deed which gives it authenticity and validity. Also, previously, delivery was only effective if the deed was actually handed over by the executing party to the other party. But since 1867, in **Xenos v. Wickham**, a deed may be delivered even though retained in the custody of the grantor all that is needed is acts or words showing that it is intended to be executed. Formal contracts have solemnity of the court, ie, it is enforceable even in the absence of consideration (something given in return for a promise). It is binding without consideration.

All contracts other than formal contracts are simple contracts, and they may be written or oral. They are not in any special form and are dependent on the presence of consideration.

2. Express and Implied Contract

A contract is express when the terms of contract are clearly stated either orally or in writing. An express contract is the most common contract type. In this type of contract, all elements are specifically stated. This can be written or done orally. Either way, offer, acceptance and consideration must bind the parties together legally. And both parties must clearly understand the terms and conditions each is agreeing to. An oral contract works the same way. In an oral contract, like negotiating the price of a new car, the parties agree on a set price, a monthly payment schedule if applicable and any warranties or guaranties included in the offer. Once acceptance is made and consideration is exchanged, the contract for the vehicle is binding and enforceable. As long as both parties uphold their promise, the car cannot be returned at a later date, nor can the salesman request the car back from the new owner.

On the other hand, an implied contract is one where the terms are not expressly stated and the court will construe the existence of a contract from the conduct of the parties. For example, a passenger boards a bus without any dialogue between him and the driver but yet, to all reasonable men, his action implies that he will pay his fare provided the bus driver carries him safely to his destination. Thus in **Brogden v. Metropolitan Railway Co**, the defendant was held bound by a contract between him and the plaintiff in spite of the fact that the defendant failed to sign the document containing the contract. It was established in evidence that both parties have been acting on the terms of the unsigned contract over a reasonable period of time. See also, **Attorney General of Kaduna v. Victor Bassey & Ors.**

3. Bilateral and Unilateral Contracts

A bilateral contract comprises an exchange of promises, the offeror promises to do something in exchange for the offeree's promise to do something else in return, ie, a promise for a promise. For example, in a contract to build a house, the contractor is obliged to build the house and the other party is obliged to give payment. There

is no performance yet by either party but a contract has come into existence. The consideration here is executor (the mutual promises).

In a unilateral contract, one party makes a promise and leaves the other party free to perform the terms if he pleases. The consideration here is executory and it consists of actual performance in return for a promise. The famous case of Carlill v. Carbolic Smoke Ball Co is a good example of a unilateral contract. There the defendant company made an advertisement that it would pay £100 to any person who used their smoke ball for a minimum of two weeks and still contracted influenza. The plaintiff did this and still caught influenza. The company was held liable for breach of contract as it was a unilateral contract and there was no need to notify the defendant of acceptance. Acceptance here was the performance of the terms of the contract and this also constituted the consideration.

ELEMENTS OF A CONTRACT

The elements of a valid contract are offer, acceptance, consideration, and an intention to enter into legal relations. **Niki Tobi JCA** (as he then was) adds a fifth element called capacity to contract in the case of **Orient Bank v. Bilante International**. These elements must be present for an agreement to be enforceable.

OFFER

An offer can be defined as a definite, precise or clear promise made by one party known as the offeror to the other party known as the offeree, with the intention that it shall become binding as soon as it is accepted by the party to whom it is addressed. An offer is an expression of willingness to contract on certain terms. It must be made with the intention that it will become binding upon acceptance. The nature of an offer is displayed in two cases involving the same defendant, Manchester City Council. The Council decided to sell houses that it owned to sitting tenants. In two cases, the claimants entered into agreements with the Council. The Council then resolved not to sell housing unless it was contractually bound to do so. In these two cases the question arose as to whether or not the Council had entered into a contract. In one case, **Storer v Manchester City Council** (1974), the Court of Appeal found that there was a binding contract. The Council had sent Storer a communication that they intended would be binding upon his acceptance. All Storer had to do to bind himself to the later sale was to sign the document and return it. In contrast, however, in **Gibson v Manchester City Council** (1979), the Council sent Gibson a document which asked him to make a formal invitation to buy and stated that the Council 'may be prepared to sell' the house to him. Gibson signed the document and returned it. The House of Lords held that a contract had not been concluded because the Council had not made an offer capable of being accepted.

Rules of Offer.

i. It must be definite, certain and unequivocal, leaving no room for specuation as to what it really entails. For example if A asks B, "Will you buy one of my cars?" and B answers "Yes", there is no actual offer here as terms such as price and type of car have not been discussed. A is merely showing his intention to sell a car. Assuming A had asked B if he will buy his Nissan car for half a million naira, this would be regarded as an actual definite offer.

ii. An offer must be communicated to the other party. There is no acceptance in ignorance of an offer.

iii. There is no limit to the number of people an offer can be made to. An offer could be made to the whole world, as stated in Carlill v. Carbolic Smoke Ball. Carbolic Smoke Ball Co. (D) manufactured and sold The Carbolic Smoke Ball. The company placed ads in various newspapers offering a reward of 100 pounds to any person who used the smoke ball three times per day as directed and contracted

influenza, colds, or any other disease. After seeing the ad Carlill purchased a ball and used it as directed. Carlill contracted influenza and made a claim for the reward. Carbolic Smoke Ball refused to pay and Carlill sued for damages arising from breach of contract. The defendant argued that it was impossible to contract with the whole world but it was held that it was not a contract but rather an offer capable of being made to the whole world and which will become binding as soon as one person performs the requirements of the offer.

iv. The offer must be made by a capable person (To be discussed more in 'Capacity to Contract').

See: - **Brogden v. Metropolitan Railway Co.**

- **Major Oni v. Communications Associates**
- **Nigerian National Supply Company v. Agricor Incorporation of USA**
- **Alfotrin v. AG Federation**

INVITATION TO TREAT

This is a puzzling term. An invitation to treat is an indication of a willingness to conduct business on certain terms. It is an invitation to make an offer or to commence negotiations. It is a preliminary move which may induce a contract but it is not an offer. Rather, it is an action which incites an offer and is not capable of being accepted. Once there is an invitation to treat by one party, the other party is expected to make an offer to the party inviting the offer. *See* **Berliet Nigeria v. Francis** where Mr. Francis, the Benin branch manager received letter from the Managing Director in Lagos that 10% of the company's shares will be owned by workers and they should come and buy. Mr. Francis applied for N2,500 per share and issued the receipt for N5,000. The shares were not given and he brought an action against the company for breach of contract. The High Court ruled in his favour but on appeal to the Court of Appeal, the decision was was reversed as it was held that the Managing Director's letter was not an offer but an invitation to treat and the payment of N5,000 was an offer which the company could either accept or reject.

There are numerous examples of situations involving invitation to treat:

1. **Auctions**: A request for a bid is not an offer but an invitation to treat. As held in Payne v. Cave, the bid is the offer and acceptance occurs when the auctioneer's hammer falls. An advert that an auction sale will hold at a certain venue does not amount to a definite promise to hold it. *See* **Harris v. Nickerson**. Concerning auctions subject to a reserved price, in **Adebaje v. Conde**, it was held that even where a reserve price has been fixed by the vendor, as long as the purchaser has no notice of this, and since the auctioneer has implied authority to sell without reserve, a sale below the reserve price is binding on the vendor and the latter cannot as against the buyer enforce a limitation of the auctioneer's ostensible authority not made known to the buyer. Referential bids also are not valid bids; a

bidder makes a bid of a specific sum and adds that, alternatively, he bids a specific sum above any other bid higher than his. In **Harvela Investment v. Royal Trust Company of Canada**, The Royal Trust Company invited bids for its shares and then Harvela Investments made a bid of $2,175,000 while Sir Leonard Outerbridge bid $2,100,000 or $100,000 in excess of any other bids the company got. The shares were thn given to him and Harvela brought an action challenging the validity of the bid. Leonard Outerbridge's bid was held to be a referential bid which was invalid as it was a bid dependent for its definition on the bids of others. It was thus an invalid acceptance.

2. **Display of goods, in shelves, shops etc**: This is an invitation to treat not an offer. The customer is the one who makes an offer by picking up objects and taking them to the clerk who then accepts the customer's offer and consideration of money. Classic illustration of this is **Pharmaceutical Society of Great Britain v. Boots Cash Chemist** where the chemist shop operated a self-service system and a customer took drug with poisions required to be sold under the supervision of a chemist. The plaintiffs argued that the defendants breached the Pharmacy & Poisons Act as the display of the goods was an offer and taking the drugs was an acceptance by any customer. The appeal was dismissed as it was held that display of goods was not an offer that could either be accepted or rejected and there was no breach as contract could only be completed at the desk. In **Fisher v. Bell**, a shop keeper displayed a flick-knife in his shop and was charged with the offence of offering a flick-knife for sale, contrary to a particular statute which aimed at controlling sale of offensive weapons. The charge was dismissed because the display of a flick-knife in a shop window was held not to constitute an offer but rather an invitation to treat. See also, Laskey v. Economy Grocery Stores

3. **Advertisement**: In a unilateral contract, advertisements are offers as there is no further negotiation required because it involves performance of an act in response to a conditional promise. On the other hand, advertisements in bilateral contracts are invitations to treat subject to further negotiations. In **Patridge v. Crittendon**, the defendant put an advert in a newspaper saying he had certain wild live birds for sale and was charged for unlawfully offering sale of wild live birds contrary to an existing statute. It was held not to be an offer but merely an invitation to treat.

4. **Invitation to Tender**: Tenders are invitations for offers from interested parties and not offers themselves. See **Spencer v. Harding** where The defendants sent out circulars stating their intention to receive tenders for stock in trade. The plaintiff sent the highest tender but was not given the property. He argued that he had accepted the offer and was also the highest tender. The advert/circular was not an offer but rather an invitation to treat and they never stated that they were going to sell to the highest tender.

5. **Buses, trains, and taxis**: Take a bus for instance. Who makes the offer? The bus driver or the passenger? The answer to this question may largely depend on the

facts and circumstances of each case. One should ask oneself, at what point in time did it become practically impossible to withdraw from the transaction? That must be the moment of acceptance. The passenger's entry into the bus can thus be regarded as the acceptance and the offer must have been made by the bus when it stopped at the bus stop. The passenger, by waiting at the bus stop, thus made an inviting an offer from the bus, ie, an invitation to treat.

ACCEPTANCE

This is the absolute and unqualified expression of assent to the terms of the offer. For a contract to be formed there must be an acceptance of the offer. The acceptance must be an agreement to each of the terms of the offer. It is sometimes said that the acceptance must be a 'mirror image' of the offer. According to **Niki Tobi JCA** in **Orient Bank v. Bilante**, an acceptance of an offer is the reciprocal act or action of the offeree to the offer in which he indicates his agreement to the terms of the offer as conveyed to him by the offeror. Acceptance ma y be by conduct, words or documents. For an acceptance to be valid, there must be some kind of external manifestation either by words or conduct on the part of the offeree. Mental or internal acceptance is not enough; mere intention to accept or silence cant amount to acceptance. In **Felthouse v. Bindley**, the plaintiff made a written offer to buy his nephew's horse adding that if he did not receive a reply from the nephew, he would assume that he had accepted the offer. The nephew intended to accept the offer and requested the auctioneer to reserve the horse during the auction. However the auctioneer forgot to do this and sold the horse. The plaintiff sued the auctioneer for conversion but it was held that at the time the horse was sold, there had been no valid acceptance by the nephew and although he intended to accept, he had not communicated his intention to the plaintiff.

INVALID TYPES OF ACCEPTANCE

Some situations appear to have an acceptance of an offer but then turn out to be invalid and inoperative for some reasons.

1. **Counter Offer:** An acceptance must correspond to the exact terms of the offer. Any qualification or change in the terms of an offer will constitute a counter offer which destroys the original offer. A counter offer is thus a fresh offer which in turn can be accepted or rejected by the former offeror. Niki Tobi, in **Orient Bank v. Bilante**, stated that the assent to the offer must be absolute and unqualified. If the acceptance is conditional, or a new term is introduced by the offeree, this is a counter offer and cannot give rise to a binding agreement. Locus classicus of this is **Hyde v. Wrench**. The defendant offered to sell an estate for 1000 pounds on June 6. On June 8, the plaintiff replied with an offer to buy the estate for 950 pounds to which the defendant rejected on June 27. On June 29, the plaintiff purported to accept the initial offer of 1000 pounds but the defendant rejected and the plaintiff brought action for specific performance. It was held that the plaintiff's offer of 950

pounds was indeed a counter offer which destroyed the initial offer by the defendant. There was no contract and thus no obligations between the parties.
A counter offer reverses the roles, that is, the offeree becomes the offeror and vice versa. A counter offer impliedly rejects the original offer as soon as it states a new term. In **Innih v. Ferado**, the appellant wrote a letter to the respondent company offering sell certain assets for N3,500,00 and specifically provided that payment should be made within the next three days. The respondent requested the period of payment be extended to three weeks. On hearing this the appellants immediately sold the assets to a third party and the respondent brought suit against the appellant. It was held that there was no contract as the respondents request for extension of period of payment was regarded as a counter offer capable of acceptance or rejection by the appellants. The appellants validly rejected this counter offer by their conduct in selling to a third party. The Court of Appeal stated that for an acceptance to be operative, it must be plain, unequivocal, unconditional, without variance of any sort between it and the offer and must be communicated to the offeror without reasonable delay. A conditional assent like the ones made by the respondent in the above case does not constitute acceptance.
See – **T.O.S Benson v. Nigerian Agip Oil**

- **Okubule v. Oyagbola**
- **Oni v. Communication Associates**
- **Council of Yaba College of Technology v. Nigerlec Contractors**

2. Conditional acceptance – acceptance 'subject to contract' and 'provisional' acceptance: A conditional acceptance is not a valid or binding acceptance. Any acceptance which is made subject to a condition cannot create a binding contract until that condition has been met and fulfilled. The practice is to incorporate terms containing the expression "subject to contract". The effect of these words is to postpone liability of the parties until a formal document is drawn up and signed. Thus in **Winn v. Bull**, the defendant agreed to take a lease of a house subject to the preparation and approval of a formal contract. It was held that in the absence of a formal contract the agreement was not binding. Though, the case of Law v. Jones gave impression that an agreement can be binding even though its 'subject to contract', it has been overruled by **Tiverton Estates v. Wearwell**. The clear meaning is that any agreement subject to contract is a non-binding agreement. In **UBA v. Tejumola & Sons Ltd**, the defendant offered to take a lease of the plaintiff's building for a period of 15 years at N215 per square metre. The letter was boldly headed 'subject to contract'. The plaintiff 'accepted' this offer and specifically stated tht the lease would commence on May 1st 1982. The defendant thereafter requested for several expensive renovations to the building which were done by the plaintiff. The defendant later refused to carry on with the agreement and the plaintiff sued. It was held that there was not yet a contract between the two parties. See also **Odufunade v. Ososami.**

On the other hand, provisional agreements confer binding nature on any document it appears in. It confers a binding effect on an agreement in which it appears. See **Branca v. Cobarro**, **AG Federation v. Awojoodu.**

3. **Cross offers**: This is a situation involving two identical offers sent by two parties to each other and they cross 'en route'. When this happens, there is no contract as there is the absence of consensus ad idem ie meeting of minds. See **Tinn v. Hoffman & Co** where the plaintiff and defendant both wrote letters to each other offering to buy and sell at 800 tons per shilling. It was held that there was no contract and there were just two simultaneous offers. There was an absence of consensus ad idem, that is meeting of the minds.

