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ELEMENTS OF COMMERCIAL LAW

(SIMPLIFIED NOTES)

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TABLE OF CONTENTS

INTRODUCTION

Both sale of goods and agency are special types of contracts. A proper understanding of the law of sale of goods and the law of agency must be founded upon a proper understanding of the law of contracts. However, the law of contracts is the main foundation of the larger area of commercial law. Consequently, a clearer understanding of the law of sale of goods and the law of agency calls for scrutiny at the introductory level of the meaning and historical development of commercial law. For this reason, we shall start the course with introduction of commercial law.

IMPORTANT DEFINITIONS

It is important to take cognisance of the definitons provided by section 2 (1) of the Sale of Goods Act.

"action" includes counterclaim and set-off;
"buyer" means a person who buys or agrees to buy goods;
"contract of sale" includes an agreement to sell as well as a sale;
"delivery" means voluntary transfer of possession from one person to another;
"document of title to goods" includes a bill of lading, dock warrant, warehouse-keeper's certificate or warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;
"fault" means wrongful act or default;
"future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale;
"goods" includes all chattels personal other than things in action and money, and all emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;
"plaintiff" includes a defendant counterclaiming;
"property" means the general property in goods, and not merely a special property;
"quality of goods" includes their state or condition;
"sale" includes a bargain and sale as well as a sale and delivery;

"seller" means a person who sells or agrees to sell goods;
"specific goods" means goods identified and agreed upon at the time a contract of sale is made;
"warranty" means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

NATURE OF COMMERCIAL LAW

What is commercial law?

Various scholars of the subject have put forward definitions which attempt to give the scope of commercial law. For instance, H.W. Bisney in his *Elements of Commercial Law* puts *'commerce, trade and business'* at the core of his definition. H.C. Gutteridge in his *Contracts and Commercial Law* elaborates on Bisney's definition and seeks to confine commercial law to '*merchandise'*. Professor Roy Goode in his definition focuses on the '*rights and duties arising from the supply of goods and services in the way of trade.'* Professor Goode in his 1998 book, *Commercial Law in the Next Millenium*, draws the distinction between contracts which he regards as the core of commercial law and equity.

The one thing that is discernible with all these things is the mercantile nature of the subject. Commercial law is the law of commerce. It is concerned with transactions in which both parties deal with each other in the course of business. The type of commercial transactions that may feature in the corpus of commercial law will include contracts for carriage of goods, contracts for the goods, insurance contracts for finance of sale transactions, equipment leasing agreements and receivables financing arrangements. It is however noteworthy that central to commercial law is the contract of sale of goods whether directly or through an agent, hence the concept of the law of sale of goods and agency.

Our concern in this course therefore will be the law of sale of goods and the law of agency as branches of the wider area of commercial law; but as already noted, the two must be seen within the context of the law of contracts.

HISTORICAL DEVELOPMENT OF SALE OF GOODS

The law of Sale of Goods started developing before the enactment of the English Sale of Goods Act of 1983. A concise historical survey of the evolution of the sale of goods law is provided by *C.M. Schmittof* in his book, *The Sale of Goods* (second edition 8 pages 5 to 17). He divides the survey into various parts i.e.:

1. The Area of Influence of Roman Law

English sale law is not derived from Roman law but is influenced by it. Roman law is part of the continental civil law. It is noted however that although the 18th and 19th century English judges occasionally resorted to civil law in order to support the decisions on new points of law; the law of sales independently developed with the essential aspects and was influenced by Roman law. The principles which the judges propounded are in many respects from those of Roman law.

2. The Influence of the Medieval Common Law

In medieval or middle ages in England, the law of sales was still embedded in the general law of contract which developed from the writs of:

a. debt,
b. covenants,
c. accounts.

However certain aspects of sale were becoming distinct in themselves. The 18th century was a period for development of *lex mercatoria* (law merchant / the law of merchant). This was the time of the great explorers and plunderers. Mediaeval common lawyers delved into and developed the laws relating to merchants.

i. First they evoked the basic and characteristic English doctrine of the consensual transfer of property in the goods sold and then divided them into four stages through which the sale of goods passes. These stages are:
   a. the formation of the contract;
   b. the transfer of the property in the goods;

c. the transfer of possession of the goods; and
d. the passing of the risk.

ii. Second, they developed the distinction between special goods and unascertained goods circa the15th century.

3. The Influence of the Statute of Frauds of 1677

The Statute of Frauds was passed for the prevention of frauds which was prevalent in the English society of the 17th century. Section 17 of the statute was substantially re-enacted as section 4 of the Sale of Goods Act of 1893. That section is broadly to the fact that a contract for the sale of any goods of the value of £10 of more shall not be enforceable by action unless the buyer shall accept part of the goods sold and actually receive the same or give something in earnest to bind a contract or in part payment or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his /her agents in that behalf. This section applies irrespective of whether the goods are intended to be delivered in the future or may not be ready for delivery. The section was repealed in England by the Law Reform Enforcement of Contracts Act of 1954 but in Kenya it is still in force as section 6 of the Sale of Goods Act.

4. The Influence of Lord Mansfield

Lord Mansfield as chief justice from 1756 to 1788 transformed the chaotic mess of commercial law usages in the law merchant into a coherent system of mercantile law of sales. He did this in his judicial decisions with the assistance of the merchants of the City of London. These merchants used to serve on his special jury. Lord Mansfield is therefore regarded as the founder of commercial law in Britain. His main process was that commercial law was universal law everywhere in the world and that it was based on reason.

5. The Influence of the Judicial Precedents of the 18th and 19th Centuries

The 18th and 19th centuries witnessed the spread of colonialism and the formation of empires abroad which are based on trade exploitation. The law had to develop to cater for these transnational transactions. The law developed from the cases decided by the court when resolving trade disputes for example, the distinction between conditions and warranties was developed by the courts in their decisions.

In addition, a French jurist Pothier who lived in the city of Orleans between 1699 and 1772 published treaties on the law of sale which are regarded both in France and Britain as the highest authority in the area. In France they were in-fact embodied in statute as these treaties were based on decided cases. In England Lord's Blackburn and Benjamin in 1845 and 1868 respectively wrote the first authoritative books on the law of sales. These were based on the English common law (case law).

6. The Influence of the Codification of the Law of Sales by Lord Chalmers.

Lord Chalmers is highly regarded as a legal draftsman who drafted the Sale of Goods Act of England. The first draft was done in consultation with Lord Herschel in 1888. Lord Herschel introduced the bill in the House of Lords in 1889. The bill was passed by both the House of Lords and the House of Commons in 1893. The bill received royal assent in early 1894 and came into operation as the Sale of Goods Act in the same year.

The important thing to note is that this Act reflects the development of the law in the 18th and 19th centuries. This law was imported into Kenya by the reception clause in 1897 through the Queen's Order-in-Council and existed up to 1930 when the colonial legislature re-enacted it as the Sale of Goods Ordinance which commenced operation in 1931. In Kenya the law of sale of goods is on the basis of the Sale of Goods Act which is to be found in three sources i.e.:

i. The Factors Act of England of 1889 which is a statute of general application in Kenya. A Factor is a commercial agent employed by the principal to sell

merchandise consigned to him / her by his / her principal but (s)he sells in his / her own name and receives a commission on the sale (s)he makes.

ii. The Sale of Goods Act of 1893; and

iii. The common law rules which were not changed or affected by the enactment of the Sale of Goods Act of 1893.

The Sale of Goods Act of 1893 has been repealed in England by the consolidated Sale of Goods Act of 1979. In Kenya, the 1893 Act still applies.

7. Influence of Equitable Rules

The court of Chancery began to deal with the relationship of principal and agent as if it were a relationship of trustee and beneficiary.

CJ Holt was very instrumental in introducing ideas used by the court of admiralty (maritime law / shipping law) in respect to the relationship of owners, masters and merchants. Maritime law has affected the contractual liability of principals. In-fact maritime law went further than the common law and made ship owners liable for contracts made by the master where the owner had not authorised or ratified the making of the contract; as long as the master had acted in a case of necessity or within the scope of the powers conferred upon him by his contract of employment or by the law of the sea.

With these developments, the later part of the 18th century and the early parts of the 19th century saw the emergence of main ideas of agency law. The first examples of these developments are in relation to the law relating to estoppel. This was followed by a development of the law of undisclosed principal and then the development of the law relating to the authority of factors and other similar agents at common law and under the Factors Act of 1889. The 19th and 20th centuries saw the refining of these developments to meet the emerging commercial needs.

In Kenya the usual reception clause imposed the law of agency. It is now embodied in section 3 of the 1967 Judicature Act. The development of agency law is closely tied up to economic development and the most critical period of development was the period

of mass production and distribution of goods in the 19th century. Therefore, sources of modern law of agency are partly:

- common law
- equity
- maritime law (admiralty law)
- mercantile law (commercial law / trade law).

DEVELOPMENT OF AGENCY LAW IN ENGLAND

A good source of historical development of the law of agency is Friedman in his book *The Law of Agency*. For a start, it is important to note that most English text writers exert that the history of the law of agency has nothing to do with the Roman law. Maitland, one of the leading English scholars on this subject, traces the origin of agency law to the *doctrine of usage* which is a doctrine equivalent to the law of trusts. Thomas and Hudson define a trust as an equitable obligation, binding a person (*trustee*) to deal with property owned by him / her (*trust property, being distinguished from private property)* for the benefit of persons (*beneficiaries or, in old cases, cestuis que trust*), of whom (s)he may himself / herself be one, and any one of whom may enforce the obligation [or for a charitable purpose, which may be enforced at the instance of the Attorney-General, or for some other purpose permitted by law though unenforceable].

During the early mediaeval period, there were instances of agency which occurred but at this time the law was in its infancy and agents were not given explicit recognition. The law wasn't fully developed because the society was organised along feudal lines which required no more than a rudimentary notion of the law of agency. For example,

i. there were instances in which kings empowered prelets as their agents to borrow money in their names.
ii. Secondly, attorneys were appointed for certain purposes although at this time they did not conduct litigation in court on behalf of their clients.
iii. Thirdly, elected knights who represented their constituents in parliament were conceived as agents.