4. **Acceptance in ignorance of offer**: The general rule is one cannot accept an offer he was unaware of. Here the principle of consensus ad idem comes to play. This rule is identifiable with reward cases. An act which merely coincides with the requirements contained in the offer is not an acceptance of the offer if the person performing it was not aware of the existence of the offer at the time of performance. In Gibbons v. Proctor, somebody who was unaware of offer of reward was held entitled to the reward after performing the requirements of the offer. This appears to be a departure from the principle that one cannot accept an offer he is unaware of. The decision has been criticized to be wrong and the correct application of the rule is in **Fitch v. Snedaker** where it was held that a reward could not be claimed by one who did not know it had been offered. This rule seem to have been taken to the extreme in **R v. Clarke** where the police offered a reward for 1,000 pounds for information leading to the arrest and conviction of the murderers of two policemen and a pardon to such an informant if he was an accomplice. The plaintiff was arrested and while in custody gave information leading to the arrest of the wanted murderers and he gave evidence at trial which led to their conviction. He brought an action to claim the reward when the police authorities refused to give it to him and it was held that he was not entitled to receive the reward. Though he knew about the offer, he gave information to clear himself from a charge of murder not to earn the reward. He was therefore no better than one who was ignorant of the reward. This decision has also been criticized to be wrong and a departure from the older and generally accepted decision of **Williams v. Carawardine** where there was an offer of reward of 30 pounds to anyone who gave information leading to the conviction of murderers of a Walter carve. The plaintiff knew of the offer, believed that she did not have long to live and in order to ease her conscience, she gave a statement that led to conviction of the murderer and she was thus entitled to receive the reward. The most important thing is that she was aware of the offer. **R v. Clarke** is thus wrongly decided.

5. **Acceptance of tender**: Advertisement for tenders from contractors and suppliers are not offers but invitations to treat. The tenders from the contractors and suppliers are the offers and acceptance occurs when the advertiser selects one or more tenders and communicates this to the supplier. This issue arose for consideration in **Great Northern Railway v. Witham**

COMMUNICATION OF ACCEPTANCE

The general rule is that acceptance must be communicated for it to be valid. The acceptance must be able to be objectively determined, in other words, it must be externally manifested either in writing, conduct or words. However, like usual, there are exceptions to every rule. In certain circumstances, the offeror may impliedly waive notification of acceptance. This usually happens in unilateral contracts for example in **Carlill v. Carbolic Smoke Ball**, the defendants argued that there was no contract since the plaintiff had not notified them of her acceptance. It was held that the offeror may waive notice and in that case, the company had indicated that it would be desirable for anyone to accept the offer without communicating notice of his acceptance. Advertisement cases carry the implication that notification of acceptance is not required and it was sufficient for one to perform the requirements of the offer.

Moment of acceptance

At what point does acceptance actually occur? It depends on each case. In **Entores v. Miles Far East Coporation**, an offer was made by telex in London to the defendants in Amsterdam and the defendants replied by telex. When a dispute arose, the plaintiffs brought an action in England and the defendant challenged the jurisdiction of the English court. Jurisdiction depended on where the acceptance took place. The acceptance was sent by Telex in Amsterdam but was not effective until received in England and this gave the English courts competent jurisdiction. As we can see, it is when the offeror has received the reply of the offeree that the contract has been concluded. Where the two parties are *inter-praesentes*, that is, face to face, acceptance occurs when the offeror hears the reply of the offeree. In a contract by telephone, its only when the offeror hears the offeree's acceptance. For telegrams, it is when the offeror receives the telegram. Basically, acceptance becomes effective not merely when communicated but when actually received by the offeror.

On place where a contract is concluded, take **Anon Lodge v. Mercantile Bank** for instance. The appellant applied for a loan from the Port Harcourt branch of the respondent bank. The application was approved by the respondent which then required the appellant to sign a document which inter alia contained an undertaking that all proceeds of the hotel business for which the loan was taken will be paid into the appellant's account in the respondent's bank at Port Harcourt.

When the appellant defaulted in repaying the loan, the respondent brought an action to recover the debt in Calabar, where the headquarters was located. The appellant challenged the jurisdiction of the Calabar High Court because the loan contract was made in Port Harcourt and the appellant also resided in Port Harcourt. By the High Court Law of Cross River State (Calabar), a court 's jurisdiction in contractual cases is dependent on

- Where the contract was made
- Where a breach of contract occurred
- Where the contract is to be performed
- Where the defendant (appellant here) resides

The Court of Appeal held that these criteria were satisfied by Port Harcourt and not Calabar therefore it was the high court of Port Harcourt which had jurisdiction over the matter in question. The contract here was concluded in Port Harcourt, was to be performed in PH, and the appellant resided in PH.

Where method of acceptance is prescribed

An offeror is allowed to prescribe a particular mode of acceptance and when this happens, the offeree must comply with such requirements. But it is safe to say that any mode either as fast as or faster than that prescribed by the offeror is sufficient. In **Tinn v. Hoffman**, acceptance was requested by post but the judge stated that it does not mean that the reply must be exclusively by post and any other means of communication not later than a post is acceptable. See Manchester Diocesan Council of Education v. Commercial and General Investments Ltd.

In Nigeria, section 109(1) contract law of Anambra State reuires compulsory compliance with the prescribed mode of acceptance and any other thing contrary to it will invalidate the acceptance. In **Orient Bank v. Bilante International**, the respondent applied for a loan of N18m and the appellant made a formal offer of loan to him telling him to confirm the agreement by signing and returning a duplicate copy of the letter. Rather, the appellant wrote another letter with some new terms and the court held that in addition to being a counter offer, the appellant's reply was invalid for failure to comply with the required mode of acceptance.

Where the offeree uses another mode of acceptance, he would bear the risk of his acceptance not arriving as fast as it would have been if he followed the prescribed mode. In **Eliason v. Henshaw**, the offeree replied by post instead of by wagon as requested by the offeror. The letter was delayed and it arrived late. It was held that the offeror was entitled to reject the acceptance.

Where the method of acceptance is not prescribed, the form to be used by the offeree will depend on the nature of the offer and the surrounding circumstances. An oral offer will thus require an oral acceptance. If the offer is by some instantaneous method, reply should as well be instantaneous. Acceptance is not effective until it reaches the offeror. The only exception is acceptance by post.

Acceptance by post

In acceptance by post, a contract comes into existence immediately its posted. It does not need to reach the offeror before it is deemed to be effective. The locus classicus of this rule is **Adams v. Lindsell**. The defendants were wool merchants and offered to sell wool to the plaintiffs in a letter posted on September 2 but due to their misdirection, the plaintiffs did not receive the letter until September 5. The plaintiffs posted their acceptance letter that same day which was then received on September 9. If the offer had been properly directed, an answer ought to have been received by September 7. Having not received a reply by September 8, the defendants sold the wool to a third party and the plaintiff sued for breach of contract to which the defendant argued that there was no contract until acceptance had been received. But it was held that in a contract concluded by post, a contract comes into existence once the letter of acceptance is posted. The contract thus became concluded on September 5, when the plaintiffs posted their reply. If an offeror had to wait to receive the acceptance, no contract will ever be completed by post as the process might go on *ad infinitum*, that is, endlessly.

This reasoning has been regarded as unsatisfactory and was attempted to be justified in **Household Fire Insurance v. Grant**. In that case, the defendant applied for shares in the plaintiff's company and the plaintiff posted a reply accepting the offer but the letter was lost in the post. The company later went into liquidation and the defendant, who did not know that his offer had been accepted and that he was a shareholder was called upon to pay for his shares. It was held that he was liable to pay for the following reasons

- Post office is the common agent of both parties so once a letter i posted, there's a technical acceptance communicated to the offeror
- With posting, a contract is complete as there is no other act necessary to bring it into existence.
- An offeror is free to make it a term that there is no valid acceptance until it is received
- Any other rule will lead to fraud and delay in commercial transactions as the offeree must wait to hear that the offeror has received the acceptance
- It is the most convenient rule.

But despite these reasons, the rule is still criticized for being arbitrary and unfair. Some decisions have departed from the posting rule and acceptance is no longer complete on posting. In **Rhode Island Tools Co v. US**, the plaintiff offered to supply bolts to the defendants and they posted an acceptance. However, the plaintiffs realized that due to a miscalculation, they had quoted too low a price and sent a telegram withdrawing their offer which reached the defendants before the letter of acceptance was delivered. It was held that the offer had been validly withdrawn before the acceptance, therefore the posting rule did not apply. See also Dick v. US.

Professor Uche argued based on **Section 3 of Postal Office Act 1958,** a statutory provision in Nigeria, that an acceptance by post is not effective until delivered. The section states that where an article is sent by post, delivery takes effect when delivered to the house or office or agent or addressee. However professor Sagay rightly argues that the section relied on by Uche was only to determine liability of post agent for loss or damage to postal article, and not as a basis for setting a rule for the formation of a contract. Thus in the absence of contrary authority, the rule in **Adams v. Lindsell** still applies in Nigeria as it does in England.

Exceptions to the rule in Adams v. Lindsell

The posting rule does not apply in the following rules:

a. Where the terms of the offer expressly or impliedly indicates that the acceptance must reach the offeror.

In **Holwell Securities v. Hughes**, the defendant granted a six month option to the plaintiffs to purchase a certain property. The offer stipulated that the option was to be exercised by notice in writing to the defendant. The plaintiff sent his written acceptance by post but this was never received by the defendant. The court held that the option had not been validly exercised as acceptance was to take effect from the time the letter reached the defendant not at the time of posting. See also **Afolabi v. Polymera Industries**.

b. Where the application of the rule would cause inconvenience and absurdity.

c. Where the letter of acceptance is wrongly addressed or inadequately stamped

d. Where the letter was not properly posted. See Re London and Northern Jones ex p. Jones

Revocation of Acceptance

Acceptance can be revoked at any time before it reaches the offeror. But what about postal cases? The rule is that once an acceptance is posted, the contract is concluded so will revocation constitute a breach of contract? There is no English or Nigerian authority on this point. In the Scottish case of **Countess of Dunmore v. Alexander**, Alexander, through one Lady Agnew, made an offer to the countess. The countess wrote to Lady Agnew accepting the letter and she forwarded it to Alexander. However, the next day, the countess wrote another letter to Lady Agnew cancelling the acceptance and she forwarded this letter through express mail. Alexander received both letters together. It was held that her acceptance was validly revoked since the letter cancelling the acceptance did not arrive later than the letter of acceptance. It should be noted that this is a Scottish case and it reduces the persuasive effect of the decision.

Termination of an Offer

An offer can be terminated in 4 ways:

1. By revocation
2. By lapse of time
3. By death of offeror or offeree
4. By rejection.

Revocation

An offer can be revoked at any time before acceptance and this is so even where the offeror promises to keep the offer open for a specific period of time; he is allowed to revoke the offer before the expiration of that period of time provided there has been no sufficient consideration by the offeree. Thus in **Routledge v. Grant**, the defendant offered to buy a house from the plaintiff and he gave the latter six weeks to accept. The defendant withdrew the offer after three weeks though the plaintiff purported to accept it at the end of the six weeks. It was held that there was no contract because the purported acceptance was invalid. There was nothing to accept.

However the position would have been different had there been some kind of consideration from the offeree. For example, in **Mountford v. Scott**, Scott granted Mountford an option to purchase his (Scott's) house for 1,000 pounds exercisable within 6 months, in return for a payment of 1 pound to him by Mountford. Within the six month period and before the option was exercised, Scott purported to withdraw the option and it was held that the purported withdrawal was void. Even though Mountford's consideration (1 pound) was small, the offer was irrevocable.

Revocation must be communicated to the offeree for it to be valid. This equally applies to postal revocation. Thus unlike postal acceptance, a letter of revocation is effective only when it reaches the offeree. So if the offeree posts an acceptance before he receives the letter of revocation, there is still a valid contract even if the letter of revocation was posted before the letter of acceptance. See **Byrne v. Van Tien Hoven.**

In this connection, the postal revocation is effective when it is delivered to the offeree's address. It is immaterial whether the letter is opened or not.

Finally the communication of the revocation need not come from the offeror himself, it is still valid if it comes from another reliable source before acceptance. In **Dickinson v. Dodds**, the defendant offered to sell some houses to the plaintiff giving the plaintiff two days to accept. A day later, Berry told the plaintiff that the defendant was negotiating to sell the houses to a third party, Alan. Shortly after that, the plaintiff purported to accept the offer however the defendant had already sold the houses to Alan before the plaintiff's acceptance. It was held that once a person to whom an offer to sell property is told that the property has been sold to someone else, it is too late to accept the offer.

Revocation of unilateral contracts

Recall that in unilateral contracts, acceptance is in form of performance of requirements of an offer. Thus acceptance isn't complete until performance is completed. So how do you tackle a situation where a unilateral offer is made to which performance of the requirements have started, and the offeror wishes to revoke the offer?

There are 4 views on this

a. No acceptance until performance is completed (but this is the traditional view which is probably no longer valid in light of contrary decisions)

b. Unilateral contracts are presumed to contain an implied promise of non-revocation of offer once the offeree has started performance; the consideration for this promise is the commencement of performance.

c. Where the offeror revokes offer after the offeree has commenced performance, the latter is entitled to *quantum meruit*, that is, reward based on stage of performance reached.

d. Once performance commences, acceptance is deemed to have been made and although the offeree is not entitled to the reward until completion of performance, the offeror no longer has the power to revoke.