Maitland however suggests in his writings that the start of modern agency law is to be found in the position and practices of the clergy. He cites a case which occurred during

the reign of King Edward in which a monk was sued for the price of goods which had been purchased by an abbot and were used by members of the convent. The monk was held liable for the price of those goods purchased by the abbot as an agent.

Similarly, Maitland notes that during the mediaeval times there was recognised liability on the part of the principal in respect of goods bought and / or acquired by agents on the basis that the principal used or benefited from goods.

In addition, mercantile necessity impose liability on a master for the act of his / her apprentices or agents. Furthermore, a husband could be made liable on the contract made by the wife provided that the money or goods under the contract had profited the husband. Liability will follow if the husband had previously authorised or subsequently ratified the deal.

By the end of the medieval period, common law had arrived at a position that the principal could be made liable on a contract made on his /her behalf by an agent:

i. if the principal ratified what the agent had done;
ii. if the principal had given the agent express authority to make the contract; and
iii. if apparently the agent worked or acted within the scope of an authority to do acts of a particular kind.

It is important to note however that despite these isolated instances of agency, the mediaeval period did not have well-developed system of agency laws. As such the designation *'agent'* was not used in the common law before 17th century mercantilist period.

However, with the development of commercial life in many areas, such as the growth of trading companies, the agency laws grew in importance. Gradually, it emerged as a separate concept distinct from the relationship of master and servant with which it had previously been equated. These developments were assisted by the equitable and civil law rules.

SOURCES OF SALE OF GOODS LAW IN KENYA

There are 3 sources of Law in the Sale of Goods

1. *Sale of Goods Act Cap 31 Laws of Kenya:* This Act is fashioned after the English Sale of Goods statute of 1893. It is basically a carbon copy of the English Statutes and is therefore the *'Bible'* for our law.

2. *Case Law:* These are laws which have grown arising out of court decisions. Case Law is massive. To understand case law as a source of law, one needs to understand the legal methods. A decision in any given case depends on the hierarchy of decisions.

3. *Relevant case law that predates 1893 English Act on Sale of Goods:* The importance of the pre 1893 English Act on sale of goods is that it allows for adoption of provisions that are not specifically covered by the Sale of Goods Act.

It is important to note that the principles of statutory interpretation are applicable in sale of goods law. These were laid down by Lord Herschell in *Bank of England v. Vagliano Bros 1891 A.C. 105* at pages 144 & 145**.** The principles are:

a. A judge examines the language of the statutes in its natural meaning uninfluenced by considerations from the previous state of the law before the legislation was enacted. The purpose of legislation is to come up with a new concept.

b. Even where there are ambiguities in the statutes, you need to apply the same kind of principle to understand what it is that a particular word was supposed to convey.

c. You try to look at the mischief that that particular law was meant to avoid. The meaning of the words as stated in the statutes. Where there is ambiguity, it is the duty of the courts to try and get the meaning. You must however not create your own ambiguity and then try to interpret it. The ambiguity must have originally been in the statutes.

In interpretation the idea is to find out the meaning of the language but not the meaning of the meaning.

PRINCIPLES OF THE LAW OF CONTRACT ARE A PREREQUISITE TO THE SALE OF GOODS.

One can approach the sale of goods only after there is a valid contract. Without a valid contract, a sale of goods contract cannot exist. The provisions of the Sale of Goods Act must be seen to apply to be able to decide if there is a sale of goods contract.

The law of sale of goods and the law of agency are mere modifications of the law of contracts. These may be illustrated by looking at section 59(2) of the Sale of Goods Act which stipulates that the rules of common law, save in so far as they are inconsistent with the express provisions of the Sale of Goods Act, shall continue to apply to contracts for sale of goods.

In the sphere of agency, the basic issue in the creation of an agency relationship is that of contracts. In this case, the contract is entered into by an agent on behalf of a principal with a third party and the contractual relationship is between the principal and the third party.

CONTRACT FOR SALE OF GOODS

The definition of the contract of sale of goods is to be found in the Kenyan Sale of Goods Act. The Kenyan Act takes the definition that is almost similar word for word with the English Act. Section 3(1) of the Kenyan Act defines it in the following manner,

> "*A Contract of sale of **goods** is a contract whereby **the seller transfers** or agrees to transfer the **property** in goods to **the buyer** for a **money consideration**, called the **price**."* *(Emphasis on the key words)*

Sale of goods law identifies that goods compose of two major components. You have property in goods i.e. the title in goods and the physical goods themselves, which are two different things.

Goods are different from property e.g. If you have borrowed a shirt, you have possession but not property or title. Ownership could be with one person whereas

control is with somebody else. When we talk of goods we are talking of the tangible aspect and when we talk of property we are talking of ownership.

A contract of sale of goods does not deal with the tangible, it deals with property. You do not transfer goods, you transfer property in the goods and deliver the goods.

According to section 3(2), the contract may be made between part owners of goods and according to section 3(3) it may be either absolute or conditional.

Where under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a **sale**, but where a transfer of the property in the goods is to take place at a future time or is subject to some condition to be fulfilled later, it is called an **agreement to sell.** The phrase **contract for the sale of goods** is thus a comprehensive expression embracing both sale and agreement to sell.

A sale may be seen as both a contract and a conveyance by virtue of a contract itself. The buyer becomes the owner of the goods. On the contrary, an agreement to sell is purely a contract. Ownership does not pass to the buyer until some later time.

The statutory definition of a contract of sale of goods has the following five distinctive elements:

i. Seller

According to section 2(1) of the Sale of Goods Act, a seller is defined as *"a person who sells or agrees to sell."*

ii. Buyer

The Sale of Goods Act defines a buyer as *"a person who buys or agrees to buy goods"*. It follows therefore that there has to be at least two parties to a contract of sale.

iii. Property

Within the sale of goods contract, property means ownership. Property is defined as *"the general property and not merely special property."* Ownership in the statutory sense means the collection of rights to use and enjoy property including the right to transmit it to others. It is the exclusive right of possession, enjoyment and disposal involving an essential attribute; the right to control, handle and dispose. They are the personal rights of the buyer against the seller which arise from a contract.

iv. The Goods the Subject Matter of a Contract

The goods are defined in section 2(1) as,

> *"… all chattels personal other than things in action and money and emblements industrial growing crops and things attached and forming parts of the land which are agreed to be surveyed before sale or under the contract of sale."*

The terms include all tangible property except money and certain things connected with land i.e. crops which are grown on that land or naturally growing on that land and fixtures. It is however of note that this definition excludes land itself or any interests therein. It all also excludes intangible personal property such as debts, rights and money.

The goods may be existing or may be future goods. This distinguishes goods already in the ownership and possession of the seller from those the seller still intends to acquire after contract of sale has been made. They may even be goods manufactured in the future. Future goods may be classified in various sub-categories i.e.:

a. goods to be manufactured by the seller;
b. goods to be acquired by the seller i.e. purchase, gift, succession or otherwise e.g. fish which a fisherman expects or hopes to catch, goods not yet in existence e.g. lambs to be born next season fruits or potatoes to be harvested next month;
c. things which exist but are not yet goods e.g. minerals not yet extracted but still forming part of the seller's land.

Goods may also be specified (ascertained) goods or unascertained goods as provided for in section 7(1) of the Sale of Goods Act.

Specific goods are goods identified and agreed on at the time a contract of sale is made. For goods to be specific, they must be designated as the unique article(s) that the contract is concerned with and must be capable of being designated at the time of the contract. It is not necessary that the goods in question should be physically present before parties at the time. Goods can also be specific even though they are identified only by words of a description.

On the other hand, **unascertained goods** are goods not identified and agreed upon at the time the contract of sale is made. They are goods sold by description i.e. commodities of an organic kind e.g. grains, coal, oil etc. and the seller undertakes to procure for the buyer the agreed quantity of such generic goods with such further characteristics as to qualify as may be specified. Unascertained goods fall into three main categories:

a. generic goods sold by description;
b. goods not yet in existence e.g. goods to be grown or manufactured i.e. a suit to be made by a tailor;
c. a part as yet unidentified out of a specific and unidentified part.

v. The Price of Consideration

The consideration which is given by the buyer for transfer of goods by the seller is called the **price.** The price must be expressed in monetary terms or else the contract would be one of barter or exchange and not a contract of sale of goods. According to section 10 of the Sale of Goods Act, the price may be fixed by the contract or it may be left to be fixed by evaluation of a third party. Where the price is not fixed, a reasonable price must be paid. Obviously if the buyer pays the price but fails to get the property, (s)he can recover that price because of failure of consideration as already noted.

The Sale of Goods Act makes a distinction between a sale and an agreement to sell. Section 2(1) stipulates that a contract of sale includes an agreement to sell as well as sale. Section 3(4) states that where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a **sale** but where the transfer of property in the goods is to take place at a future time or is subject to some

condition thereafter to be fulfilled, the contract is called an **agreement to sell**. This section is very clear in distinguishing the two terms sale and agreement to sell.

Section 3(5) states that such an agreement to sell becomes a sale when the time lapses or the conditions are fulfilled, subject to which property in the goods is to be transferred. Section 4(1) covers the question of capacity under a contract of sale. The section is to the effect that capacity to buy or sell is regulated by a general law of contract. If necessaries are sold and declared to an infant or a mentally ill person or a drunkard, (s)he must pay a reasonable price. **Necessaries** are goods which are essential to the condition of the person and are required at the time.

FORMALITIES OF A SALE OF GOODS CONTRACT

The formalities of the contract of sale of goods are covered by section 5 of the Sale of Goods Act. This is to the effect that the contract may be in writing or partly in writing or it may be inferred from the conduct of the parties.

On the other hand, section 6(1) requires that sale of goods contracts of the value of more than 200 Kenya shillings be evidenced in writing for them to be enforceable. The mere acceptance of the goods within the meaning of section 6(3) doesn't dispense with the need for a written memorandum unless there is also actual receipt of the goods.

CONTRACT OF SALE DISTINGUISHED FROM OTHER TRANSACTIONS

There are many contracts that look like sale of goods contracts that need to be distinguished from a sale of goods contract. The distinction is crucial to be able to apply the provisions of the Sale of Goods Act i.e. section 6(1) which requires that a sale of goods contract of the value of KShs. 200 must be evidenced in writing. It is important to note that the provisions of the Sale of Goods Act only apply to a sale of goods contract. The distinction is important because the results are critical to the resolution of disputes if they do go to court.

I. Sale of Goods and Barter Distinguished:

In a sale of goods contract or in any sale, there must be monetary consideration and in the case of sale of goods it must meet all the criteria of a contract. Similarly, section 2(1) of the Sale of Goods Act defines the term goods to exclude money. These two factors distinguish a contract of sale of goods from a contract of exchange or barter. Barter exchange is a contract where goods are exchanged for other goods or services or any other thing of value. In this case, the absence of monetary consideration is what counts and consequently the Sale of Goods Act cannot be applied. Barter exchange is a valid contact but it is not a sale of goods contract because it does not have monetary consideration. It is worth noting that you cannot buy money but you can exchange one currency for another. There are occasions when money such as collector's coins can be sold so long as it has ceased to be legal tender.

It is however important not to confuse sale and set off with barter and /or exchange. Set off is where goods are exchanged for other goods but some money is paid by one of the parties as well. For example in *Aldridge v. Joshua (1857) 7 E&B 885*, the evidence seems to have pointed to an arrangement under which there there were reciprocal sale of bullocks and barley. The prices of each were calculated and then set off against each other and the balance of £23 was agreed to be paid in cash. These were two separate contracts of sale and the sale of goods principles were applied.

Similarly, situations of trade-in's are not transactions of barter but of sale of goods.

II. Sale of Goods and Gifts Distinguished:

Gift is transfer of property without any consideration. It is not binding unless it is made by a deed i.e. in writing. It is not easy to distinguish gifts from sale of goods.

In *Esso Petroleum Limited V. Commissioners of Customs & Excise [1976] Vol 1 AER 177* , the Esso petrol station put out on the signboard the following advert *"free gift of a coin bearing the likeness of a footballer to anyone buying 4 gallons of petrol."* The defendant bought petrol from this petrol station and when the petrol station was required to pay taxes by the Customs Department, the argument was whether this transaction consisted a sale of goods or a gift. It was neither a sale of goods nor a gift. In getting the coin, there was no monetary consideration involved. Their Lordships stated that,

> *"There was no intention to create legal relationship between Esso and the customers...In substance it was a collateral contract existing alongside a contract for the sale of petrol."*

If there were a sale of goods, then the company would have been liable to pay taxes.

III. Sale and Bailment Distinguished:

A bailment is a transaction under which goods are delivered by one party (the bailer) to another (the bailee) on terms, which normally require the bailee to hold the goods and ultimately to redeliver them to the bailor or in accordance with his / her directions. The property in the goods is not intended to pass and does not pass on delivery. The bailee only has custody for a small fee. The bailee is empowered to sell the goods only for purposes of recouping demurrage.

Conversion: In conversion if you went to a car dealer who allowed you to test drive a car but instead of test driving it you advertised it for sale by putting adverts on the car, that is behaviour inconsistent with the owner's wishes and you will be converting.

IV. Sale of Goods and Hire Purchase Distinguished:

Contracts of hire-purchase resemble contracts of sale very closely. In hire-purchase, the ultimate sale of the goods is the real object of the transaction. A contract of hire-purchase is a bailment of the goods coupled with an option to purchase them which may or may not be exercised. Only if and when the option is exercised is there a contract of sale.

In hire purchase, possession and enjoyment of the goods is passed before payment is concluded and even before intention to own is expressed. The risk in hire purchase is that there is the intention that if the hirer opts to own the goods, they can become owners but in sale of goods there is no option of owning or not owning, you pay for the goods you own them. Possession is usually after payment.

The owner of the goods in hire purchase undertakes the risk that the seller transfers or agrees to transfer to the buyer and by virtue of possession of the goods the owner of the goods takes the risk that the owner may sell the goods to a third person and the only safe area is with durable goods such as a car where to sell the car again you need to transfer the logbook. A look at section 23(2)(a) *(which expounds on sales conducted by persons who are not owners of the goods)* and section 47 (*which expounds on the effect of subsale or pledge by the buyer)* adequately explains the aforementioned point.

The fear of a financier is that having given possession or documents of title in durable goods; then any disposition by the person who has acquired possession with consent of the owner; if they sell the goods to another person who buys without notice and for value, the second buyer acquires a better title than the first buyer.

V. Sale of Goods Distinguished from a Loan on Security of the Goods

Loan on security of the goods is a transaction that is designed to enable someone 'A' who owns some goods to borrow money from 'B' and give possession of those goods to the money-lender. The goods can only be reclaimed upon completion of repaying the loan. This transaction does not mean that the person borrowing the money has delivered the goods to the money-lender but only delivers the goods to the money

lender to hold as security. (S)He has not sold the goods but has only given them to operate as security. The understanding is that 'A' will retain possession of the goods and the borrower will repay the lender capital plus the agreed interest and lastly the borrower will have the right to take back the goods if (s)he has repaid. The lender has no right at all to resell the goods unless the borrower has defaulted.

VI. Sale of Goods Distinguished from Contract of Supply of Services

Historically contracts for supply of services were divided into two:

1. contracts for skill and labour and
2. contracts for labour and material.

It was also assumed that the applicable law was not sale of goods law for contracts of skill and labour. For example services of a lawyer. When you contract a lawyer to draw a will, you pay for the services of the lawyer making the will but you receive a document which is incidental.

Similarly, a contract for the supply of goods to be installed or fitted into a building or a construction is normally regarded as a contract for labour and materials and not a contract of sale of goods.

If the contract was for the supply of services only, then insofar as the services themselves were concerned, the supplier's duties were generally duties of due care. Only where there is a contract for sale of goods do the duties remain, prima facie duties of strict liability, that is to say the seller is responsible for defects in the goods, even in the absence of negligence.

For supply of services, the applicable law is that of torts and the measure is reasonable care. The test in supply of services is due or reasonable care; but in sale of goods, goods are of a particular perceivable quality. They are tangible.

The test for deciding whether a contract falls into the one category or the other is to ask what is 'the substance' of the contract. If the substance of the contract is the skill and labour of the supplier, then the contract is one for services, whereas if the real

substance of the contract is the ultimate result, the goods to be provided, then the contract is one of sale of goods.

The law of Sale of Goods was developed as a consumer protection mechanism. It came in to bridge the gap between the seller and the buyer. The seller is supposed to have more knowledge than the buyer and the buyer is no longer bound by *'caveat emptor'*. Goods must be fit for the purpose. Currently one of the emerging issues with this concept is that fact that with technological development, it is difficult for the buyer to know all the information about some goods just by looking at it for example a computer. The protection has to keep pace with the changes and buyers cannot keep up.

VII. Sale of Goods Contract and Patents Distinguished

Items of intellectual property such as copyrights, patents and trademarks are not personal chattels or corporeal movables and so fall outside the definition of goods although goods may exist which embody these intellectual property rights. In modern times, an important point, not yet wholly resolved, is whether computer software may constitute 'goods' within the meaning of the Act. Software is normally embedded in some physical form, such as disks or as part of a package in which it is sold along with computer hardware, that is computer or computer parts. It is protected as a literary work by the law of copyright. Usually only the medium in which the software is embedded, e.g. a disk is sold. The copyright in the software remains in the software house which developed it. Software can also, of course, be delivered on-line subject to licensing terms.

VIII. Sale of Goods and Agency Distinguished:

Distinction between a sales of goods contract and a contract of agency is a difficult one. For example where 'A' asks 'B' a commercial agent, to obtain goods for him / her from a supplier or from any other source and 'B' complies by sending the goods to 'A'; it may well be a fine point whether this is a contract under which 'B' sells the goods to 'A', or is a contract under which 'B' acts as 'A's agent to obtain the required goods from

other sources. In an agency contract there may be privity of contract between the buyer and the agent's supplier, which will enable action to be brought between them. On the other hand, if it is a sale, there will be no privity between the buyer and the seller's own supplier.

The duties of a commission agent are less stringent than those of a seller and in the event of a breach of contract; the measure of damages may also be different. Thus if a seller delivers less than (s)he is bound to under the contract, the buyer can reject the whole, but if despite his / her best endeavours, a commission agent delivers less than his / her principal has ordered (s)he has committed no breach of contract and the principal is bound to accept whatever is delivered. Should the commission agent deliver goods of the wrong quality (s)he will only have to pay (as damages) the actual loss suffered by the buyer but should a seller be guilty of such a breach (s)he may have to pay damages for the buyer's probable loss of profit. This contract is not one for sale of goods.

PASSING OF PROPERTY

A clear distinction is drawn in the Sale of Goods Act of passing of property as between the seller and the buyer and the transfer of title. The prominent feature of the property rights is that they bind both the immediate party to the transfer and also the third party. It is therefore important to note that just because property in goods has passed to the buyer doesn't confer on him / her title to the goods as against third parties nor does it confer on him / her the right to possession as against the seller.

The legal concept of property in goods under the Sale of Goods Act can be understood from a consideration of the consequences of the passing of goods in contrast from consequences which follow when the buyer has acquired a good title that is binding against third parties. A buyer wishing to acquire possession from the seller can only do so upon payment of the price or by being granted credit by the seller.

In summary therefore, property in sale of goods signifies scarcely anything more than personal right of the buyer against the seller which arises from the mere contract.

Effect of Property Passing Between Buyer and Seller

1. Unless otherwise agreed, the risk of accidental loss or damage to goods *prima facie* passes with the transfer of property in the goods which passes with the property.
2. When the property in specific goods has passed, the buyer can no longer reject them for breach of condition but (s)he can only sue for damages.
3. The seller is generally not entitled to sue for the price unless the property has passed from him / her to the buyer.
4. If the seller is a company, the buyer will generally have a good title against the liquidators / repudiators in the event of the company being wound up while goods are still in its possession.
5. It is important to distinguish between specific goods / ascertained goods and unascertained goods as:
    a. no property can pass in unascertained goods; and
    b. property in specific / ascertained goods is transferred at such a time as the parties to the contract intended it to be transferred.