In **Errington v. Errington**, A father-in-law purchased a house for his son and daughter-in-law to live in. The house was put in the father's name alone. He paid the deposit as a wedding gift and promised the couple that if they paid the mortgage instalments, the father would transfer the house to them. The father then became ill and died. The mother inherited the house. After the father's death the son went to live with his mother but the wife refused to live with the mother and continued to pay the mortgage instalments. The mother brought an action to remove the wife from the house. The wife was held to be entitled to remain in the house. The father had made the couple a unilateral offer. The wife was in course of performing the acceptance of the offer by continuing to meet the mortgage payments. The promise was a unilateral offer and could not be revoked once performance starts but it would cease to bind on him if it was left unperformed which they had not done in this case. There was an implied promise of non-revocation that they could continue living in that house as long as they kept up with the instalment payments.

Lapse of time

An offer may be terminated if there is no acceptance after an appropriate lapse of time. If the offeror stipulates a time limit for acceptance and it is not accepted or rejected within such time, the offer will lapse. In the absence of such time limit, the offer will lapse after reasonable time. What constitutes reasonable time depends on the nature of circumstances. Thus an offer to sell perishable goods, or goods subject to frequent price fluctuations will lapse after a short time. In **Ramsgate Victoria Hotel v. Montifiore**, the defendant offered to buy shares in the plaintiff's company on June 8 and he received no answer till November 23 when he was informed that

the shares had been allotted to him. He rejected them validly as it was held that the defendants offer had lapsed by reason of the company's delay in accepting it.

Death

Where the offeree knows about the death of an offeror before acceptance, he cannot validly accept the offer. However, if he has no notice of the death, whether acceptance can be valid depends on the nature of the offer. If it is one that does not require personal performance and can be performed from the offeror's estate, then the offer will not lapse. In **Bradbury v. Morgan**, JM Leigh requested Bradbury & Co to give credit to HJ Leigh, his brother. JM Leigh guaranteed his brother's account to the extent of £100. Bradbury thereafter credited HJ Leigh in the usual way of their business. JM Leigh died but Bradbury, having no notice or knowledge of his death, continued to supply HJ Leigh with goods on credit. JM Leigh's executors (Morgan) refused to pay, arguing that they were not liable as the debts were contracted and incurred after the death of JM Leigh and not in his lifetime. Judgment was given for the plaintiffs, Bradbury. It was held that since it was a contract not requiring personal performance from Leigh, it could be performed from his estate.

For the death of an offeree, an offer lapses if the offeree dies before he accepts it. See **Kennedy v. Thomassen.**

Rejection

An offer is terminated if rejected by the offeree. A purported acceptance which modifies or varies the offer (counter-offer) is also a rejection of the offer. Rejection of offer must be communicated to the offeror. Thus if the offeree changes his mind before the notice of rejection reaches the offeror, he can still validly accept provided his acceptance reaches the offeror before his rejection. Thus if A makes an offer to B and B posts a letter to A rejecting the offer, if B changes his mind, he can still accept the offer if he conveys the acceptance by faster means such as telegram or telephone. In situations like this, it is generally believed that the posting rule does not apply. Acceptance after initial rejection must reach the offeror before it can take effect. For example, if A rejects B's offer and then changes his mind to accept it, he cannot, by principle of the postal acceptance rule that it becomes a contract once posted, post a letter of acceptance after initially rejecting it and claim that there is a contract. His notice of acceptance must reach the offeror before it can take effect.

CONSIDERATION

An agreement cannot be enforced unless there is some sort of consideration furnished by either or both parties. There must be an exchange, either of promises or of promise for an act. Either way, both parties must give and benefit something. The basic feature of the doctrine of consideration is reciprocity. It is only contracts made under seal that do not require the salient item of consideration. But in contracts not under seal, only a party who has furnished consideration can bring an action to enforce such agreement. A gratuitous promise not made under seal cannot constitute an enforceable contract. Consideration gives a contract enforceability.

Consideration was defined by **Lush J.** In **Currie v. Misa: "A valuable consideration in the eye of the law may consist either in some right, interest, benefit or profit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."** Consideration does not only consist of profit by one party but also exists where the other party abandons some legal right or limits his legal promise as an inducement for the promise of the first. To sustain an action, the plaintiff must prove either a benefit conferred by him on the defendant or some kind of detriment he suffered in the execution or implementation of the contract. He has to show that he gave something in return for a promise which was made to him and that may either be an act or promise.

RULES OF CONSIDERATION

Moral obligation does not constitute consideration

Thus the fact that A owes B moral obligation does not constitute consideration moving from B to entitle B to enforce a promise made by A towards discharging the moral obligation. The attempt to equate moral obligation was first made by Lord Mansfield after he became Chief Justice in 1756, After his death, this notion was done away with in the 1840 case of **Eastwood v. Kenyon**. In that case, Eastwood was a guardian to Mrs. Kenyon when she was young and had spent a considerable amount of money on her in improving her estate and bringing her up. When she reached maturity, she promised to reimburse him for his expenses and her husband promised the same. When they failed to do so, the plaintiff sued them and relied on the moral obligation of the defendant to fulfil her promise. It was held that moral obligation could not constitute moral obligation.

Echoes of Lord Mansfield's discarded doctrine arose in the Nigerian case of **Barclays Bank v. Sulaiman** where it was held that natural love and affection between an uncle and a nephew was sufficient consideration to give the nephew a good title to property transferred by the uncle to the nephew without any other consideration on the part of the nephew. The correct position of the law has however been affirmed in the case of **Faloughi v. Faloughi** where it was held that natural love and affection cannot constitute sufficient consideration in the eye of the law because it was not capable of estimation in terms of value.

Consideration must move from the promisee.

Alternative to saying that only a person who has furnished consideration can bring an action to enforce a promise given by the defendant in that contract. Conversely, a party that did not furnish any consideration cannot bring an action to enforce such promise. Absence of consideration can take various forms:

a. Total failure of consideration (gratuitous promise by defendant)

A gratuitous promise is like a gift given freely without expecting anything in return, that is, a person makes a promise without requiring some kind of promise or act in return from the promisee. If the promise is a continuous one like a promise to pay school fees for a person's university education, the promisor can stop at anytime without liability. Unless such promise is in form of a formal contract, it cannot be enforced in the absence of consideration.

L.A. Cardoso v. The Executives of Late J.A Doherty. In this case, The plaintiff mortgaged his properties to Doherty. On his failure to repay the loans, ownership passed to Doherty who proceeded to sell them but did not sell the property where the plaintiff lived promising to allow him stay there throughout his lifetime. When Doherty died, his executors reiterated the promise but later tried to sell it and the plaintiff sought an injunction preventing the sale. It was held that the plaintiff furnished no consideration for the promise that he could reside in the property for life. A gratuitous promise is unenforceable in a court of law.

b. Total failure of consideration (non performance by plaintiff)

There is no contract if a party has either undertaken no obligations or has not performed his own part of the agreement, in a situation in which the second party's (defendant) liability can only arise after such performance by the first party. In such a situation, any action brought by the first party to enforce the promise of the second party will fail for want of consideration. See

- **Miles v. New Zealand Alford Estate Co**
- **Bank of West Africa v. Fagboyegun;**
- **Ikomi v. Bank of West Africa**

c. Consideration furnished by third party

Any action based on consideration furnished by another party will necessary fail. Only a party to a contract can of course, bring action to enforce it. This underlies the whole doctrine of privity of contract. Any consideration thus furnished by another party will necessary fail. If the plaintiff beongs to an organization that furnished consideration, then he must sue in representative capacity and not in his own name on his own behalf. See **Gbadamosi v. Mbadiwe.**

d. Claim in excess of benefit provided for in an agreement

A contract always specifies the benefit or consideration each party is to furnish. See **UTC v. Hauri**

Consideration may be executory or executed

Executory consideration involves mutual promises being made; the offeree makes a promise in return for the offeror's promise. Each promise is the consideration for the other. This kind of consideration often happens in commercial transaction where delivery of goods and payment occurs at a later date. "One promise is the consideration for the other because each may have his action against the other for non-performance." – **Holt C.J.** The parties are bound before the actual performance which will take place at a later date. Both parties are liable here.

Executed consideration involves consideration in form of an act being performed in return for a promise. Here, the performance for a promise is the consideration. This often happens in reward cases e.g. Carlill v. Carbolic Smoke Ball Company. Here, liability is outstanding on one side, that is, the offeror.

Past Consideration is not valid consideration

Past consideration is not valid consideration. Any further promise subsequently made by any of the parties without fresh consideration furnished for it is not enforceable. Such promise is given upon past consideration. It often happens that such promise was induced by the previous bargain or transaction between the two parties. Nevertheless, if such promise is not met with fresh consideration from the other party, it remains unenforceable. For the promisee's consideration is 'past', having been exhausted in the previous transaction. For example, if A pays for the hospitak bills of B, and B then promises to refund him but does not, A cannot bring an action to enforce such promise because his performance (paying of the bills) would be regarded as past consideration. It happened before the subsequent promise was made by B. To sustain an action, A must show he has provided fresh consideration for B's promise to refund him.

ReMcArdle: A testator left his house to children and one of the wives of the children spent a lot of money making improvements on the house. The other children jointly agreed to pay her back but such promise was held not to be binding as the plaintiff had completed the works before such promise was made. Her consideration was therefore past. In **Akenzua II, Oba of Benin v. Benin Divisional Council,** the plaintiff was the president of the defendant council and they asked him to use his influence in persuading ATPC to release forest areas to them, which they did. The plaintiff requested that one of the areas be given to him for his exclusive exploitation and the defendant agreed but later withdrew consent. The Oba's act in getting the forest areas took place before the resolution granting him excessive use of them. His act was thus past consideration as he had furnished no fresh consideration for the later promise by the council. See **AG Bendel State v. Okwumabua**.

In **Lampleigh v. Brathwait,** This is an exception to the rule of past consideration using the doctrine of implied assumpsit. Here, Brathwait had killed a man

unlawfully and had asked Lampleigh to obtain a pardon from the King. Lampleigh's request was successful and Brathwait promised to pay him 100 pounds for his services but he did not do so. Lampleigh sued and while it was argued that Lampleigh's act of obtaining the pardon constituted past consideration, it was held that the consideration was performed at an earlier request and there was an implied assumption that a fee would be paid. The consideration was thus held to be valid.

Exceptions to the rule of past consideration

i. Doctrine of implied assumpsit.

This applies where the act was performed at the promisor's request and later, a promise is made to pay for such act. See **Lampleigh v. Braithwait** where Braithwait killed someone and asked Lampleigh to get a free pardon for him to which he did. Brathwait then promised to pay him but did not. It was held that the prior request and then the subsequent promise were to be treated as the same. This reasoning was questioned in **Kennedy v. Brown**.

However the modern position on this is well illustrated in **Re Casey's Patents, Stewart v. Casey** where at that time, the defendant rendered his services to the owner of the patent, it was understood that it was to be paid for. There was an implied promise to pay in the original prior request. This principle was confirmed in **Pau On v. Lau Yin Long,** to include requirement of prior request in **Lampleigh's case**. For one to successfully rely on the doctrine of implied assumpsit, the following conditions must be met:

- He must have performed the original act at promisor's request
- It must have been clearly understood or implied that when the act was done, he would be rewarded
- Eventual promise of payment after the act was done must be one which, had it been made prior to the act, would be enforceable

ii. Bill of Exchange Act, 1882

Section 27(1): A valuable consideration of bill can be

- Any consideration sufficient to support a simple contract
- An antecedent debt or authority

iii. Limitation Act, 1980

Section 27(5): A statute barred debt could be revived by fresh acknowledgement of debt by the offeror.

Adequacy of Consideration

In absence of fraud, duress, misrepresentation, the courts wont question the adequacy of consideration. Once the consideration is something of value in the eyes of the law, even the courts cannot determine whether its adequate or not.

- **African Petroleum v.Owodunni**

- Thomas v. Thomas

Sufficiency of Consideration

While consideration need not be adequate, it must however be sufficient. It must be worthy of being exchanged in return for the defendant's promise. If the consideration is too vague, unascertainable, useless or meaningless, then it is insufficient, and therefore invalid consideration. Sufficiency will be discussed under three broad headings

i. Something of value in the eye of the law

Though value is subjective, it must be something of value in the eye of the law. What is deemed valuable in the eye of the law? JC Smith feels consideration does not have to be of economic value. All that is necessary is that the defendant should request for something in return for his promise and if he gets what he has asked for, then this is his consideration. If A makes a promise and then requests 3 chocolate wrappers that have no economic value, then there is a contract if B accepts and provides him with those 3 wrappers. A has gotten what he asked for (benefit) and B has parted with something he might have kept (detriment).

- Consideration does not have to be of economic value
- Once it is clear that it is what the defendant requested, it is valuable consideration
- It may be quite useless to either parties
- It must be something owned by the party giving it out or at least something which he is entitled to.

In contrast, GH Treitel states that consideration must be of economic value. Recall in Falughi v. Faloughi, Treitel's view was that natural love and affection was not sufficient consideration as they could not be estimated in monetary value.

Bainbridge v. Firmstone: The defendant promised to return two boilers in good condition if allowed to weigh them. Any benefit to the promisor or detriment to the promisee is sufficient consideration. Bainbridge parted with something he could have kept and that is sufficient consideration. In **White v. Bluet**: A father lent his son some money and then died. Mr White sued the son to recover the money but the son claimed that the dad told him that he should not repay the money if the son stopped complaining about the way the father did not share his property equally. There was no valid consideration as the father was entitled to share his property anyhow. The sun gave nothing in return for the father's promise. It is not sufficient consideration when you give up something you're not really entitled to.

Chappel v. Nestle: Nestle ran a sales promotion where anyone who sent in 3 empty wrappers of chocolate bars and a postal order for 1s 6d would be sent a record. Chappell owned copyright of said record and demanded for their royalty which, under Section 8 Copyright Act, was 6.25% of ordinary retail selling price. Nestle argued that 1s 6d was the price but Chappell counter argued that it ought to be more than that. But the issue in question was whether the empty wrappers

constituted partial consideration for the promise of the records. The bar wrappers formed part of the consideration as their acquisition by the record buyers was of direct benefit to the defendants and also, they had specifically requested for those wrappers and had gotten them. **Dunton v. Dunton**: Mr Dunton promised to pay Mrs. Dunton some money if she conducts herself in a sober and respectable manner. Her promise to surrender her liberty and do as he wished was considered good consideration.

From all these, it can be said that 'value in the eye of the law' comprises:

- If A surrenders something he is entitled to keep or he refrains some exercising something he has the right to (**Bainbridge v. Firmstone**)
- Needs not have economic value (**Chappel v. Nestle**)
- Must not be too vague (**Dunton v. Dunton**)

II. Performance of existing duty

There are three basic types

- Duty imposed by law
- Duty imposed by contract with promisor
- Duty imposed by contract with third party

Duty imposed by law (public duty)

A person cannot enforce a promise made to him in return for his performance of an act he's already legally bound to do. Since the promise is under public duty, actual performance or a promise to do so cannot constitute valid consideration. That is, if A is bound by law to perform an act, performance of such act is not sufficient consideration since that is what he is already supposed to do. In **Collins v. Godefroy,** Godefroy promised to pay Collins if Collins would attend court and give evidence for Godefroy. Meanwhile Collin was already subpoenaed to attend court proceeding. When Collins sued for payment, it was held that Collins was under a legal duty to attend court and doing so was not good consideration since that's what he was legally meant to do.

If the plaintiff acts in excess of what the law required him to do, then this would amount to sufficient consideration. In **Glassbrook Brothers v. Glamorgan County Council,** the police were required to guard the mine site of the defendants and were promised to be paid. However, when there was no payment, they sued. It was discovered that while they were under legal duty to guard, they had gone beyond that duty by assigning men to the mine site and giving extra protection. If there is excess of what the law requires, this is sufficient consideration.

Duty imposed by contract with promisor

(where plaintiff is under contractual duty to promisor)

If A is already under contractual duty to perform an act, he has offered no fresh consideration. **Stilk v. Myrick,** two sailors left a ship and the captain promised to pay the rest if they sailed the ship but he didn't. It was held that the sailors were already bound by their contract to sail back and actually doing so did not constitute fresh consideration. In **Hartley v. Ponsonby,** 19 out of 36 of the crew of a ship left and so the captain promised to pay the rest extra money if they sailed the ship but did not do so claiming that they were already under obligation to do so. However, the ship was so undermanned that it made the journey hazardous and sailing the ship back in such conditions was going beyond their normal duties. They were therefore entitled to the extra payment the captain had promised.

Duty imposed by contract with a third party

Here, if A is already bound by contract to do something for B and he receives a fresh promise from C telling him to do what he is already obligated under contract to do for B, actual performance of the act is valid consideration under the contract with C. An agreement by A to do an act or performance of an act in which A is already under existing obligation to another party (B) to do, may quite well amount to valid consideration under a fresh promise made by C.

In **Shadwell v. Shadwell,** a nephew was engaged to marry one Ellen and the uncle because of this promised to pay him 150mpounds till his salary reached 600 pounds. When he died, the nephew demanded the remaining money from the uncle's estate. It was argued that there was no sufficient consideration because he was already bound to marry Ellen but the performance of an act where the party is already bound to do so amounts to valid consideration under a fresh promise made by a third party.

III. Variation of contractual Rights

Where A is under contractual duty to B and with his consent performs less than what he is to perform in discharge of his full obligation, can B later legally enforce performance by A of the remaining balance? This issue first arose in **Pinnel's Case** where Pinnel sued Cole in debt for 8 pounds 10 shillings due in November. Cole argued that he had paid 5 pounds 2 shillings 6 pence on October 1 with Pinnel's consent and he had accepted it in full satisfaction of his original debt. It was held that part payment of a lesser sum does not discharge a debtor from obligation to pay the full amount of debt, notwithstanding the consent of the creditor.

The exception to this rule in **Pinnel's Case** is the introduction of some new elements at the creditor's request e.g a robe, a hawk, horse or part payment at a different place or at an earlier date is good satisfaction for whole debt.

Parties usually relied on 'concept of new element' as an exception to the rule. Thus, payment by use of paper, not cash, was a new element and therefore good consideration for acceptance of a lesser sum. **Sibree v. Trip** and **Godard v. O'Brien**

Cheques are not all that different from cash hence they are not acceptable.
The rule in **Pinnel's Case** was equally applied in **Foakes v. Beer** where it was held that part payment for a debt cannot discharge obligation to pay full sum. Foakes owed Beer some money and she asked that he pay 500 pounds immediately and the rest by half-yearly instalments of 150 pounds and this he did till he paid the debt off. Beer later demanded for interest to which Foakes argued that there was no mention of that and he had done his part. It was held that Mrs. Beer received no consideration as part payment of debt is not sufficient consideration and she was therefore entitled to interest.

Promissory Estoppel

Otheriwse known as equitable estoppels because it is relief in equity. This doctrine establishes the fact that a promisor is prohibited from going back on his promise where the promisee has in good faith acted on the promise. For example, if A owes B some money and B says he would accept half payment of such debt provided A does something for him and A does it, this doctrine would bind A to his promise and prevent him from going to his original position and enforcing his strict legal position.
Here, two parties are in a legal position and one indicates he would not enforce his strict legal position and the other party in good faith relies on this promise. Promissory estoppels prevents him from going back on his word and enforcing his strict legal position.
This doctrine was unsuccessfully relied on in **Jorden v. Money**. Mr. Money owed money to C and when C died, Mrs. Jorden became entitled to the money owed. She said she would not enforce payment of the debt knowing M was about to get married and needed assurance that the debt was gone. After marriage, Mr. Money sought to be released from the debt relying on the estoppels that if one makes a false representation and another acts on this representation, the person making the representation would not be allowed to claim that such statement was false. It was held that estoppels were only applicable to facts not statement of intention and Mrs. Jorden was entitled to payment of the debt.
However, in a very powerful dissenting judgement, Lord St. Leonards held that the doctrine of estoppels was applicable to the facts of this case and Mrs. Jorden was barred from recovering the debt. He said estoppels were applicable to statements of intention as well as statements of existing fact. This dissenting view was adopted in **Hughes v. Metropolitan Railway Co** where a promise made by a party knowing that the other party will rely on it will be held binding. A landlord gave his tenant six months to repair the premises. A month later, negotiations for purchase of the lease started and after two months, there was no agreement and it ended. At the end of the 6 month period, the tenant was sued to forfeit the lease. The court held that the tenant was protected against forfeiture since the failure to repair was due

to the negotiations by the landlord to purchase the lease. The landlord implied by conduct that he would suspend the forfeiture notice during the negotiation period.
This doctrine was firmly established in the famous **High Trees Case**. The plaintiffs leased a block of flats to the defendants for 99 years in 1937. Because of the war, many people left the country and men were recruited into the army so the flats were not fully occupied. The parties agreed that the defendant should pay half the rent from start of lease. By 1945, when the flats were fully let again, a new management took over and demanded that the rents be paid at full rate and claimed arrears for half rent not paid between 1937 and 1945. The court held that where a promise is made and the promisor knows that such promise would be acted upon by the promisee, the promisor would be held bund by his promise. The plaintiffs were therefore prevented from claiming arrears accrued in 1937 – 1945 as promissory estoppels prevented them from going back on their promise to accept lower rent despite the fact that there was no consideration.
It was also reinforced in **Combe v. Combe** That P.E does not creat new causes of action where non existed but rather it prevents a party from insisting on his strict legal rights. Mr. Combe promised to pay Mrs. Combe annual maintenance. After they divorced, Mr. Combe refused to pay and Mrs. Combe sought to enforce his promise by relying on the estoppel. It was held that the estoppel is a shield and not a sword. It could not create a cause of action where there was none and Mrs. Combe's action must fail.
In **Offiong . African Development Corporation,** The appellant was secretary of the respondent corporation and was promised a car loan of 600 pounds but was instead given the Chairman's used car worth 646 pounds. He later paid the 300 pounds and asked the company to forgo the balance of 346 pounds and let him leave the company with the car and they agreed. A new management sued to recover this balance but it was held that Offiong was released from the obligation of paying this balance.

- **Tika Tore Press v. Abina;**
- **Temco Engr & Co Ltd v. El Nasr Export & Import Co.**

Operation of P.E has given rise to so many questions

1. Should a party relying on P.E show he has suffered detriment?
2. Does it abrogate or suspend a promisor's right?
3. How can those rights be restored if possible?
4. Can promisee rely on promise as cause of action and sue for its breach?

a. Detriment

Ajayi v. Briscoe suggests that detriment is essential. He didn't alter his position for the worse, that is, he suffered no detriment. Ajayi entered a hire purchase agreement with the company Briscoe for 11 lorries. After they were delivered, nearly all of them broke down. He complained to the company and they asked him to bring the lorries for repairs and suspend all payments till the repairs were

completed. The company claimed Ajayi did not come to collect them and Ajayi claimed the company had sold them without his consent. It was held that A did not alter his position (his position did not worsen) by relying on the promise made by the company, that is, alteration for the worse. Detriment is necessary.
This view has been severely criticized especially by Lord Denning. He reconsidered the phrase 'alteration of position' to mean he must have been led to act differently from what he would have otherwise done. In **W.J Allan & Co Ltd v. El Nasr Export & Import Co,** it was held that its not necessary to show detriment and it is sufficient for a party to conduct his affairs based on mere representations made by the other party. The plaintiff in Kenya agreed to sell some products to the defendant and the currency was supposed to be in Kenyan shillings but the defendant paid pounds. The plaintiff accepted this for a while till the pounds devalued and then he argued that the Kenyan shilling was the valid currency. The plaintiff had altered their rights by accepting payments in pounds leading the defendant to act in that manner. The promisor's strict rights are suspended for as long as the waiver lasts.

However Nigerian courts tend to lean towards the detriment view. See **Temco Engr & Co v. Savannah Bank**

b. Duration

P.E is usually suspensory on promisor's rights and he can regain such by giving adequate notice to the promisee. There are some cases where no withdrawal is possible, it may be too late to withdraw or the promisor cannot withdraw without causing injustice to the other party. When bound by his waiver, the promisor cannot revert back to his strict legal rights. In some cases, the promisor's right would just be suspended but in such a case, reasonable notice must be given to the promisee. See **Tool Metal Manufacturing Co v. Tungsten Electric Co**
The summary of all these is that
i. P.E suspends rights for some time.
ii. Sometimes rights are permanently irrevocable:
- when recovery of rights will do injustice
- when its too late to withdraw.
iii. Where the right is suspended, the promisor can regain it by adequate notice. However;
- Notice need not be formal
- Where the promisor merely agrees to suspend his rights for a fixed period
- Where such suspension is to terminate with occurrence of event, notice can be dispensed with

Whereas a contract modification which is supported by consideration will generally be of permanent effect, lasting for the duration of the contract, the same is not true of promissory estoppel. Sometimes the promise itself will be time limited. Thus in **High Trees** it was accepted that the promise to take the reduced rent was only to

be applicable while the Second World War continued. Once it came to an end, the original terms of the contract revived. In other cases, the promisor may be able to withdraw the promise by giving reasonable notice. This is what was done in **Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd (1955)**. To this extent, therefore, the doctrine is suspensory in its effect. While it is in operation, however, a promissory estoppel may extinguish rights, rather than delay their enforcement. In both **High Trees** and the **Tool Metal Manufacturing case** it was accepted that the reduced payments made while the estoppel was in operation stood and the promisor could not recover the balance that would have been due under the original contract terms

c. Cause of action

Can the promisee base an action solely on the promise? No! P.E is not a new cause of action and can only be used in defence to an ction brought by the promisor on unjust grounds. This is well represented by the principle that promissory estoppels is a shield not a sword. **Combe v. Combe**

d. When it is not inequitable to go back on the promise

However if the promisee's conduct has been improper or unreasonable, promisor going back on his promise cannot be regarded as inequitable. **D&C Builders v. Rees**

e. Composition with creditors

This is another exception to the rule in **Pinnel's Case.** A composition with creditors is a situation where a party owes a lot of people money but he cannot pay back all the creditors in full and the creditors agree amongst themselves to accept a fraction of the individual debts owed to them from the debtor in discharge of whole sum in each case. Such an agreement is binding on all of them and none can sue A for balance of his debt.

Also part-payment of debt by a third party discharges the whole debt. Once the creditor accepts the money, he can no longer sue debtor for balance of his debt.

Generally, the conditions for a claim of promissory estoppels to succeed are:

a. There must be an existing legal relationship: It is generally, though not universally, that promissory estoppel operates to modify existing legal relationships, rather than to create new ones. The main proponent of the opposite view is Lord Denning himself who, in **Evenden v Guildford City FC (1975)**, held that promissory estoppel could apply in a situation where there appeared to be no existing legal relationship at all between the parties.

b. There must have been reliance which must be injurious: At the heart of the concept of promissory estoppel is the fact that the promisee has relied on the

promise. It is this that provides the principal justification for enforcing the promise. The lessees of the property in **High Trees** had paid the reduced rent in reliance on the promise from the owners that this would be acceptable. They had no doubt organised the rest of their business on the basis that they would not be expected to pay the full rent. It would therefore have been unfair and unreasonable to have forced them to comply with the original terms of their contract. It has sometimes been suggested that this reliance must be 'detrimental', but Denning consistently rejected this view (see, for example, **W J Alan & Co v El Nasr** (1972)) and it now seems to be accepted that reliance itself is sufficient.

c. P.E is a shield not a sword: This is related to the first point (concerning the need for an existing relationship). The phrase derives from the case of **Combe v Combe** (1951). A wife was trying to sue her former husband for a promise to pay her maintenance. Although she had provided no consideration for this promise, at first instance she succeeded on the basis of promissory estoppel. The Court of Appeal, however, including Lord Denning, held that promissory estoppel could not be used as the basis of a cause of action in this way. Its principal use was to provide protection for the promisee (as in **High Trees** – providing the lessees with protection against an action for the payment of the full rent). As Lord Denning put it: consideration 'remains a cardinal necessity of the formation of contract, though not of its modification or discharge.'

d. Enforcement of strict legal right must be unfair or inequitable: The doctrine of promissory estoppel has its origins in equitable 'waiver'. It is thus regarded as an equitable doctrine. The importance of this is that a judge is not obliged to apply the principle automatically, as soon as it is proved that there was a promise. The way that this is usually stated is that it must be inequitable for the promisor to withdraw the promise. What does 'inequitable' mean? It will cover situations where the promisee has extracted the promise by taking advantage of the promisor. This was the case, for example, in **D & C Builders v Rees** (1966) where the promise of a firm of builders to accept part payment as fully discharging a debt owed for work done was held not to give rise to a promissory estoppel, because the debtor had taken advantage of the fact that she knew that the builders were desperate for cash. Impropriety is not necessary, however, as shown by **The Post Chaser** (1982), where the promise was withdrawn so quickly that the other side had suffered no disadvantage from their reliance on it. In those circumstances it was not inequitable to allow the promisor to escape from the promise.