Specific Goods

As already noted, specific goods are defined in section 2(1). On the other hand, ascertained goods are defined in *Re Wait (1927) 1 Chancery 606* as,

> *"…identified in accordance with the agreement when the contract of sale is made."*

It is worth noting that the two definitions are similar.

Unascertained Goods

Unascertained goods are of various categories i.e.:

i. Future goods: they are goods to be manufactured or acquired by the seller after the time of making the contract.
ii. Purely generic goods: involve general goods where the subject matter of the goods is not a specific chattel but goods of a particular type. These are goods indicated by description and not separately identified.
iii. A part of a large quantity of goods e.g. 100 kg of maize out of a consignment of 10,000 kg.

If after looking at all the aforementioned one doesn't discover the parties' intention, then resort has to be made to rules specified in section 20 of the Sale of Goods Act.

These rules are rebuttable presumptions to assist in ascertaining the parties' intention as to when the property passes.

<u>RULES</u>

Rules 1 to 4 deal with specific / ascertained goods while rule 5 deals with unascertained goods.

<u>Rule 1 (unconditional contract for sale of goods)</u>

Where there is an unconditional contract for sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made. Consideration is not given to whether time of delivery is postponed. However, proof showing that there is an unconditional contract and the goods are in a deliverable state must be provided. This was illustrated in *Underwood Limited v. Burgh Castle Brick and Cement Syndicate (1922) 1 KB 342*, where Underwood Ltd. agreed to sell a certain machine to Burgh Castle. The machine which was to be delivered for free via rail. The machine was a trade fixture that was bolted to the concrete floor in a business premise and weighed

about 30 tonnes. Before delivery, the machine had to be separated from the concrete. While this was being done, it was damaged. The defendant buyer refused to accept it. The plaintiff seller sued for the price of the machine on the basis that property had already passed. Lord Justice Bankes in addressing the question of a deliverable state indicated that a deliverable state does not depend upon the main completeness of the subject matter in all its parts. It depends on the actual state of the goods at the date of the contract and the state in which they are to be delivered by the terms of the contract. The court therefore held that the English equivalent of our section 20(a) did not apply because there was a different intention specified in the contract. It is however noteworthy that for this to be effective, the contrary intention must be shown at or before the making of the contract.

Section 28 of the Sale of Goods Act talks about an unconditional contract for the sale of specific goods. The question that arises is what these terms mean. The controversy in this area boils down to two views:

i. That the term unconditional means a contract without conditions whatsoever. This is the view that is espoused by the courts.
ii. That an unconditional contract means a contract without conditions precedent or subsequent. This is a view propounded by text writers. Various reasons have been advanced by text book writers that the phrase refers to conditions precedent or subsequent.
    a. a contract of sale may be absolute or conditional, therefore it implies a condition subsequent or precedent.
    b. Paragraphs (b), (c) and (d) of section 20 deals with contracts subject to a condition precedent and therefore the natural inference is that paragraph (a) of section 20 deals with contracts not subjected to such conditions.
    c. it is difficult to see that there can be such a thing as conditions if the term unconditional means without condition. This is because parties to a contract always provide conditions to be fulfilled and also provide for rights and liabilities under the contract.
    d. The effect of that condition is that the buyer will lose the right to reject even before (s)he sees the goods because the property passed upon contracting.

Rule 2

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

Goods are in a deliverable state when they are in such a state that contractually binds the buyer to take delivery of them. The seller has to give notice that the goods are ready for delivery. In the *Underwood Ltd* case, the court further held that, the relevant section applied so that the risk was still on the sellers. Thirdly that, as an alternative, the parties intended that no property will pass until the engine was safely on the rail.

Rule 3

The third rule deals with cases where the passing of property is conditional upon performance of some act with reference to the goods. The property does not pass until the thing is done and the buyer has notice thereof.

If question about the determination of the price of the goods arise, then the phrases used in the contract have to be interpreted *ejusdem generis* with the other words used in section 20(c) of the Sale of Goods Act.

Rule 4

This rule deals with a situation where goods are delivered to the buyer on 'approval' or 'on sale or return' or other similar terms; it is up to the buyer to approve the goods for the sale contract to become binding. In this situation property in the goods passes when the buyer approves them or adopts the transaction or where the buyer retains the goods for an unduly long period of time (section 36).

Rule 5

This rule deals with the passing of property in unascertained or future goods. The general rule as regards unascertained goods is that; where there is a contract for the sale of unascertained goods, property in the goods does not pass to the buyer unless and until the goods are ascertained.

Section 20 (e)(i) gives the rule about these goods. It states,

> *"where there is a contract for the sale of unascertained or future goods by description, and goods of that description, and in a deliverable state, are* ***unconditionally appropriated*** *to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer; and assent may be express or implied, and may be given either before or after the appropriation is made;"*

The term 'unconditionally appropriated' to the contract means goods which have been altered such that the seller could not use them except for the purpose of the contract in question.

TRANSFER OF TITLE

In a contract of sale, ownership or title of goods is transferred from one person to another in exchange of money. The fundamental reason for crafting a sale of goods contract is the transfer of rightful ownership and possession from a seller to a buyer.

Accordingly, during preparation of the contract, the Latin maxim, *Nemo dat quod non-habet* has to be upheld by the contracting parties. This principle is to the effect that *"one cannot give what one does not have."*

The court applied the *nemo dat quod non-habet* principle in *Ingram v Little (1961) 1 QB 31*. In this case, three plaintiffs who were joint owners of a car advertised it for sale and a rogue introduced himself as Hutchinson offered to buy it. When he removed his cheque to pay for it; the first plaintiff, who was conducting negotiations on behalf of the plaintiffs, told him that they expected cash and not a cheque therefore the sale was cancelled. The rogue insisted that he was P.G. Hutchinson a reputed businessman and he gave his particulars. The plaintiffs had never heard of him, but one of them checked with the local post office and confirmed that the particulars were correct. They then allowed him to pay for the car using the cheque. The cheque was subsequently dishonoured when presented for payment. In the meantime, the rogue had already sold the car to the defendant who bought it in good faith and without notice of the bad title. On a claim by the plaintiff against the defendant for the return of a car, or alternatively damages for its conversion; it was held that the plaintiff's claim succeeded as the rogue had no title to the car which he could pass to the defendant. The court observed that where a person physically present and negotiating to buy a chattel fraudulently presumes the identity of the existing person, the tests to determine to whom the offer was addressed and when the offer was addressed was how the promisee ought to have interpreted the promise. Applying that test to the present case and treating the plaintiff as offerors to the real P.G. Hutchinson meant the rogue was incapable of accepting title. Therefore, the plaintiffs' mistake prevented the formation of a contract with the rogue. Accordingly, the plaintiffs case succeeded.

In Kenya, the *nemo dat quod non-habet* principle is embodied in section 23(1) of the Sale of Goods Act and it demonstrates the protection that the law gives to private property. Therefore, if the seller's title is defective and if this defective title is passed on to the

buyer, then the buyer's title would also be considered to be defective. This means that (s)he will have no rights to the goods despite the fact that (s)he acted in good faith and paid the price.

Note that it is the purpose of sales law to ensure that the buyer obtains such property in the goods that are sold to him / her as will enable him / her to exercise all the rights of an owner.

In *Bishopsgate Motor Finance Limited v Transport Brakes Ltd (1949) 1 KB 332*, Lord Denning made a statement which has become a classic exposition of the principle of *nemo dat quod non-habet* and its exceptions. He stated that,

> *"In the development of our law, 2 principles have striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the possession of commercial transaction. The person who takes in good faith and for value without notice, should get a good title"*

The first principle has held sway for a long time but it has been modified by common law itself and statutes so as to meet the needs of our times. The first of these principles is still the general common law principle of *nemo dat quod non-habet* and has been codified in the first part of section 23(1).

A second case illustrating the workings of *nemo dat quod non-habet* and one of its exceptions is *Weingut v Leslie (1967) EA 480*. Channan Singh J had the following to say in connection to this case;

> *"this case is an example of the classical conflict between two principles of law."*

EXCEPTIONS TO *NEMO DAT QUOD NON-HABET*

Channan Singh J in *Weingut v Leslie (1967) EA 480* quoted Lord Denning in *Bishopsgate Motor Finance Limited v Transport Brakes Ltd (1949) 1 KB 332* and said that the first principle mentioned by Lord Justice Denning is a universally accepted principle in relation to the protection of private property. Singh J then listed the exceptions. He said that the Sale of Goods Act listed the following exceptions to the first of the two

principles i.e. protection of property. No one can give a better title than he himself possesses (as stated by Lord Denning):

i. where the owner is estopped from denying the seller authority,
ii. where the sale is by mercantile agent,
iii. where the goods are sold under a power of sale or an order of the court,
iv. where the seller's title is voidable and at the time of sale hasn't been voided,
v. where the goods are seized under a writ of execution and sold to a bona fide purchaser,
vi. where the goods are disposed of under conditions described in section 26 of the Sale of Goods Act

The exceptions have been discussed hereunder:

I. The Estoppel Doctrine Under Section 23(1) of the Sale of Goods Act

This exception is embodied in the words,

> *"… unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell"*

The essence of estoppel in terms of this sale is that there are two situations under which an owner may be prohibited for denying the seller's authority to sell i.e.:

a. Where (s)he has by his /her own words or conduct represented to the buyer that the seller is the true owner or has the owner's authority to sell. This is called *estoppel by representation.*
b. Where the owner by his / her own negligent failure to act, allows the seller to appear as the owner or having the owner's authority to sell. This is referred to as *estoppel by negligence.*

There are three requirements of estoppel i.e.:

- there must be a representation of facts,
- this representation must be unambiguous, and
- the representation must be relied upon and acted upon by a third party.

II. Sale by a Factor

The second exception is found in section 2 of the 1889 Factors Act of England. This section states that a sale by a mercantile agent passes a good title to a third party despite the fact that the mercantile agent is not the owner of the goods. In *Kapadia v Laxmidas (1964) EA 378*, the court held indirectly that the Factors Act was a statute of general application in Kenya. Section 23(2) of our Sale of Goods Act forms the foundation of this exception

A factor is a mercantile agent whose business is to sell or otherwise deal in goods. A factor is a type of agent who sells goods owned by another, called a principal. The factor engages more frequently in the sale of merchandise than the purchase of goods.