INTENTION TO CREATE LEGAL RELATIONS

This is an intention by the parties to create a valid and binding contract. Do the parties actually want their agreement to be legally enforceable? Professor Wilson thinks intention is irrelevant and a promise made is binding irrespective of the promisor's views. He believes that the presence of consideration in an agreement indicates a clear intention to be bound. But this thought is inapplicable in social and domestic agreements. When determining intention, the courts apply an objective test. The objective test involves looking at the situation from the point of view of a neutral third party. A legal obligation differs from a moral obligation with no legal backing

Domestic and Social Agreements

There is a rebuttable presumption here that parties do not intend to create legal relations.

In the instance of husband and wife, contractual intention is absent. Spouses make numerous agreements but do not actually intend to be legally bound. In **Balfour v. Balfour,** a Briton was employed by the Government of Ceylon but his wife couldn't travel because she was sick. He promised her 30 pounds a month till she came but he failed to pay. She sued to enforce the promise of payment but it was held that there was no contract. Contractual intention is absent between husbands and wives. In **Spellman v. Spellman**, a man promised to buy his wife a car and got a hire purchase agreement and the car was delivered to him. Upon delivery, he refused to give his wife the car and she sued. It was held o be a domestic agreement with no intention to be legally binding. Although this rule does not apply in cases where couples are separated or about to be separated, that is, they are not living in amity. In **Merrit v. Merrit,** after a husband and wife separated, they met and agreed that the husband would pay the wife 40 pounds monthly and out of this, the wife would pay off mortgage on the house and then he would transfer the house to her. After she did this, he refused to transfer the house to her. The agreement was held to be binding as the presumption that there is absence of contractual intention between husband and wife does not apply when they are not living in amity but are separated or about to separate.

The law also presumes that agreements between parents and children are devoid of contractual intention. See **Jones v. Padavatton** where Mrs. Jones wanted her daughter who worked at the Indian embassy to become a barrister and so offered a monthly allowance while she read for her Bar in London. The daughter reluctantly accepted the offer and went. Mrs. Jones bought a house for her to live in one part and the other part was let out and the rents used as fee. In 1967, the daughter only passed Part 1 of the Bar and Mr. Jones sought to collect her house back. It was held that the agreement wasn't binding because there was no legal intention to be bound. Family arrangements are based on good faith and not law.

In circumstances where there a great sacrifice has been made on the part of one party or both parties, the general rule will not apply. See **Parker v. Clark** where the plaintiff's uncle invited him and his wife to come live with them and so the plaintiff sold their house and moved in with the defendant. They agreed the plaintiff would share living expenses with the defendant and the defendant would leave the house for the plaintiff in his will. After a fight, the defendant sought to evict them because their agreement wasn't binding. It was held to be binding and that the presumption that family agreements are not binding will not apply where the agreement involves a great sacrifice on the part of one or both parties.

Commercial Agreements

There is rebuttable presumption that parties intend to enter into legal relations in every commercial transactions. Although there are two exceptional situations where the defendant pleads an absence of intention

i. Where it is a mere puff

A mere puff is an extravagant statement made which no reasonable man will believe to be true. Some parties use this to escape liability. But ordinarily offers involving wild exaggerations and unfounded claims which no reasonable person will take seriously cannot be legally binding. **Weekes v. Tybald** where a man promised 100 pounds to any man who married his daughter. This was held to be a mere puff meant to excite suitors and was thus not enforceable.

But there is an exception to this exception. The statement will be enforceable if the puff or advert is accompanied by something that shows a clear intention to be bound. E.g. The deposition of 1000 pounds was held to disprove the argument that the advert was a mere puff in **Carlill v. Carbolic Smoke Ball.**

ii. Exclusion Clauses or Honor Clauses

Commonly found in football or pool agreements. Such clauses operate to exclude any contractual liability on the part of a party. If an agreement involves the phrase, 'in honor only' then the agreement shows an absence of contractual intention. If pool companies were to be liable at the insistence of every one of their stakers, pandemonium will result. In **Amadi v. Pool House Grouo & Nigerian Pools Co** it was held to be a clause which expressly excludes contractual intention. The plaintiff staked a sum of 1 pound 16 shillings and won 50,009 pounds 12 shilling. The defendant denied liability relying on the honor clause which operated to exclude contractual liability. In **Buko v. Nigerian Pools Company**, the intention for a relationship to be in honor is a gentleman's agreement rather than a legal relationship. Once an honor clause is included in a contract, such contract has no legal force and cannot be sued upon.

iii. Agreement termed 'subject to contract'

There is no intention to enter into legal relations until a formal document is drawn up and signed. **UBA v. Tejumola & Sons Ltd.**

Intermediate Situations

These can neither be described as social or domestic agreements nor as commercial agreements e.g. An arrangement between friends where one gives a lift to the others to and from work and other contribute towards petrol and maintenance of the car. What happens if one refuses to pay his contribution. **Coward v. Motor Insurance Bureau.**

In the absence of evidence that the parties intended to be bound contractually, courts should be reluctant to conclude that such agreement to carry others to work in return for their payment involved any legal contractual relationship. In the case of contractual effect of collective bargaining agreements, such agreement depends on a number of factors. **ACB v. Nwodika** was binding because the bank had relied on it earlier case and indeed, one of the bank's witnesses had admitted it was binding on them.

TERMS OF A CONTRACT

It is very important to determine extent of legal obligations undertaken by the parties to the contract. This is done by considering certain factors e.g. express terms and implied terms. Terms are not all of equal importance as they range from fundamental terms to warranties and so on. Extent of a party's obligations and consequences of breach of contract can only be assessed after determining the nature of terms. It is also important to distinguish between the terms of a contract and mere representations as they both attract different remedies in contractual breaches.

Significance of Distinction

The importance lies in the type of remedy available to an aggrieved person when a breach of contract is alleged. If breach is of a term of contract then the party can sue for breach of such term but if it is a breach of mere representation then an action for misrepresentation will be brought, that is, if such misrepresentation is fraudulent. If its not, it would be deemed to be an innocent misrepresentation and there is no remedy for that in common law but maybe in equity. There is also negligent misrepresentation for which damages can be obtained for negligent misstatements. **Hedley Byrne & Co v. Heller & Partners Ltd**

Differences between terms and misrepresentations

A term is any provision forming part of a contract which gives rise to contractual obligations while a representation a statement made by any of the parties regarding facts about the contract which is influential in bringing about the agreement. **Cheshire & Fifoot** designed three independent tests for determining their differences.

a. **Timing**: At what stage of the transaction was the crucial statement made? Statements made at preliminary stages of the negotiations would be seen as mere representations not terms of contract. The longer the time between when the statement was made and when contract was concluded, the more likely it would be a mere representation. In **Routledge v. McKay,** the defendant stated that a motorcycle, the subject of a proposed sale was a 1942 mode. In a written contract a week later, the date was not mentioned. The car turned out to be a 1936 model and the plaintiff sued for breach of term. It was held that such a statement was a mere representation and not a term. The longer the time lapse between when the statement was made and when the contract was concluded, the more likely it would be a mere representation. This test is quite inconsistent as there are statements made at a time where the contract was concluded three weeks later which was then deemed to be a term; In **Shawel v. Reade**, the defendant told the plaintiff who wanted to buy a horse not to bother examining it because it was perfectly sound. The plaintiff bought the horse three weeks later but discovered it was not suitable so he sued. Even though the lapse of time was 3 weeks, the

statement was held to be a term. Whereas in **Routledge v. McKay**, time lapse was one week and the statement was held to be a mere representation.

b. **Parol Evidence Rule**: Was the oral statement followed by a reduction of terms into writing? If there was an oral agreement which was later reduced into writing, any statement contained in the oral agreement not included in the written one will be a mere representation. This is quite useless as it is easier to cite a case where the test was ignored, for example, in **Birch v. Paramount Estate**, the defendant offered to sell the plaintiff a house they were building saying it was as good as the showhouse so the plaintiff bought it though the written contract made no reference to this statement. The house was not actually as good as the show house. It was held that it was a term, and a very important spoken term may persist even if omitted from the contract.

c. **Relative Skill & Expertise**: This is the issue of a party's superior knowledge. If the person making the statement has special knowledge or skill as compared to the other party, the statement would be treated as a term. In **Esso Petroleum v. Margon,** Esso bought new site for petrol service station with estimate of selling 200,00 gallons of petrol a year but this was prior to the building regulations for the station which changed its prominence and adversely affected the sales rate. Esso knew but didn't change the estimate but they leased it to Margon assuring him it would sell 200,00 gallons. It didn't sell as much as that and the statement was held to be a term considering that it was made by one presumed to have superior knowledge and skill. However if the party is less knowledgeable, it would be a mere representation. In **Oscar Chess v. Williams**, Williams sold Oscar Chess a Morris car stating it was a 1948 Morris but it was really a 1939 model worth 175 pounds. Williams had said it was a 1948 model in good faith, relying on the car log book which had been forged. This was held to be a mere representation, not a term as it was made by a layman with little special knowledge. Oscar Chess, a car dealer with greater knowledge was in a better position to know the age of manufacture. He couldn't have thought a person with no experience in cars would have guaranteed the truth of his statement. This is actually the most successful test.

Treitel has devised two additional tests.

d. **Verification**: A statement cannot be seen as a term if the party making it expressly asks the other to verify the truth of it; **Ecay v. Godfrey**. And any statement intended to prevent the other party from finding out the truth and induces him to enter into the contract on reliance of it is likely to be a term.

e. **Degree of importance attached to the statement by the representee**: If representee can demonstrate that, to the knowledge of the representor, he would not have entered into the contract had the statement not been made, then such statement would be a term. **Bannerman v. White.** A buyer of hops asked the seller if sulphur had been used in their cultivation and if so he wont bother asking the price. He said no but it turned out to be false. The seller's assurance that sulphur was not used was held to be a term.

COLLATERAL CONTRACTS

If a representor makes a promise which is intended to induce the representee to enter into a contract and the representee enters into such contract in reliance of the promise, the representor would be held bound by that promise. Such promise is treated as part of a preliminary or collateral contract. This collateral contract influences representee to enter into the main contract. **City & Westminister Properties Ltd. V. Mudd,** the defendant's lease came up for renewal and the plaintiff restriceted the use of the premises to showrooms, workrooms and offices thereby preventing the defendant from sleeping there. The defendant objected and was assured by the plaintiff that if he signed the lease, he'd be allowed to continue sleeping there. After he signed it, the plaintiff then sued him for breaking the restriction on the premises. It was held that though he had broken the lease terms, this was due to the promise the plaintiff had made to him. He was entitled to sleep on the premises on basis of the collateral contract in which the plaintiff had allowed him sleep on the premises.

In all cases of collateral contracts, consideration furnished is the actual act of entering into the contract.

Nature and effect of contractual terms

Not all terms are of equal importance; some terms attract way more consequences than others

- Warranties
- Innominate or intermediate terms
- Conditions
- Fundamental terms

Fundamental Terms

In the case of **Smeaton Hanscom v. Sasson**, it was stated that a fundamental term is something which underlies the whole contract so that if not complied with, it amounts to and is equivalent to not performing the contract at all. This is a term forming the main purpose of the contract and it is greater than a condition. This is the very core of te agreement, non-performance of which destroys the very substance of the agreement. According to Devlin J, it is something underlying the whole contract and if not complied with, performance becomes totally different from that which the contract contemplates. Whereas liability for breach of a term could be excluded by an exemption clause, for fundamental terms, exclusion is not possible. A party cannot exempt himself from breach of a fundamental term which goes to the very root of the contract. Breach of a fundamental term not only leads to claim for damages but the injured party also has the right to repudiate the contract. Sometimes fundamental term is used to alternatively refer to conditions.

But it can be argued that a fundamental term is the main purpose of the contract while a condition is essential to the main purpose.

Condition

A provision or stipulation forming an essential part of the contract, breach of which gives right to repudiate the contract, that is, discharge oneself from further performance of obligations under the contract, and he can also claim damages. This is because non-performance is considered as failure to perform contract at all. Parties can expressly or impliedly agree that a term is to be a condition. **Section 11(1)(b) of the Sale of Goods Act 1893** defines condition as a stipulation, breach of which repudiation leads to repudiation or right to damages. There are three kinds of conditions

i. Condition precedent: An agreement subject to contract is one subject to condition precedent ie, liability begins when a further event happens. Rights or obligations are suspended until the happening of a future stated event;

- **Pym v. Campbell;**
- **Pickard v. Innes.**

ii. Condition subsequent: Here, the happening of an event operates to destroy an existing obligation. Obligations are binding normally but if certain facts are ascertained to exist or upon happening of some further event, then the contract ceases to be binded or would be avoided by one party.

- **Head v. Tattersal;**
- **ACB v. Okonkwo**

iii. Condition inherent: This qualifies obligations in a contract.

Warranty

This is a provision in a contract that is not so essential, breach of which does not give rise to repudiation but claim for damages. It was defined as a term collateral to the main purpose of the contract in **Section 62 of the Sale of Goods Act.** A warranty is stated to be so in the contract or classified as one by the statutes. If a warranty is a collateral to the purpose of the contract then the condition must be one that is essential to it. The warranty is a minor term. Difference between warranty and condition can be seen in **Bettini v. Gye** and **Poussard v. Spiers and Pond.** In **Poussard v. Spiers & Pond,** an actress was gotten to play a leading part in a French operetta from the beginning of its run but she couldn't show up until a week after performance had started due to illness. The producers had replaced her and refused to accept her. Her failure to show up for rehearsals and early performance was a breach of condition and the producers were entitled to repudiation. In **Bettini v. Gye,** the defendant entered a contract to engage the plaintiff as a singer in operas and concerts for 3 months. The plaintiff promised to be in London 6 days before it starts for rehearsals but he only showed up 2 days before and the defendant repudiated the contract. It was held that the term as to

rehearsals was a warranty and the defendant could only claim damages and not repudiate the contract.

Note: In **Poussard v. Spiers & Pond**, the plaintiff did not come for the first 7 days of the actual performance of the contract hence the breach of condition. In **Bettini v. Gye**, the plaintiff did not show up for 4 days of the rehearsal but came for the remaining 2 days and opening performance hence the breach of warranty.

Intermediate Terms

This is a cross between a condition and a warranty. Remedy for the breach depends on the extent and severity of such breach; emphasis is on the quality of the term broken whether its major or minor. Right to repudiate is based on the gravity of the breach not the nature of the term broken. If the breach is so devastating as to deprive the injured party of the whole benefit which was the intention that he should obtain from the contract, remedy would be repudiation. If there is no deprivation of whole benefit, remedy is just damages. In **Hong Kong Fir Shipping Company v. Kawasaki Kisen Kaisha,** the defendant chartered a ship from the plaintiff for 24 months for cargo service. The vessel was delivered and sailed some places before finally breaking down on a journey to Osaka because the engine staff were incompetent and the engines were old. It was held for 5 weeks and on arrival at Osaka needed another 15 weeks for further repairs. The defendant repudiated the contract even though they had another 20 months more. It was held to be wrongful repudiation because the breach by the plaintiff was not enough to frustrate the whole contract. Stipulations as to time and date are conditions;

- **Mihalis Angelo;**
- **Bunge Corporation NY v. Tradax Export SA Panama.**

Conditions and warranties are still more relevant and once a clause is termed as a condition, it will remain as a condition and not be subject to scrutiny as if it is an intermediate term.

IMPLIED TERMS

Whether or not a term is implied depends on parties intentions and such terms will be effectively implied if they don't contradict the terms expressly stated. Courts assume the existence of certain terms not expressly included in the contracts to give it business efficacy ie, make it capable of being performed effectively. Implied terms can be

i. Implied by custom or trade

They're derived from the custom of an area or by usage of certain trade. **Hutton v. Warren.** A custom is implied only when its not expressly excluded. No evidence of custom can override the terms of a contract; **Leyland v. Dizengoff**. For implication to be by custom

- Term must be certain and uniform
- It must be notorious ie, well known and ascertainable
- Recognized as having binding effect
- Must be fair, proper and reasonable
- Not to be contradictory to express terms

ii. Terms implied by Statute

Sale of Goods Act 1893, which applies to Nigeria as a Statute of General Application, implies certain conditions or warranties in every contract of sale though they may be excluded by express terms.

a. **Title (Section 12(1))**: Implied condition in a contract of sale is that the seller has a right to sell such goods and implied warranty that the buyer will enjoy quiet possession of the good and will be free from any charge in favour of a third party. **Akoshile v. Ogidan,** the defendant bought a car from Europe for 335 pounds and sold to the plaintiff for 340 pounds. The Euro had stolen the car which was then taken away from the plaintiff who then sued to recover his money. The defendant was held to be liable having breached an implied term of title as he had no right to sell the goods.

b. **Description (Section 13):** Implied condition that the goods must correspond with the decision and if by sample, must correspond with the sample. This applies when the buyer hasn't seen the goods but relies on the seller's description; **Varley v. Whipp,** where the seller described an old reaping machine as new to a buyer. The buyer, relying on this statement, bought it without first seeing it but was allowed to recover the money. The seller breached the term that the goods must correspond with the description. Even when buyer has seen goods but still relies on the description, the term applies; **Beale v. Taylor**

c. **Fitness for purpose (Section 14(1)):** Where the buyer makes known the purpose for which he desires a product and relies on the sellers info, there's an implied condition that the goods shall be reasonably fit for that purpose; **Priest v. Last** where the buyer asked for a hot water bottle and since it is only used for one purpose, the obligation to make the purpose of requirement known to the seller was satisfied. There is no need to specify purpose for which a buyer needs a good when there is only one purpose it serves. In **DIC Industries v. Jimfat**, the plaintiff bought a truck to convey passengers but was faulty when it operated. The plaintiff sued because the truck was not fit for the purpose but there was no evidence that the plaintiff had told the defendant the purpose he needed the truck for. But the defendant should have been held to be liable.

d. When the goods are only fit for one purpose, seller's info wont be necessary but where the goods have various purposes, the buyer is obliged to indicate which he needs it for and there is an implied condition that the goods shall be reasonably fir for such purpose. **Ijoma v. Mid Motors** where the wire coils sold to the

defendant were capable of being used for so many purposes and because the defendant did not indicate the purpose he needed it for, the condition of fitness could not apply. Where goods could be used for many purposes, the buyer should indicate the particular purpose it needs it for.

e. Merchantable Quality (Section 14(2)): Goods bought must be of merchantable quality. That is, the goods must be fit for the purpose for which the good is normally used. This does not apply if the buyer examines good and does not detect defects before buying them; **John Holt v. Ezefulukwe**. The plaintiff sued the defendant for the sale of rotten Geisha fish to him but it was held that he examined the goods himself and could not claim he was relying on the seller's judgment. The requirement of being merchantable does not apply if the buyer examines the goods and doesn't find defects before buying them.

f. Sale by Sample (Section 15): There is an implied condition in contracts of sale that the bulk shall correspond with the sample in quality, buyers shall have reasonable opportunity of comparing bulk with sample; goods shall be free from any defect.

Breach of implied terms

Remedy is damages. Right to repudiation is restricted under **Section 11(1)(c).**

iii. Terms implied by the courts

Courts do this to give the contracts business efficacy ie, to make them workable. Three kinds of terms may be implied

- Those that the parties had in mind but didn't bother to express
- Those they had in mind and would have probably expressed
- If they had foreseen the difficulty

Court often imply terms which parties, either through bad drafting or forgetfulness, fail to incorporate and which are necessary to the contract. The law implies what must have been the obvious intention f the parties. **The Moorcock,** the appellant possessed a wharf, that is, a place for landing ships on a shore or river bank. The respondent owned the Moorcock ship. They agreed that the vessel should be discharged and loaded in the wharf and then moored (secured) alongside jetty where she would rest in the bottom of the water. This was done but the tide ebbed and she was damaged owing to her centre sitting on ridge of hard ground beneath the mud. The appellant sued but the respondent argued that there was no provision in the contract guaranteeing the safety of the river bed. The court held that there was an implied term that the river bed would be safe for mooring and the ship would be well taken care of. The courts introduced the business efficacy test, that is, if the contract is workable without such term, it would not be implied.

Without such an implied term, the contract wont be workable. The term must also be necessary and reasonable. **Liverpool City Council v. Irwin,** The defendants were

tenants in a block of 70 flats owned by the plaintiff. The conditions of the flats deteriorated seriously and the tenants refused to pay rent. The plaintiff sued to evict them while they counter claimed breach of implied term to repair common parts of the estate. It was held that no term could be implied since it was not necessary to do so. There was an implied term for the plaintiff o maintain the common parts and there was no breach.

Construction of terms (written contracts)

1. Literal rule: to be understood in its clear and plain meaning
2. Effectiveness: If there are two words with similar meanings, the one with the ability to validate the contract will be used.
3. Interpretation giving effect to intention
4. Express mention of one thing excludes any other thing of a similar nature
5. Ejusdem Generis Rule: Meaning of general words will be restrained by specific description of subject matter to which they apply
6. Contra preferentem rule stating that words are construed against he who puts forward the document.

EXCLUSION CLAUSES

Parties can limit or exclude obligations in contracts in contracts. You can even choose to exclude terms implied by the Sale of Goods Act. Exclusion Clauses are mostly found in standard form contracts, that is, terms contained in printed forms. Most contracts contain some terms limiting or excluding their liability for breaches of various terms, expressed or implied. Courts have set complex rules limiting the use of exclusion clause. This is due to the disputes which arise when a supplier relies on such clause and deprives the consumer of compensation he would have normally derived. To protect consumers by limiting the scope of the exclusion clause and subjecting its application to various conditions, the courts have come up with separate rules concerning E.C signed by innocent parties and those not signed.

Unsigned Documents

In **Parker v. South Eastern Railway Co**, the plaintiff deposited a bag in the cloakroom of the defednat's railway station and received a paper ticket with number, date and notices to when they're open. Several clauses were on the other side of the ticket including an exclusion clause limiting their liability of packages to 10 pounds. The defendant relied on the exclusion clause in the ticket but it was held that a person getting a ticket not knowing of the exclusion clause would not be bound. Whether one knows or not depends on the type of document.

If the ticket receiver did not now that there was writing, he is not bound by it. If he knew there was writing but did not know it contained conditions or if he knew and believed it contained conditions then he is bound. **Odeniyi v. Zard**, here, the plaintiff was a contractor within the Western State Ministry of Agriculture and was ordered to get goods for the Minister to be delivered not later than August 9. The plaintiff met the defendants and bought the goods. The plaintiffs had informed them of the necessity to get the goods delivered on time but the defendant never did so. The plaintiff lost the contract and then sued the defendant. The defnenant claimed there was an error in selling price and the letters E and OE (meaning error and omission except) printed on the receipt was sufficient notice. It was held that the plaintiff was not bound by these conditions. A person issued a receipt for payment of money could not be reasonably expected to search for conditions in it. The letters E and OE also were not sufficient notice as they could have meant anything.

A person to whom a receipt was issued cant be reasonably expected to look for any conditions in it and those relying on such conditions must bring it to the notice of the other party. Courts cant pay attention to ambiguous terms. For the injured party to be bound by EC not signed by him, it must be a contractual document. Receipts and tickets are not contractual as they are given after the contract has been concluded.

- **Chappelton v. Barry UDC;**
- **Thornton v. Shoe Lane Parking**

Whereas terms and conditions contained in documents known to contain such terms would be held binding.

- Parker v. South Eastern Railway;

In **Iwuoha v. Nigerian Railway Corporation** where the appellant delivered 3 packages to the respondent at Aba for conveyance to Bukuru. After paying for the freight, the appellant was given a waybill subjecting the tariff to Nigerian Railway Corporation Act 1955 and Tariff Regulations. The train arrived and 2/3 packages were missing so the appellant sued for N40,000. The respondent denied liability for N40,000 claiming it was limited to N40 as the Tariff Regulations limited it to N20 per package. It was held that the waybill was a contractual document and the appellant was bound by its content.

In car park cases, large well displayed notice exempting owner from liability for loss or damages is binding and effective. **Imo Concorde Hotel v. Anya.**

For an EC to be effective notice of it must be given to the other party before the contract is concluded. An EC given after contract has been concluded will be of no effect. **Olley v. Marlborough Court** where a husband and wife went to a hotel and paid for a week's residence. A jotice in their room said the hotel would not be liable for loss of any item not submitted for safe keeping. The wife lost her fur coats and the defendant claimed they were protected by the notice. It was held that the couple had completed the contract before seeing the notice. An exclusion clause given after the contract is concluded will not be effective.

When there has been a previous course of dealings, injured party could be held bound by the EC but for him to be truly bound, he must have had knowledge of actual terms not just that he knew of them but never bothered to read them. **McCutcheon v. MacBrayne**

Degree of notice necessary to make EC applicable to illiterates is higher than normal. **Otegbeye v. Little**

Signed Documents

In absence of fraud, duress, misrepresentation person signing is bound by the excluding the limiting term. **L'Estrange v. Graucob** where the plaintiff took 2 packets containing applications to polytechnics to defednant's branch at Port Harcourt and the relevant one was the application to thepolytechnic at nasarrawa. The clerk said they operated in Jos not Nasarrawa but the defendant told her Nasarrawa was in Jos so the packet was accepted and sent to Jos but was returned because Nasarrawa was not in Jos. The period of application for Nasarrawa expired and the plaintiff sued for missing admission. The defendant relied on an exclusion clause in the receipt signed by the plaintiff. It was held that it was a mere receipt and the exclusion clause in it could not be effective unless brought to the notice of the plaintiff. But this is the rule of undisgned documents so the plaintiff should have been held bound by the exclusion clause in the signed receipt.

In **DHL International v. Udechukwu Chidi**, the plaintiff purchased from the defendant an automatic lot machine and signed a form in respect of purchase. It contained terms and exclusion clause excluding any term not in the form. When the machine came, it was not working well so the plaintiff sued. The defendant relied on exclusion clause but the plaintiff said she hadn't read it. It was held that a contractual document which was signed, in absence of fraud and misrepresentation, the person signing it is bound and it does not matter whether he read it or not, so far he signed it.

It was held that the person signing the document is bound and it is irrelevant whether he read the clause or not. He is bound not because he read, understood and consciously assented to it but because by signing, he signified his assent.

A person is also liable if he signs a document including reference of another document containing the exclusion clause. **Chagoury v. Adebayo** where the rules and conditions on the EC were not in the signed one but a separate one. But did the defendant do everything he could to bring it to the attention of the plaintiff? But this is a principle identifiable with unsigned documents not signed ones and once a party signs a document containing conditions, he will be bound by them whether he reads them or not. **Chike Atu v. Face to Face Million Dollar Fixed Odd Pools; Curtis v. Chemical Cleaning & Dyeing Co**

General Rules

These are other rules and principles employed by the courts in restricting the use of EC

Contra Preferentem Rule

i. Strict interpretation: Words of written documents are construed more forcibly against the party using them, that is, any uncertainty in meaning and scope of EC will be resolved against the person inserting it into the contract. See **Baldry v. Marshall; Andrews v. Singer**. Anyone relying on EC to escape liability must do so in a very clear and unambiguous language

ii. Negligence: Unless an exclusion clause specifically says negligence, the clause wont be construed to cober it. **White v. Warrick**; EC covers only breach of contract not negligence. **AG Bendel State v. UBA**

Third Parties

Contract cant confer rights on one who isn't a party to the contract (doctrine of privity). EC therefore wont cover one who is not a party to the contract. This applies to contract of carriage of goods by sea. New Zealand Shipping Co v. Satterthwaite. Here the undertaking in bill of lading to protect the defendants was a unilateral offer capable of acceptance by performance (unloading was both the acceptance and consideration)

DOCTRINE OF FUNDAMENTAL BREACH

A fundamental breach is an event resulting from the failure of a party to perform a primary obligation which actually deprives the other party of the benefit which was the intention of the parties that he should gain from the contract. This breach goes to the root of the contract, that is, it is the main reason upon which the contract was formed in the first place. A party guilty of a fundamental breach cannot avoid liability by relying on an exclusion clause provided for his benefit; tis was the general belief until the decision of the House of Lords in the **Suisse Atlantique Case**. An exclusion clause can only protect inessential aspects. It cannot be used to cover misconduct or disregard obligations. A person cannot rely on EC if the breach goes to the very root of the contract. **Adel Boshalli v. Allied Comm Exporters,** where the plaintiff bought cloth from the defendant in London but they were of very much inferior quality to the sample which caused the agreement. The defendant relied on the exclusion clause but it was held that such clause would not cover him as a breach going to the root of the contract destroys the operation of an exclusion clause.