A factor is distinguished from an agent in that a factor must have possession of the principal's property, while an agent need not have physical possession of the goods.

The factor-principal relationship is created by a contract. Both parties are expected to comply with the terms of the agreement. The contract is terminable by the factor, by the principal, or by operation of law. The merchandise entrusted to the factor is called a consignment, and a factor is often synonymously called a consignee. The factor is sometimes referred to as a commission merchant when his / her compensation is based on a percentage of the sale price. Factorage is defined as the compensation paid to factors.

Conditions to be fulfilled by a mercantile agent

1. A mercantile agent must have been in possession of goods belonging to an owner. The mercantile agent must be a person who falls within the meaning of section 26 (3) at the time (s)he sold the goods.

2. The mercantile agent must be in possession of goods with the owner's consent. A mercantile agent will be considered to have proper consent from the owners to possess the goods even if (s)he obtained those goods by:
   i. larceny by tricks, or
   ii. larceny by bailee, or
   iii. fraud or by false pretences.

The only situation in which the mercantile agent is deemed not to have consent, is whereby the agent out-rightly steals the goods.

3. The agent must have acted or sold goods in the ordinary course of business as a mercantile agent.

4. The buyer must prove that (s)he took the goods in good faith and without notice and that the sale was made without the owner's authority.

5. Finally, the transaction effected by the mercantile agent with the innocent party must be a sale pledge or other disposition.

III. A Sale Under a Special Power of Sale

The third exception is contained in section 23(2) of the Sale of Goods Act and is referred to as *'a sale under a special power of sale'*. This therefore qualifies the *nemo dat quod non-habet* principle as contained in Section 23(1). Consequently, this exception can be subdivided into three i.e.:

- sale under common law power of sale;
- sale under statutory power of sale; and
- sale under the order of a competent court (effect of writs of execution).

Sale Under Common Law Power of Sale

There are several common law powers of sale which may be exercised by various persons. These include:

a. pledgees of goods or documents of title can sell goods pledged to them and be able to pass a good title;
b. agents acting within the scope of their apparent authority are viewed in common law as having power to sell goods and pass a good title;
c. auctioneers in possession of goods are able to sell the goods and pass a good title;
d. sale by executors / administrators of estates of deceased persons are sales on the basis of common-law with a power of sale. When acting in their representative capacity, they can sell goods belonging to the estate and pass a good title.

Sale Under Statutory Power of Sale

Apart from common law powers of sale, there are also situations of statutory powers of sale. This right and mandate is donated by law and allows the holder of the goods to sell them without seeking the court's intervention. Examples of such situations include:

a. Power conferred upon an unpaid seller. Section 40(c) talks on the rights of unpaid seller whereas section 48 speaks to the effect of exercise of lien or stoppage in transit. Therefore, if a person has sold goods but (s)he has not been paid for those goods, the Sale of Goods Act gives him / her power to resell the goods in such circumstances that the original purchaser cannot sue a third subsequent purchaser.

b. Sale under the Disposal of Uncollected Goods Act.

c. Under the Land Act, statutory power of sale is given to a mortgagee. A lender can sell land which has a charge on it (security) upon default by a borrower without seeking the intervention of the court.

d. Under the Distress for Rent Act, a landlord / landlady can sell the property which (s)he has seized from the tenant's premises for non-payment of rent and pass a good title.

e. Similarly, trustees in bankruptcy under the Insolvency Act are entitled to sell the property of a bankrupt person and convey a good title.

f. With regard to companies, liquidators under the Insolvency Act have the power to sell property of a company in liquidation and pass a good title.

Effect of Writs of Execution / Sale Under the Order of a Competent Court

Section 27 of the Kenyan Sale of Goods Act provides for this technical exception. Court Execution is achieved through a court order of execution. Any of the orders issued in court for disposal of perishable goods can be executed by a court broker who then passes a good title to the purchaser. The court order serves as proof of the property owed by the judgment debtor to the judgment creditor. An officer of the court can take possession of the judgment debtor's property in a lawsuit on behalf of the judgment creditor, sell it via public auction and use the proceeds to pay the judgment. Ordinarily,

a writ of execution cannot be issued until after a court issues a judgment or decree determining the rights and liabilities of the parties involved.

IV. Sale Under a Voidable Title Not Avoided at the Time of Sale

The fourth exception relates to sale under a voidable title not avoided at the time of sale. It is embodied in section 24 of the Sale of Goods Act. This section declares the general rule that a seller cannot avoid a voidable contract once third parties' rights have been acquired by the buyer. It is important to distinguish between a contract of sale which is *void ab initio* and one which is merely voidable because section 24 only protects the third-party in the case of voidable contract but not in the case of void contracts.

V. Resell by a Seller in Possession

The fifth exception is in section 26(1) of the Sale of Goods Act. There are several conditions which must be fulfilled before this section is invoked:

a. the seller must have sold their goods under a contract of sale where title has already passed, but the seller still has physical possession of the goods;
b. there must be no breach in continuity of physical possession either by the seller or his / her agent;
c. the seller must transfer to the third-party physical delivery of the goods; and
d. the seller must be in possession of those goods either as seller or in some other capacity.

VI. Sale by a Buyer in Possession

The sixth exception is the opposite of the fifth exception and it concerns sale by a buyer in possession. This exception is contained in section 26(2). The conditions to be fulfilled in this respect are:

a. the buyer must have obtained possession of the goods with the owner's consent;
b. there must be a contract of sale within the meaning of the Sale of Goods Act;
c. the meaning of consent must be that meaning given to it in the Factors Act;

d. the possession must be actual physical possession of the goods or documents of title to the goods and it must be obtained by the buyer in his / her capacity as a person who has bought or agreed to buy the goods; and
e. the third party must take the goods in good faith and without notice of any lien or other right of the original seller in respect of those goods.

OBLIGATIONS CREATED BY THE SALE OF GOODS CONTRACT

A lot of scholars have discussed the need to distinguish between fundamental obligations and minor obligations of a contract. They have also emphasized the need to distinguish between conditions and warranties in a contract.

1. The main reason for these distinctions is the insertion of exclusion or exemption clauses in contracts, which exclude liability for any defects in the contract.

2. In cases of breach of fundamental obligation or fundamental breach of contract, the innocent party could repudiate the contract despite the presence of an exclusion clause.

3. The distinction must differentiate between the core of the contract and the condition and warranty. Breach of a condition may give rise to a right to treat the contract as repudiated. Breach of a warranty may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. It is worth noting that depending on the construction of the contract, a stipulation may be a condition, though called a warranty in the contract.

   Usually a condition is a term which although not a fundamental obligation of the contract, is still so vital that it goes to the root of the transaction. A warranty on the other hand is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of the contract. Breach of a warranty gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

   A warranty is a minor term whereas a condition is a major term.

   'Condition' should also be distinguished from *'representation'*. Representation is a statement made at, or before the making of the contract but which does not form part of the contract. It is often contrasted with '*a warranty'* which is part of the contract.

DUTIES IN A SALE OF GOODS CONTRACT

SELLER'S DUTIES

The duties of the seller in a sale of goods contract are:

1. Duty as to The Existence of Goods

There is an implied condition on the seller's part that the goods are in existence at the time the contract is made. The goods may have perished. If this is without the seller's knowledge, then the contract is void. If the goods perish without any fault on the part of the seller or buyer, but the risk has not passed to the buyer, then the agreement can be avoided.

2. Duty to Pass a Good Title

This is an implied condition on the part of the seller, unless the circumstances of the contract show a different intention. In the case of a sale, the seller has a right to sell his /her goods. In the case of an agreement to sell, the seller will have the right to sell goods at the time when the property is to pass. Since the essence of the contract of sale is the transfer of property in the goods sold, where the seller has no right to sell their goods and the buyer has the right to buy the goods; the courts can find that a condition has been breached and the buyer can recover the price from the seller.

3. Duty of Quiet Possession of the Goods

This duty is to the effect that as an implied warranty, the buyer shall have and enjoy quiet possession of the goods. The seller should not disturb the enjoyment of the goods by the buyer.

4. Goods Must Be Free from Encumbrances

A fourth but minor warranty is to the effect that goods are free from encumbrances. Encumbrance simply means a burden.

5. Duty to Deliver the Goods

The seller has a duty to deliver the goods and the buyer has to accept and pay for them, on the condition that the terms of the contract have been fulfilled.

With regard to delivery, it is not necessary that the seller physically transfers the goods to the buyer. If the parties are aware that the goods are at a different place other than the seller's place of business, then that different place is the place of delivery.

The delivery expenses are borne by the seller. Further, the expenses of putting the goods in a deliverable state must be met by the seller. This obligation has various aspects that can be summed up as follows:

a. There must be a duty to deliver to the buyer goods in which property has already passed. This specific duty can be breached should the seller fail to deliver those specific goods.
b. There may be a duty to procure and supply to the buyer goods in accordance with the contract but without any particular goal being designated to which the duty of delivery attaches.
c. It may be that the seller is under a personal duty to deliver the particular consignment of goods although the property has not yet passed to the buyer. The general rule is that it is the seller's responsibility to see that the goods are in a deliverable state. Delivery may be effected in various ways:
    i. delivery by the physical transfer of the goods;
    ii. delivery by the transfer of the means of control over their goods;
    iii. delivery may be an acknowledgement by a third-party in whose possession the goods are;
    iv. delivery of the documents of title to the goods;
    v. delivery may also be constituted where the parties agree that the seller should hold the goods as the buyer's agent or bailee;
    vi. delivery may be to the buyer's agent or to a courier for purposes of transmission to the buyer.

A question that arises is as to whether the time of delivery is important. As a general rule, payment and delivery are concurrent conditions. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not considered to be of essence to a contract of sale. However, the seller is bound to deliver

goods within a reasonable time and at a reasonable hour. It is important to note that stipulations as to delivery times may be waived.

6. Duty to Supply Goods in the Right Quantity

Where the seller delivers less than the quantity contracted for, the buyer can either reject the goods or if (s)he accepts those goods, (s)he must pay for them at the contract rate.

Where the seller delivers more than the contract quantity, the buyer can either accept the contracted quantity and reject the rest or (s)he may accept or reject the whole consignment. If (s)he accepts all the goods delivered, then (s)he must pay for them at the contract rate.

If a seller delivers goods contracted for with mixed goods of a different description which were not included in the contract, then the buyer may accept those goods which are in accordance with the contract and reject the rest or (s)he may reject all the goods delivered.

The buyer is not bound to accept delivery of goods by instalment unless there is a contrary agreement between the parties. If the contract of sale provides that the goods are to be delivered by instalments (each of which is to be paid for separately) and the seller makes a defective delivery of one or more instalments, or the buyer neglects or refuses to pay for delivery of one or more instalments; such breach is not to be treated as a repudiation of the entire contract but as a severable breach giving rise to a claim for compensation.

7. Duty to Supply Goods of the Right Quality

This duty is covered under the general rule of ***caveat emptor***. Literally interpreted, this doctrine means ***'let the buyer beware'***. What this means is that, in the absence of fraud or express agreement by the seller, (s)he is not liable to the buyer, should the goods lack the quality or characteristics expected of them by the buyer.

The doctrine of *caveat emptor* was dictated by the demands arising out of the industrial revolution in Europe. It particularly emphasized the economic interests of factory

owners and industrialists. The effect was that anything they produce had to be bought without any warranty as to their quality. The reasoning behind this was for the owners / industrialists to realize the cost of production. The surplus value was normally slated go back into production costs and for expansion purposes.

Certain exceptions have been developed to counter the effects of the doctrine of caveat emptor. These rules are implied by statute. The main justification for these exceptions was an attempt to protect the ultimate consumer of goods. The second reason that has been advanced for the development of the exceptions is that the goods are not being demanded for their 'use value' but rather for their 'exchange value'. The exceptions were aimed at the protection of merchant capitalists who had emerged as middlemen between the industrial capitalist and the ultimate consumer. It is however notable that even after providing for these exceptions in statute, this protection is taken away by section 55 of the Act. Section 55 champions caveat emptor and freedom of contract. Contracts can still have exemption clauses by virtue of section 55. This must be done subject to the application of doctrine of fundamental breach.

Exceptions to Caveat Emptor

i. Sale by Description

The first exception deals with the implied condition that the goods must correspond to their description. Description co-notes and applies to two situations i.e.:

a. where the purchaser has not seen the goods but is relying on the description alone.
b. where the buyer has actually seen the goods.

Description in the narrow sense refers to the physical identity of the goods and in the wider sense it includes both the physical identity and quality of the goods.

The question of description also applies to the manner of packaging of the goods. If the manner specified is not followed, it will be a breach of the implied term of description.

Parties to a contract are given the freedom to include in the description particulars of the goods which may relate to quality and quantity as well as time of shipment and packaging including the size of the containers. This must always be fulfilled otherwise the implied condition as to description will be held to be breached.

ii. Fitness for Purpose

Two conditions are envisaged i.e.:

a. The goods must be in a condition in which they are normally supplied in the course of the seller's business to supply.
b. The buyer must have expressly or by implication made known to the seller the purpose for which (s)he needed the goods and they must have relied on the seller's skill and judgement.

   The legal elements are:

   - If goods are delivered for a special purpose which is disclosed to the vendor and (s)he undertakes to supply them, it is sufficient to show that the buyer relied on the seller's skill and judgement.
   - Even if the seller has no reasonable opportunity of exercising his / her skill and judgement towards supplying the goods, the implication is that the buyer can still rely on the seller's and judgement.

No reliance will be placed on the seller's skill and judgement if the goods are ordered by their trademark or patent name.

The seller will not be liable for breach of this condition (fitness for purpose) if the injury which is caused to the buyer is a result of some abnormality on the part of the buyer which wasn't enforceable by the seller or was not disclosed to the seller.

iii. The Goods Are of a Merchantable Quality (Section 16(b) of The Sale of Goods Act)

The third implied condition relates to merchantability. A question that arises is: *what is meant by merchantable quality?* Quality of goods is defined to include their state or condition. Conversely, the goods must be sellable or usable by the buyer. In relation to

merchantability, it has been said to mean the goods sold, shall be of the general kind described, and reasonably for the general purposes for which it has been sold.

In answering the question, *for how long must the goods be merchantable?* It has been said that the goods must be merchantable within a reasonable time, which includes the time of arrival and disposal by the buyer. It is important to note that if the buyer examines the goods, the implied condition as to merchantability, which the examination ought to have revealed, is excluded. However, if goods are delivered to the buyer, which (s)he had no prior opportunity of examining, no presumption of acceptance arises until (s)he has been given the opportunity to examine the goods.

iv. Sale by Sample (Section 17 of The Sale of Goods Act)

A contract of sale is a contract of sale by sample where there is an implied term in the contract (express or implied) to that effect. Accordingly, the quality of the bulk should correspond with the quality of the sample.

There is also an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with a sample and further that the goods shall be free from any defect rendering them un-merchantable; which defect will not be apparent on a reasonable examination of the sample.

v. Conditions Annexed by Trade Usage (Section 16(c) of the Sale of Goods Act)

There is a general rule applicable to all contracts that the intention of the parties must be ascertained from all surrounding circumstances. Where the transaction is connected with particular trade, the custom and usage of that trade must be considered as part of the background against which the party is contracted.

Evidence of custom or usage of trade is always admissible to indicate the background against which the contract was made. In connection with this principle, the fundamental question to be addressed is whether these exceptions are effective in the light of section 55 of the Act.

BUYER'S DUTIES

These are basically two i.e. the duty to pay the price and the duty to take delivery of the goods.

1. The Duty to Pay the Price

The buyer has a duty to pay the price of the goods and cannot claim possession of the goods unless (s)he is ready and willing to pay the price as per the contract. In the absence of a fixed term for payment, the price is due immediately upon the completion of the contract.

The duty to pay the price is only a warranty and not a condition. Therefore, a buyer who fails to pay the price on the agreed date is in breach of a warranty for which the damages can be recovered by the seller. This means that the seller cannot treat the contract as repudiated and sell the goods elsewhere except in cases of perishable goods.

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

2. The Duty to Take Delivery

Generally, it is for the buyer to take delivery of the goods from the seller's business premises and not for the seller to send the goods to the buyer.

As a general rule, the buyer's duty to take delivery at a certain particular time is not of essence to the contract. Therefore, the buyer's failure to take delivery of the goods at the time agreed upon does not entitle the seller to dispose of them to a third party except in cases of perishable goods where the buyer's default in taking delivery at the right time will justify the seller in immediately reselling the goods.

REMEDIES IN SALE OF GOODS

SELLER'S REMEDIES

These are divided into two categories; real remedies and personal remedies.

I. Real Remedies

Real remedies are classified as the rights of the unpaid seller. They are closely linked with protection of owner's title as well as the need to facilitate the circulation and distribution of goods.

The seller of goods is deemed to be an unpaid seller:

a. when the whole of the price has not been paid;
b. when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled.

The definition of an unpaid seller also includes the seller's agent.

The rights of the unpaid seller against the goods are categorised as three i.e.;

i. the unpaid seller's lien
ii. the right of stoppage in transitu
iii. the right of resale

These three rights are made available to the unpaid seller not withstanding that the property in the goods has passed to the buyer. This takes us back to the concept of property and title.

i. The Right of Lien

Lien at common law is possessory in nature i.e. it depends on possession of the goods. It also presupposes that property in the goods has passed because one cannot have a lien over his / her own goods. The function of a lien is to entitle a creditor to retain possession of the goods belonging to his / her debtor until the amount of debt is paid.

If the creditor is entitled to exercise a general lien (s)he may retain possession of any goods so as to enforce the payment of any debt. If the lien is a particular lien, then only the goods in respect of which the debt is owed may be retained by the creditor. The unpaid seller's lien is a particular lien.

Conditions Prerequisite for the Exercise of the Right of Lien

1. The seller must be an unpaid seller;
2. the seller is not entitled to lien in cases where:
    a. goods have been sold on credit and credit terms have expired; or
    b. the buyer becomes insolvent.
3. In order to exercise the lien, the seller must be in actual physical possession of the goods. There are four ways in which the seller can lose his / her lien i.e.:
    a. if price is paid;
    b. when the seller delivers the goods to a courier or bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
    c. when the buyer or his / her agent lawfully obtains possession of the goods;
    d. by waiver.

Where the unpaid seller who has exercised his / her rights of lien or right of stoppage in transitu resells the goods (s)he passes a good title to the third party.

In the case of goods of a perishable nature, or where a notice of resell has been given to the buyer, the seller can resell the goods and recover damages for any loss which is occasioned by breach of the contract.

Finally, where the seller has reserved the right of resale upon the buyers default in making the payment and the buyer makes such default, the contract is rescinded subject to recovery of damages from the buyer.

ii. Stoppage in Transitu

In cases of stoppage in transitu, an unpaid seller has the right to resume possession of the goods which have left his / her possession as long as those goods are still in transit. The goods must not have come into the possession of the buyer. This right can also be exercised where the buyer has become insolvent. This right can be exercised not only by the seller himself / herself but also by his / her agents.

The right of stoppage in transitu is available whether or not property in the goods has been transferred to the buyer.

The unpaid seller may either take possession of the goods or may give notice of his / her claim to the courier or other bailee in whose possession the goods are. Once the notice is issued, the goods must be redelivered to the seller at his/ her expense.

The main purpose of right of stoppage in transitu does not of itself terminate the contract of sale. What it does is merely to prevent the buyer from obtaining possession of the goods. It then puts the seller in a position of exercising the statutory power of resale. Finally, it is important to note that the right of stoppage in transitu is stopped once the transit terminates. In that event, the seller can pursue the buyer for the recovery of the price and damages.

iii. The Right of Resale

The unpaid seller's right of lien or stoppage in transitu are affected by any sale or disposition which the buyer might have met without the seller's consent. However, those rights are defeated if the documents of title have been validly transferred to a buyer in good faith and for value without notice.

The unpaid seller who exercises these two rights is merely attempting to enforce the contract by obtaining security for the performance of the buyer's duty to pay the price.