A fundamental breach differs slightly from a breach of fundamental term. In breach of fundamental term, emphasis is on the nature and character of the term breached and not on the consequences of the breach. A breach of fundamental term will entitle the injured party to repudiate. Also, a party breaching a fundamental term cannot rely on an exclusion clause to escape liability. Consequences of breach of fundamental term and a fundamental breach are often the same; right to repudiate and claim damages, and also the ineffectiveness of an exclusion clause.

The principle that one guilty of fundamental breach cannot rely on an exclusion clause was so widely used and applied to different types of contract that a substantive rule emerged and declared that a guilty party cannot rely on an exclusion clause inserted for his benefit. This principle has been applied in

i. Hire-purchase agreements: EC cannot cover breach of degree and gravity of fundamental breach. **Karsales (Harrow) v. Wallis.**

ii. Bailment: An exclusion clause cannot cover deliberate misperformance. **Alexander v. Railway Executives**

iii. Sale of Goods: If one supplies beans when he contracted to supply rice, this is non-performance not breach of condition. **Ogwu v. Lewentis Motor**

iv. Deviation Cases: A shipowner departing from the agreed routes without justifiable reason will lose benefit of the EC. By deviating, he has 'stepped out' of the contract and cannot seek an exclusion clause. **Thirley v. Orchis SS Co**. A deviation is a breach so serious that no matter how slight it is, the other party can treat it as affecting the root of the contract and repudiate. Hain SS Co v. Tate & Lyle; **Lilley v. Doubleday**

This principle of exclusion clause not covering one guilty of a fundamental breach was violently rocked in the case of **Suisse Atlantique Societe d'Armement Maritime SA v. Rotterdamsche Kolen Centrale** also known as the **Suisse Atlantique Case.**
Various Lords opined on the matter but they all tend to confirm that an exclusion clause cannot cover one guilty f a fundamental breach, even those advocating that it is a matter of construction. There emerged the **rule of law doctrine**.
Viscount Dilhorne: It isnot right to say that the law nullifies exclusion clauses for fundamental breach as such rule of law would involve restriction on freedom of contract. As to the question of fundamental breach, there is a rule of construction that normally an exclusion clause cannot cover fundamental breach. This is a rule of construction based on the presumed intention of the parties and involves implication of certain terms to give contract business efficacy.
Lord Hodson: Exclusion clause normally should not be construed as not applying to fundamental breach.
Lord Wilberforce: A party cannot think that an exclusion clause should be so wide as to deprive a party of the benefit it was the intention he should gain from the contract. There is a rule of law against the application of an exclusion clause to a fundamental breach. They all tend to confirm the rule of law doctrine that no matter how widely phrased an EC may be, it cannot avail a party guilty of fundamental breach.
Lord Upjohn: When putting an exclusion clause, parties are not contemplating breaches of fundamental terms and such clauses therefore do not apply to relieve one from the consequences of such breach.
Lord Reid: Terms of an EC can be so wide, they cannot be applied literally.
Farnworth Finance Facilities v. Attryde: If they were broken in fundamental respect, the former cannot rely on EC. **Harbutts Plasticine v. Wayne Tank & Pump Co:** When a party is guilty of fundamental breach.
Uncertain effect of the **Suisse Atlantique Case** was finally overturned in **Photo Productions v. Securicor Transports**. There is no rule of law by which an exclusion clause can be rendered ineffective due to breach of contract whether fundamental or not. Although the defendants were in breach of their implied obligation, the exclusion clause was clear and unambiguous and it protected the defendants.

The question whether an exclusion Clause applies to fundamental breach, breach of a fundamental term or any other breach turns on the construction of the whole contract including the exclusion clause. So basically if the construction includes covering a fundamental breach, such exclusion Clause will actually hold, but if the bridge is not covered, the party will be held liable. In **George Mitchell Chester Hall v. Finney Lock Seeds**, it was agreed that whether an exclusion Clause applies to fundamental breach or not turns on construction of the whole contract. An exclusion Clause cannot cover non contractual performance, that is, performance totally different from that which the contract contemplates. This case followed the

rule of law despite accepting rule of construction, the House of Lords rejected the reasoning and reaffirmed the rule of construction.

Validity and scope of the exclusion Clause are contained in the unfair contract terms act 1977. In Nigeria there is no general legislation protecting consumers from arbitrary exclusion Clause. The role of construction simply states that an exclusion Clause should not be construed as applying to situation created by a fundamental breach. See **Niger Insurance Limited v. Abed Brothers.**

Decisions of Nigerian courts on consequences of a fundamental breach or breach of a fundamental term on exclusion Clause were not informed by any conscious policy or philosophical considerations but by an indiscriminate following of English, particularly the House of Lords decisions. **Narumal & Sons v. Niger Benue Transport Company**. There was no rule of law that an exclusion Clause is nullified by a fundamental breach or breach of a fundamental term, but in each case, question was one of construction of the contract whether the exclusion Clause was intended to give exemption from consequences of fundamental breach.

Presence dominance of rule of construction in Nigeria can be traced to the case of **Akinsanya v. UBA.**

There is a compelling need for the Supreme Court to give judgement recognizing the fact that the contracts in Nigeria are concluded and performed in different socio-economic and cultural environments of the United Kingdom.

Unfair contract terms 1977

- applies only to business liability
- No one can escape liability in negligence for personal injury or death. It does not matter if the injured party was given notice.
- Loss or damage arising from negligence other than death or personal injury, exclusion Clause will only be valid if it is reasonable.

CAPACITY TO CONTRACT

A contract, containing all the essential components may not be possible against certain people who enjoy special status and the law seeks to protect them in such contractual transactions. This is for people, who because of their special circumstances or situations, can be easily taken advantage of and manipulated for example infants, illiterates, lunatics, drunkards.

Contracts involving illiterates

Contracts concluded orally will be enforceable against an illiterate and he enjoys no special privilege, and is fully liable for all his obligations. However, when the contract is in written form, special rules apply. These rules are found in laws for protection of illiterate contractors in Nigeria. They are either in general form or directed a certain types of transactions.

Illiterate protection laws and land instruments registration laws Section 8

Section 2 of illiterates Protection Law provides that any more rights and document on behalf of an illiterate must include his own name and address as this signifies that

i. he was asked to write such by the person and correctly represents his instructions and

ii. if the document was signed by the illiterate, prior to its being signed, it was read over and explain to the illiterate.

If the contract is between the writer and the illiterate, strict compliance is required as the law will not let the writer to manipulate the illiterate.

Between two illiterates, the writer will be summoned to give evidence.

Duties of the writer under the Illiterates Protection Act

a. He must write his own name and address. This is called franking.

b. He must explain the document to the illiterate prior to Signature by the latter.

c. Document must fully represents what he has said.

Who is the writer of the document?

The one in whose hands the document was written, that is, the one who prepares the document.

P.Z & CO v. Gusau v. Kantoma; PZ & Co v. Gusau and Kantoma

The 2nd defendant agreed to guarantee debt owed the plaintiff by the 1st defendant but was sued on failure to do this and the defence of illiteracy was raised since he could neither read nor write in English. The document was prepared by the typist but spaces for name and address of 2nd defendant was filled by the plaintiff's manager hence he was held to be the writer and must comply with the requirements of the Act. See **UAC v. Edems v. Ajayi**.

Over the years, it appears that the writer is not necessarily the person who negotiated the agreement or who types it, it is he who enters the name and address of illiterate. If he fails to answer his own details or does not prepare a statement that the document was read over and explained prior to Signature by illiterate, such a contract will be unenforceable.
When the Act was drafted, the writer in mind was a professional letter writer and was not expected to be a party to the contract. Their names and addresses were necessary so that they could be contacted to give evidence in case of disputes. A person who took part in negotiating agreements or someone acting under his instructions should be regarded as a writer.

When must the writer enter his name and address?

Is the right time in to endorse name and address on documents on the day it is signed by the illiterate? In **PZ & Co v. Gusau and Kantoma**, the writer did not answer details on the day it was signed, but rather on the day of the hearing of the case. It was held that the writer still complied with the Act. But in **Igbadume v. Bentworth Finance**, details were also inserted on the document after its execution but it was held that states could not be satisfied because it was fraught with risk of fraud.
If writer includes any information which will enable him to be found or identified, document would not be rendered invalid because the information does not contain his name and address. Where a letter or document is prepared by a legal practitioner on behalf of his client who is an illiterate, provisions of illiterate protection laws would not apply and the lawyer need not explain the document to the client. This is so because when the Act was drafted, it was done with the idea of a letter writer being a professional letter writer in mind and not a lawyer.

Who is an illiterate ?

The high court in **PZ & CO v. Gusau and Kantoma** explained that an illiterate is one who is unable to read the document in question in the language in which it was written and this also includes one, not totally in the streets, who is not sufficiently trained to read and understand contents of the document.
Osefor v. Uwania: An illiterate was held to be one who is unable to read with understanding the document made for him. This definition is comparative; a graduate in English may be an illiterate in German. This is an obiter, not a ratio decidendi.

The strict meaning is one who cannot read or write in any language that is, he's totally illiterate. **PZ & CO v. Gusau v. Kantoma.**
The functional meaning is one who is unable to read and understand it document before him. **Osefor v. Uwania**.

The Supreme Court's view approached with a very technical and narrow meeting. An illiterate is one who is ignorant of letters, without education, totally illiterate, unlearned, and unable to read. An illiterate is one unable to read or write in any language! This definition is rather harsh and the relative/functional approach is much to be preferred. It describes an illiterate as one unable to read with understanding and to express thoughts through writing in the language used in the document

Proof of literacy

This is established by evidence of circumstances surrounding the Act. Presumption is that the maker of signature is literate and maker of thumb impression is illiterate. These presumptions are rebuttable. The fact that one is able to write or sign his name does not mean he is in literate.

Limits to applicability of illiteracy law

Illiterate protection laws are for those illiterate in the language of the document and not for fraud. One is not supposed to use the protection to evade obligations of whose implications he was fully aware of the beginning. Illiterates may be denied protection if it appears that he understood the document or what he was doing or what he purported to do.

It shows that the Supreme Court has abandoned the technical approach for purpose and object. An illiterate must show that he did not understand the contents of the documents or he would not have signed it if you understood the concept.

Consequences of non-compliance

There are four possible effects of non-compliance and it could make the contract illegal, void, voidable or unenforceable. Although, not declaring contract void the courts have held that they are not enforceable at the instance of the writer

Contracts involving Infants

21 is the age of maturity and persons below that age, at common law, are infants for the purpose of contractual transactions. In the United Kingdom, family law Reform Act 1969, age of majority has been reduced to 18. In Nigeria however, the **child Rights Act of 2003** has declared a child to be anyone under the age of 18.

It was argued that English law could not apply to indigenous Nigerians, natives, since the customary law already stipulates the ages of majority and issue of age was a mtter of personal law and within province of customary law. Those subject to customary law were thought not to be subject to English law.

The position at common law.

Contracts involving infants are voidable at their option, that is, they are not binding on the infant but binding on the other party, those binding unless epudiated and

those not binding unless ratification after coming of age. The two types of contracts which would regard it as absolutely binding at common law were regarded as contract for necessaries and beneficial contracts of services. Align Infants Relief Act 1874 declares the following contracts to be absolutely void

- Contracts of loan
- Contracts for goods other than necessaries
- Account stated e.g. IOU

Liability for necessaries

Section 2 of sale of goods act defines necessary Goods as good so table to the condition in life of such an infant or minor and to his actual requirements at the time of sale and delivery. Infants are liable to pay not only when goods are sold to them but also when they are delivered. Another thing is the provision that it must be suitable to the condition in life of an infant and his actual requirements at the time of sale and delivery periods must continue to be necessary at the time of delivery. They must be suitable to actual requirements not only when the contract was concluded but when the goods were delivered. **Nash v. Inman** where the defendant was an undergraduate who was sued by the plaintiff for 122 pounds for value of eleven fancy waistcoats supplied to him. The defendant was an infant and he already had adequate supply of clothes. The plaintiff's action was held to fail because the tailor hadn't given evidence to show that the clothes were suitable to condition of life of the infant and that he wasn't already adequately supplied with them.

The best definition of necessaries is in **Chapple v. Cooper** "those without switch an individual cannot reasonably exist."

Loans for necessaries

An infant cannot be liable for loans given to him for necessaries. Lender can get money back on the doctrine of subrogation which is the substitution of one person or thing for another so that the rights attached to the original person can transfer to the substituted one.

Apprenticeship all beneficial contracts of services

An infant can enter into such contracts which must be substantially for the benefits of the infant otherwise he can repudiate it. In **Roberts v. Gray**, the plaintiff sued the defendant for damages of breach of executor contract to join him on a billiard playing tour which was for the defendant's education and training as the defendant was gaining experience and advice which was to be of profit to him. The plaintiff had suffered and incurred liabilities to hold up the contract which the defendant repudiated to his detriment. It was held that being a beneficial contract of service, the infant was liable.

Contracts valid unless repudiated (voidable contract)

Contracts in which an infant acquires interest in property of a permanent nature but which continuous obligations are attached to it. Such contracts are binding or subject to repudiation either during infancy or within a reasonable time. In **Edwards v. Carter**, An infant in a marriage contract couldn't repudiate it at 24 years, three years after coming of age. The repudiation must be during infancy or reasonable period after attaining age of majority. The infant is bound to perform the obligations as they arise.

Contract formerly valid only when ratified

This comprises contracts which were enforceable by the infant but were not binding unless he expressly ratified them after coming of age. This includes all contracts other than contracts for necessaries, beneficial contracts of services and contracts involving interest of property of a permanent nature.

Contracts absolutely void

i. Contracts of loan
ii. Contracts for goods other than necessaries
iii. Account stated

In these contracts, money paid by an infant is recoverable by him as being money had and received for his use. But money paid or transferred to him isn't recoverable from him. These contracts are void against the infants but binding on the adults.

Liability of infant in tort and contract

An infant is normally liable in tort but if the tortuous dispute arises out of a contract upon which the infant will not be held liable, the case will not be treated as a tort.

- **Jennings v. Rundall;**
- **Johnson v. Pye;**
- **Burnard v. Haggis**: if contrary to the owner's instruction, the infant does a wrongful act not contemplated by the contract, he would be liable for the tort.