II. Personal Remedies

These are personal remedies in the sense that they are monetary claims for the price and damages. The two personal remedies are identified as follows:

i. An action of the price of the goods sold

The circumstances in which a seller may bring an action for the price. These are where:

a. the buyer is in default in paying the price; or
b. either property has passed to the buyer or the price has been due on a specified day or at a certain time, irrespective of delivery.

In order to be entitled to sue for the price, the contract must be continuing in force and where the goods have not been delivered to the buyer on the continuing ability and willingness of the seller to deliver.

ii. An action for damages for non-acceptance

The action for damages arises in two situations:

a. where property has not passed and the buyer refuses to accept; or
b. as an alternative remedy where property has passed but the buyer neglects to take delivery.

Interest or special damages may be recoverable.

In connection with the action for damages, the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events in the buyer's breach of contract.

BUYER'S REMEDIES

1. A buyer can seek the remedy of damages for non-delivery of the goods. The measure of the damages has to be the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract. Damages for non-delivery may be divided into:
   - damages for non-delivery,
   - damages for delayed delivery,
   - damages for defective quality of goods delivered.

2. The buyer can reject the goods for breach of condition which was to be performed by the seller.

3. There is also the remedy of specific performance where damages are inadequate.

INTRODUCTION TO LAW OF AGENCY

The Law of Agency deals with those relationships which arise when one person is used by another in order to perform certain tasks on his/ her behalf. **Friedman** in his book, ***Law of Agency,*** gives a more comprehensive definition. He says that,

> *"agency is the relationship that exists between two persons where one called the agent is considered, in law, to represent the other called the principal in such a way as to be able to effect the principal's legal position in respect of strangers to the relationship by the making of contract or the disposition of property."*

There are several features which arise out of this definition i.e.:

1. For agency law to apply, the representation of the agent must affect the legal position of the principal.

2. The determining factor as to whether an agency exist or not, is the effect (in law) in the way the parties conduct themselves. This is irrespective of either the parties' conduct or the language that the parties use.

Two important factors may be considered in understanding the function and the legal nature of agency include:

a. the parties' consent; and
b. the agent's authority.

a. The Idea of Consent

The idea which is central to the agency relationship is that the principal and the agent have agreed that the agent should represent the principal.

This consent can either be expressed or implied. Despite this idea of looking at the consent of the two parties as being essential, there are some criticisms which have been levied against the ***Consent Theory***. It has been argued that the theory seems to establish consent as the basis of agency. It is however suggested that it is for the law to determine what is or what is not agency on the basis of factual arrangements between the parties but in essence also outside those arrangements.

It is further argued that the consent theory will appear to exclude from the scope of agency relationships; those situations in which the parties have not truly consented to any such relationship but agency relationship does not arise irrespective of consent.

b. The idea of Authority

The issue of authority is said to be at the very core of the agency relationship. In fact, it was once regarded as the cornerstone of that relationship. It has been said that an agent is one who has express or implied authority to act on behalf of the principal and to bind the principal. This theory requires authority to flow from the principal to the agent.

The idea is also subject to criticism by a number of scholars. it has been said;

i. the idea of authority is an artificial concept because there are many occasions where an agent is regarded as having authority to act even where it is impossible to say that (s)he has been so empowered by the principal.

ii. One cannot describe the reason why the agency acts to produce a change in the principal's legal position by speaking of his/ her authority to act on behalf of the principal.

iii. The third criticism is that the theory describes agency as a relationship whereby one person commits another to act for him/ her but it fails to say why this permission or authorisation is so essential to the relationship.

The agency relationship is a power liability relationship. The essence of agency is the power to affect the principal's relations with the outsider world. It concerns the powers and liabilities of the principal and the agent. The agent uses the power to make the principal liable.

c. Contractual Relationship

Agency is not just a relationship arising from consent and authority. In the vast majority of cases, there is a contract between the agent and the principal which gives rise to the rights and obligations (internally as well as externally) with third parties. There are three features which are discernible in this relationship:

i. service
ii. representation
iii. power.

There are other legal relationships which may be distinguished from agency i.e. trusts, bailment, servants and independent contractors. These have been distinguished hereunder.

AGENCY DISTINGUISHED FROM OTHER RELATIONSHIPS

AGENCY DISTINGUISHED FROM TRUSTS

There is a very close similarity between a trustee and an agent. A trustee, just like an agent, can affect the legal position of people with whose property (s)he is dealing with. (S)he has, to some extent, the same powers as an agent. However, despite the similarities a number of things have to be stressed i.e.:

i. Whereas a trustee is invested with legal title to property, the agent has no title to the property in question. All that an agent possesses is the power to dispose of his/ her principal's title.

ii. The agent's duty towards his / her principal closely resembles some duties which a trustee owes to his/ her principal. An agent, just like a trustee must not let his/ her own interest conflict with that of his/ her principal. The agent's duties do not derive from any statute but trustees have additional duties that they are bound to fulfil which are imposed by the Trustee Act.

iii. Certain equitable remedies in respect to property which is in the hands of an agent are provided for, for the principal's protection e.g. secret profits which are made out of the agency must be accounted for.

The differences between agency and trust are as follows:

i. Although an agency relationship is not always consensual as it may arise by operation of the law, it still requires the consent of one of the parties. A trust may be created without the consent of either a trustee or the beneficiary.

ii. Agency can be created without any special form but certain trusts must be in writing.

iii. A trustee, unlike an agent, is in no way the representative of his / her beneficiary.

iv. Actions between the principal and agent may be barred by the Limitation of Actions Act, but the action between a beneficiary and a trustee in respect of fraud, or fraudulent breach of trust, or the recovery of trust property, are not statute-barred.

AGENCY DISTINGUISHED FROM BAILMENT

A bailment is the delivery of possessions of property to the bailee with a requirement that the property will be returned to the bailor or be dealt with in accordance with the bailor's instructions. In some cases, an agent may be the bailee of his/ her principal's goods; for instance, auctioneers given goods to sell on behalf of the owner. However, there are two distinguishing features between an agency and bailment i.e.:

i. the bailee does not represent the bailor but merely exercises certain powers of the bailor in respect of his / her property. On the other hand, an agent always represents his / her principal.

ii. The bailee has no powers to make contracts on behalf of the bailor and (s)he cannot subject the bailor to liability for any acts which (s)he does.

AGENTS DISTINGUISHED FROM SERVANTS AND INDEPENDENT CONTRACTORS

A servant is one, who by agreement, whether gratuitously or by reward; gives services to another person.

An independent contractor on the other hand is one, who by contract, usually for a reward; provides services for another.

Both servants and independent contractors, just like agents, provide a service and because they can involve their employer in liability in tort, they may be said to represent the employer; just like the agent represents the principal.

A question that is asked is whether servants and independent contractors can therefore be called agents even though they cannot affect the contractual or appropriated position of the principal. The test employed is that of **control**. A servant is someone who is completely subject to the control of his / her master as to what (s)he does and how (s)he does it. An independent contractor is his / her own master but (s)he must provide what (s)he has contracted to provide in the way of work or services. However, (s)he can determine his / her own method of performance which is consistent with the terms of his / her contract.

Then normal purpose of the agency relationship is for the agent to make a contract and to dispose of property on behalf of the principal. The fact that in the performance of his / her tasks, the agent may involve his / her principal in tortious or criminal liability in the same way the servant and independent contractor do; does not make their tasks similar.

In summary therefore, an agent is one who has the power of affecting the legal position of his / her principal by the making of contract or other dispositions of property but who may incidentally affect the legal position of his / her principal in other ways.

TYPES OF AGENTS

i. General and Special Agents

The main distinction between general and special agents lies in the authority which is given or exercised by the agent.

A general agent has the authority to do acts which fall in the ordinary course of his / her trade, business or profession as an agent (on behalf of his principal) or to act in all matters of a specified trade or business on behalf of the principal. The idea here is that of continuous service, for instance a director of a limited liability company is a general agent of the company.

A special agent's authority is limited to carrying out a specific transaction for a principal which is not in his / her ordinary course of trade, profession or business as an agent. (S)he is employed to do a single specified transaction.

There are two tests in determining whether an agent is a special agent or a general agent, i.e.:

a. the nature of employment; and
b. the continuity of employment.

While the special agent's authority will depend on the express or implied terms of the agreement which is made by his / her principal; that of the general agent will be determined by both express and implied terms, as well as what is usually normally done by the agent in the ordinary course of his /her business.

ii. Factors and Mercantile Agents

A factor is a commercial agent who is employed by a principal to sell mercantile consignments for or on behalf of the principal but usually in his/ her own name. (S)he is thus conferred with the possession and control of the goods and (s)he is paid a commission. The Factors Act of 1889 defines a mercantile agent as a person having in the customary course of his / her business as such agent authority either to sell goods,

or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

iii. Brokers

Brokers are a category of mercantile agent but are not given possession of the goods or the documents of title. A broker acts as an intermediary without control or possession of the property. (S)he cannot sell in his / her own name but (s)he may negotiate sales. Brokers sell by private contract and not by public auction.

iv. Del Credere Agents

Del credere agents are also mercantile agents but they are paid additional commission called a del credere commission. This extra commission is meant for guaranteeing the solvency or acting as surety for the purchaser. If the third party fails to perform his / her contractual obligations by paying the price, the del credere agents indemnify the principal.

A del credere agency can be said to be a contract of indemnity and it need not be by in writing. It may be implied from the conduct of the parties. A del credere agent's liability therefore extends to the liability to pay the price of the goods on the default or insolvency of the buyer.

v. Auctioneers

Auctioneers are authorised or licenced by law to sell, by public auction, goods or any other property. If auctioneers are given possession of the goods, they become mercantile agents within the meaning of the Factors Act. Notably, auctioneers are agents of both parties to the sale. They negotiate for the bidder as well as the owner of the property.

vi. Commission Agents

A commission agent is one whose business is to receive and sell goods for a commission. (S)he is normally entrusted with the possession of the goods to be sold and (s)he sells it in his / her own name. Therefore, a commission agent is someone commissioned by the principal to sell goods.

vii. Ship Masters

Ship masters are also agents. They are entrusted with the safety of the goods in transit. Ship masters are agents of necessity since they are authorised to sell any goods which are likely to perish.

viii. Estate Agents

Estate agents are the types of agents who may be entrusted with property in order to find possible buyers or leasees.

ix. Advocates

In some situations, advocates are regarded as agents of their clients in transactional settings as well as litigation. In any agency relationship, for example the agent's loyalty to the interest of the principal, is a dominant concern, as is the loyalty of an advocate to a client. Advocates who are members of a law firm act as its agents in firm-related activities. This also applies for in house counsel acting for a client organisation.