Fraudulent misrepresentation of age and restitution

If an infant lies about his age to an adult, who on that basis contracts with him, the infant will still be protected by the Act but in certain cases, the court will grant relief against him/her by compelling him to return the ill-gotten gains or release the deceived from legal obligations. This is called the doctrine of restitution for the Act should not be used as an engine for fraud.

a. If an infant obtains goods by fraud; he would return them

b. If the infant has sold or parted with the goods, it is a complex situation as it would amount to enforcing a void contract if he's compelled to pay an equivalent sum. **Leslie Ltd v. Sheill**

c. Where infant obtains loan by fraud, it cannot be recovered as contracts of loan involving infants are void.

PRIVITY OF CONTRACT

Only parties to a contract are subject to the obligations under it and can enforce the rights on it. Only parties to a contract can sue on it. This basically means, only those who have furnished consideration towards the formation of a contract can bring an action to enforce such contract.

General Principle and its Application

In the late 17th century in the case of **Dutton v. Poole**, there's no talk on privity but rather consideration. In this case, a father wanted to sell wood to raise money for his children but his eldest son discouraged him from doing so and promised to pay 1,000 pounds to each child. When he failed to do so, one child sued him and was successful. The court held that there was a consideration of affection from the father to the children and the promise to the father extends to the children too. If the promise had been made directly by the father to the children, he would have been bound by natural love and affection which was then seen as good consideration.

By the 19th century, idea of love and affection was discarded and priity of contract was used in **Price v. Easton** where Price's action failed because the contract was between Easton and X. X owed Price 13 pounds. Eston promised that if X worked for him, he would discharge X's debt to Price. X did the work but Easton didn't follow up. Price sued Easton but failed. He was held that he could not recover the money as he was not a party to the contract between Easton and X. In **Tweddle v. Atkinson**, the fathers of a husband and wife agreed that one should pay the husband 200 pounds and the other should pay 100 pounds and the husband should be able to enforce the payments. The husband sued to enforce the payments gainst the wife's father but it failed because he was not a party to the contract.

Doctrine of privity was firmly established in the case of **Dunlop Pneumatic Tyres v. Selfridge Ltd**. Here, the plaintiffs sold tyres to a dealer on a condition that he was not supposed to resell lower than a certain price and subsequent buyers were to observe the same condition. The dealer sold to Selfridge who agreed to obey the condition and pay Dunlop 5 pounds for every tyre sold below the stipulated price. Selfridge went ahead and old some tyres below the stated price and Dunlop sued to enforce their promise of 5 pounds. It was held that Selfridge had breached the contract between him and the dealer, and Dunlop wasn't a party to the contract and he had furnished no consideration hence his action must fail. Dunlop instead should have asked the dealer to sue Selfridge. Lord Haldane here proposed the doctrine of privity of contract.

This doctrine was applied in the Nigerian case of **Ikpeazu v. ACB,** the appellant contracted with Emodi who owed the respondent bank money and they agreed

that the appellant would run Emodi's business and that all the proceeds be paid to the bank to settle debt. They did this and then newly agreed to hand back Emodi's business to him without the bank knowing about it. The bank sued the appellant for the remaining debt and it was held that the agreement was between Emodi and the appellant. The bank was not a party and could not acquire rights under the contract.

In **Etco Nigeria Ltd v. Western Nigeria Development Corporation**, The plaintiff sued the defendant for money being cost of work done by them for the defendant at Premier Hotel. The hotel was owned by the defendant and he had contracted with nigersol for construction and Nigersol commissioned work of the plaintiff. There was no contract between the plaintiff and defendant. A contract cannot impose obligations and confer rights on any person, except parties to it.

A contract cant confer rights and impose obligations arising under it on anyone except the parties to such contract. Furthermore, when one is acting as an agent between his principal and third party, the contract still belongs to only the principal and the third party.

Principle of privity applies even in complex cases;

- **Shuwa v. Chad Basin Authority (CBA);**
- **Union Bank of Nigeria v. Sparkling Breweries;**

Ilesa Local Planning Authority v. Olayide, the respondent was appointed by Oyo State Governor as chairman of the appellant authority. The appellant could not appoint or dismiss the Chairman, only the Governor could do so. When the Governor dismissed him, the respondent sued the authority for breach of contract and claimed arrears of salaries. This action failed as the authority was not a party to contract between Chairman and Governor. The authority therefore could not be sued and made liable. The respondent should have sued the Governor. One who is not a party to a contract cannot be held liable for its breach.

- **Mercantile Bank v. Abusonwa;**
- **Incar v. Ojomo**; respondents action against GNIC was dismissed as the contract was between the appellant and the respondent and GNIC was just an insurance company acting on the instructions of the appellants who were their clients.

Exceptions to the doctrine

1. Covenants running with the land (land law)

This rule according to **Tulk v. Moxhay**; a restrictive covenant voluntarily accepted by a purchaser of land as part of a contract of sale will in certain circumstances bind those who subsequently acquire such land. **Tulk v. Moxhay**: plaintiff sold land (garden) to Elms on a condition that he wnt build onit but rather preserve it. The garden was then sold to Moxhay who proposed to build on it even though he was aware of the restriction. He was successfully stopped from doing so by the court after Tulk sought an injunction against such act. When one sells land to a purchaser, he can insert restrictive covenant which will bind purchaser and subsequent buyers. This rule is subject to certain conditions. A mere notice by the third party is no longer enough to invoke the rule. The original seller giving the restriction must have retained some other land in the area for benefit and protection of which the restrictive covenant was taken. If one sells a portion of his land, selling value of the part not sold will depreciate unless restrictions are placed upon the enjoyment of the part sold. Only when the covenantee (seller) retains some land which will benefit from enforcement of restrictive covenant, that the court will enforce it against the covenantor (buyer). There are now 2 requirements under which general rule will apply

- Later buyer must have had notice of restrictive covenant
- Person seeking to enforce restriction should have land which will benefit from enforcement of restriction.

Formby v. Baker; a plaintiff trying to enforce terms of a covenant against a third party must show that he's in possession of land or the covenant was one running with the land, ie, the covenant must touch and concern the thing and not merely be collateral to it. A covenant runs with land when liability to perform it passes to assignee of the land. **Smith v. River Douglas Catchment Board.**

Another exception is contract relating to sale of family land in customary law. Members of the family are entitled to bring action setting aside conveyance (to which they are not parties) which had been made without their consent. **Lewis v. Bankole**

2. Contracts for hire of a chattel (shipping contracts)

If A charters his ship to B for three years, then sells it to C who then wishes to use it in a manner contradicting the contract between A and B, can B seek injunction against C? In **DeMattes v. Gibson**, it was held that an injunction would be issued restraining C from using the ship in a way inconsistent with the charterparty. The applicable remedy is an injunction to a specific performance. The principle was continually applied except in London County Council v. Allen. The principle was boosted in Lord Strathcona Steamship Co v. Dominion Coal. But the case of Port Line v. Ben Line Steamers did not follow the Strathcona Case. Nigerian courts are bound by the Strathcona case while the Port Line case is only of persuasive

authority. Although the latter fits the Nigerian atmosphere better as it is based on good faith, equity and conscience.

3. Interference with contractual rights (law of tort)

It is a legal wrong for one to knowingly interfere with the contractual rights of others. In **Lumley v. Gye**, the defendant wilfully induced a singer to break her contract and was held liable to her employer, the plaintiff for the tort of wrongful interference with contractual rights. This case is also applicable to chattels and services. **British Motor Trade Association v. Salvador.**

4. Restrictions Upon Price

If A, producer of goods, sells to dealer B on condition that retailers buying from B must promise not to sell goods below a certain price, A cannot directly sue any retailer C who sells below the restricted price.

- **Dunlop Pneumatic Tyres v. Selfridge;**
- **Tadday & Co v. Sterious & Co**

It should be noted that this really is not an exception to the doctrine of privity but rather an enforcement to it.

5. Insurance Contracts

Law of insurance is a statutory exception to the doctrine of privity. **Section 11 of Married Women's Property Act 1882** (applicable to all northern and eastern states in Nigeria) states that where a man or woman insures his/her life for the benefit of spouse/children, policy shall create trust in favour of the objects therein named. The law in Western Nigeria left out the provisions for life insurance by a spouse in favour of spouse/children.

Akene v. British American Insurance Co: plaintiff's dad died but he had named the plaintiff as beneficiary in case of his death. The plaintiff claimed 1,900 pounds but the defendant only gave him 500 pounds and argued that there was an absence of privity of contract between them and the plaintiff. The court held that the deceased was in position of trustee for the plaintiff and the plaintiff was entitled to sue as a beneficiary.

Also **Section 6(3) of Motor Vehicles (3rd Party) Insurance Act** explains one thus insured can bring an action against the insurance company even though he isn't a party to the insurance contract. In **Sule v. Norwhich File Insurance Society**, a third party in position of driver had right to claim directly against the company even though he wasn't a strict party to the contract. But in the absence of statutory provisions, doctrine of privity will apply and one cannot enforce the contract unless he/she is a party, even in insurance matters. Liberty Insurance Co v. John

But a major exception to the rule in Liberty Insurance Co v. John is a situation involving a tripartite agreement. J.E Oshivere v. Tripoli Motors; the appellant's car was damaged in an accident and he took it to car repairers saying insurance will pay. The respondent did a bad job and then after a dispute, they did not release the car to the appellant and claimed no privity of contract between them and the appellant. The court held that where the owner of the car goes to repairers and informs them that the insurance company will take care of the payment, and the insurers expressly agree to do so, there exists a tripartite contract involving the car owner, the car repairers and the insurers. There is thus privity of contract between the appellant and the respondents. In tripartite contracts, there are 2 separate contracts.

- Contract between the repairers and insurers that the insurers will pay less any 'excess'
- Between the repairers and the owners where the repairers promise to repair well and owner pays insurance excess

6. Privity and the trust concept

If A promises B that he will confer a benefit on C, it is obvious that C, not being a party to the contract and furnishing no consideration cannot enforce such contract. Only B can do so. But if B is unwilling to do so or is dead, equity will treat B as a trustee for C and will allow C to join B as defendants to sue A or if B is dead, sue A alone.

In Gregory and Parker v. William, Parker owed rent to Williams and money to Gregory. Parker agreed with Williams to transfer all his property to him and that Williams would pay Parker's debt to Gregory. Parker transferred everything but Williams did not pay Gregory. Gregory and Parker sued Williams for enforcement of payment and succeeded as Parker was a trustee for Gregory.

It can be seen that third parties for whose benefit contract was made can enforce such contract either by themselves or by joining the trustee to the promisor as defendants. This was confirmed in Walford's Case where Walford, a third party, was held to be entitled to sue in his own name. No special form was deemed as necessary to create a trust. It was held in ReFlavel, Murray v. Flavel, that a trust may be created even in absence of any expression in terms of importing confidence.

This trust concept gradually met increasing hostility by courts. See ReSchebsman ex Parte Offficial Receiver, trustee v. Cargo Superintendent (London) and Schebsman where the court was reluctant to discover a trust which will result in the 2 parties not being able to alrer terms they wished to. This thinking was applied in Vandepitte v. Preferred Accident Insurance Corporation of New York. In Green v.

Russell, it was held that an intention to provide benefits for someone else and pay for them, does not in itself give rise to a trusteeship.

This trust concept is extinct in the UK but still alive in Nigeria, see **Akene v. British American Insurance**. Although its not every contract conferring benefits on third parties that creates a trust in its favour, any trust intended to benefit third party must be an express one. The deceased acted on behalf of his son and thus a trust could be implied. Deceased was vested with the status of a trustee and his son, beneficiary was *c'estui que* trust. Element of intention is crucial. Once it is clear that the promisee was acting on behalf of the beneficiary, a trust is discovered, even though the term might not have been used.

7. Section 81(1) of Property and Conveyancing Law Western Nigeria

A person may take interest in land or other property or benefit of any condition, right of entry, agreement respecting land or other property, although he may not be named as a party to the conveyance.

This section literally rubbishes the doctrine of privity and would entitle any third party to enforce any contract made for his benefit. But the House of Lords reduced this scope in **Beswick v. Beswick** and its effect is now limited to agreements involving land alone. Third party cannot sue unless trust is present or benefit is one involving land. Beswick sold business to nephew and said he would pay him 6 pounds a week for the rest of his life and when he died, his widow should be paid 5 pounds per week. The nephew did this for her only once and the widow sued. She was held to be entitled to be able to bring action in 3 capacities:

- As her husband's administratix or personal representor
- Her own right under Section 81(1) of PCL Western Nigeria
- *C'estui que* trust, acting under a trust in her favour.

It was held she could only use (i) to bring action as she had no right under (ii) for it was only limited to interests in land.

8. Banker's commercial credits

These have been described as the most important practical example of termination in unilateral contracts. It facilitates process of international trade. Suppliers of goods may not be sure of being paid for goods ordered by one abroad and even the producer might refuse to supply a seller without assurance of payment. Solutions to these problems arose

- Clause in contract where buyer promises to direct bank to open credit in seller's favour
- Buyer agrees with bank; bank promises to open said credit in return for buyer's promise to reimburse bank
- Buyers bank informs seller of credit opened in his favour; to be drawn as soon as seller shows shipping documents.

Can seller sue the bank if after shipping the goods, receives no payment? Step three shows a valid contract between seller and the bank. Bank promises to pay seller if seller ships goods and shows shipping documents. Once goods are shipped and the shipping documents are produced, bank is bound to pay seller and seller is entitled to sue if there is a default.

9. Assignment of Choses in action and Novation

Sometimes, a party to a contract can transfer obligations under that contract to a third party without consenting the debtor and this enables third party to enforce the rights against the debtor. This is called 'assignment' and properties susceptible to this transfer are called 'choses'. They are personal rights of the property which can only be acquired by action and not physical possession. **Torkington v. Magee** e.g. debts, patent, copyrights etc. Most are assignable by statutes. However ordinary contractual rights are still assignable. This is a clear exception to the doctrine of privity.

Assignment differs from Novation. Novation is a transaction by which, with consent of all parties, a new contract replaces an already existing one. Its effect is not to transfer liability but to destroy original contracts and replace with new ones. Consideration must be furnished. For example, if A owes B, and B owes C, they can all agree that A should pay C the debt, thus fulfilling the obligation to B and from B to C. There is consideration from all sides. This is the essential distinction between assignment and novation; the requirement of consent and consideration. These are absent in an assignment.