With regard to an advocate's duty to the court, an advocate is considered to be a special agent, a representative of parties, an officer of the court and public citizen. In this position (s)he has a responsibility to ensure that the rule of law is upheld and that justice is served to all who seek redress from the legal system. The legal consequences of these relationships parallel the consequences of agency generally, even when they are not identical.

OBLIGATIONS IN AN AGENCY RELATIONSHIP

AGENT'S DUTIES

There are two types of duties:

i. those that arise from the agreement; and
ii. those that are implied duties.

i. Duties Arising from The Agreement

The duties that arise from the agreement are express duties and are normally stipulated in the contract. One therefore has to examine the contractual document and apply rules of statutory interpretation. If the act in question is done outside the scope of the powers expressly conferred by the principal to the agent, then the principal is not liable simply because the agent has breached the terms of the contract.

ii. Implied Duties

These are duties which the law implies and which need not be put in the contractual document. They are:

i. Performance

The agent must perform what (s)he has contractually undertaken to perform so long as it is not illegal or the transaction is null and void by virtue of common law or statute. However, where the agency is non-contractual and is instead a gratuitous one, then there is no obligation on the agent to perform the undertaking at all.

ii. Obedience

The agent must act in accordance with the authority given by the principal and obey all lawful instructions contained in his / her express authority or (s)he must act in accordance with the general nature of his/ her business i.e. within his/ her implied authority or else (s)he must act in accordance with the trade customs and usages of his/ her profession. This means acting within his/ her usual or customary authority. In the

absence of express instructions or customs and usages of particular trade, the paramount consideration is that the agent must use his/ her discretion to act for the benefit of his/ her principal

iii. Care and Skill

The requirement is that the agent in the performance of his/ her duty, must exercise due care and skill. The standard of care expected is that which an agent in his/ her position will usually possess and exercise

iv. Non Delegation

This Duty implies that the agent must act personally. The relationship of principal and agent is a confidential relationship where the principal places trust and confidence in the agent. Therefore, the agent should not delegate his / her duties to a sub-agent unless the principal ratifies or unless such delegation is permitted by law or the nature of the business makes delegation inevitable this is the Maxim of *Delegatus non potest delegare.*

v. The Duty to Respect the Principal's Title

The agent cannot deny the principal's title to the goods, money or land possessed by the agent on behalf of the principal.

vi. The Duty to Account

The agent must remit all money received to the use of his / her principal to the principal. This duty exists even if the transaction in respect of which the money is received by the agent on behalf of the principal is void or illegal; provided that the agency itself is not void or illegal.

vii. Fiduciary Duties

Some duties arise from the fiduciary nature of the agency relationship. These duties are equitable in nature and arise from the fact that the agency relationship is one of trust

and confidence. Summed up, they simply amount to the fact that the agent must not allow his / her personal interests to conflict with the duty (s)he owes to the principal.

- There is for instance the duty of fidelity which implies that where an agent is in a position in which his / her own interests may affect the performance of his / her duty to the principal, (s)he is required to make a full disclosure of all the material circumstances so that the principal (with such full knowledge) can choose whether to consent to the agent acting for him / her or not. Failure to disclose may lead the principal to setting aside the transaction and to claiming from the agent any profits that have been obtained.

- In furtherance of the duty of fidelity, it is said that the agent may not use information acquired in the course of his / her employment for his / her own benefit. This rule is illustrated by cases in which employees have had access to employer's processes or lists of customers and have tried (after termination of employment) to make use of the knowledge gained. The employer may seek an injunction to prevent the former employee from using the information.

- The other duty concerns the acquisition of secret profits by the agent. It is required that the agent must not make secret profits out of the agency relationship. Secret profits refer to any financial advantage which the agent receives over and above what (s)he is entitled to receive from the principal as his / her commission e.g. bribes. The effect of receiving secret profits is to terminate the agency relationship. The principal can repudiate the contract and refused to pay the agent his / her commission.

PRINCIPAL'S DUTIES

These are two:

i. the remuneration duty; and
ii. the indemnity duty

i. The Remediation Duty

The principal is required to pay the agent his / her remuneration commission. This is either express or implied in the agency contract. The only exception is when the agency is gratuitous. The important factors to be considered are:

a. there must be an express or implied term in the agency contract;

b. the agent must earn the commission i.e. (s)he must perform what (s)he is supposed to do.

c. It is immaterial to the payment of commission that the principal had derived nothing from the agent's act so long as the agent has done what (s)he was employed to do.

d. The agent will not be paid where the transaction is illegal.

e. The agent will not recover where (s)he is guilty of misconduct or (s)he is in breach of the contractual terms of the agency.

These general statements apply to the various types of agents other than estate agents. There are specific rules which apply to estate agent's commission. These principles were laid down by Lord Denning in *Dennis Reed Ltd. v. Goody (1950) 1 All ER 919,* where he stated that:

a. in the absence of express terms in the contract, the agent receives a commission only if he succeeds in effecting a sale;

b. any language that is used in the contract will have this effect as long as it shows that the agent is to introduce a purchaser;

c. if the agent is to be given commission on offers only, (s)he must use clear and unequivocal language;

d. the normal arrangement or common understanding is that the agent's commission is payable out of the purchase price;

e. if a binding contract of purchase is signed by the principal and the third party, then if the principal repudiates the contract, (s)he is still liable to pay the commission not because it has been earned and is payable, but because it is his / her own fault that the sale has not been completed;

f. no commission is payable if it is the third-party not the principal who has defaulted on a binding contract; unless the principal sues for specific performance and gets damages, in which event (s)he will probably be liable to pay commission out of those damages.

ii. Duty of Indemnity

The principal is under a duty to indemnify his / her agent against losses liabilities as well as the costs incurred in the performance of the agency. If the agent has to use his / her own money, this will be reimbursed by the principal. This is either expressly stated in the contract or implied. However, it is not implied that the principal will advance funds to the agent to enable him / her to perform his / her duties.

There is no duty to compensate an agent who acts unlawfully or in breach of his / her duty or if (s)he is negligent.

AGENT'S REMEDIES

i. The agent has the right of action for damages for breach of contract if the agent earns his / her commission and it is not paid to him / her. Where there is no fixed sum as remuneration, the agent can sue on the basis of quantum merit. Furthermore, as the principal has a duty to indemnity for acts committed in the course of business, the agent can enforce his / her right of indemnity by action.

ii. Counterclaim or set off: if the principal sues the agent for breach of any of the duties, the agent can counterclaim or set off such claims with the amount which is due to him / her as remuneration for indemnity. If a counterclaim is proved, the principal loses the suit and pays the balance, if any.

iii. There is the agents right to lien over a particular property. If the agent has goods which (s)he is supposed to pass to the principal and the principal does not pay his / her commission, the agent can have a lien over the property. In order to exercise the lien, the agent must be in lawful possession of the goods. It is notable that the agent loses his / her lien if (s)he acts or agrees to act in a manner which is inconsistent with the existence of lien. (S)he waives his / her right of lien expressly or by implication.

iv. The other remedies include where the agent has subcontracted on behalf of the principal. In this instance, the agent is personally liable for the price of goods bought in the agent's own name. The agent is protected against the principal's possible failure to reimburse him / her or indemnify him / her in two ways:
    a. the property in the goods remains in the agent until the principal pays him / her or until the agent allows or intends it to pass to the principal; and
    b. the agent has the same right of stoppage in transitu against the principal in the same way that an unpaid seller has against the buyer.

PRINCIPAL'S REMEDIES

i. Dismissal for Misconduct

If the agent is guilty of breach of any of the duties for which (s)he was employed to perform, then (s)he may be dismissed. The consequence of dismissal is the loss of remuneration. If the agent is guilty of fraud, the principal has a complete defence for a claim of damages, compensation or indemnity.

ii. Actions in Court

The principal can sue the agent for breach of any of the duties and seek damages either in contract or in tort for damages or for negligence. The principal can sue under conversion where the agent has failed to hand over the principal's property or (s)he needs to account for the secret profits received. In instances where the property of the principal has become mixed with that of the agent, the principal can follow it by tracing in equity.

iii. Criminal proceedings

The principal can institute criminal proceedings if the agent's conduct amounts to a criminal offence such as bribery or misappropriation of funds.

RIGHTS OF THE PRINCIPAL AGAINST THE AGENT

i. Title to Property

The agent cannot deny his / her principal's title to property in his / her possession. If (s)he is employed to purchase property for the principal in his / her own name. Once such property is conveyed to him / her, the agent is treated as a trustee of that property for the principal.

ii. Accounts

Generally, the agent is liable to account for and give the principal all money received from third parties on behalf of or for the use of the principal. However, the agent may

be required to repay this money to a third party where it was wrongfully obtained or obtained by fraud, duress or by mistake from a third party.

iii. Rights in Action

If property is still in the hands of the agent, the principal can sue him / her for the property or money by bringing an action for accounts; or in tort for breach of contract; or an action for money had and received to the use of the principal. If the agent has wrongfully dealt with the property (s)he may be liable for the tort of conversion. If the principal's money or property has been mixed and wrongfully dealt with by the agent, so long as it can be traced, the principal can recover it.

RIGHTS OF THE PRINCIPAL AGAINST THE THIRD PARTY

If the principal's property or money has come into the hands of a third party through the wrongful act of the agent, the principal has two actions:

i. (s)he may have an action for conversion giving rise to a judgement for damages against a third party (whether innocent or not) provided that the goods or money are identifiable and traceable; and
ii. the principal may have an action for money had and received where the third-party acted wrongfully i.e. with notice of the agent's lack of authority, again provided that it can be identified and traced.

The principal's rights to recover such property may be precluded on three grounds:

i. the authority given to the agent: if the principal has authorised the agent to dispose of property but not the specified the particular mode of disposal to be used by the agent, then the principal will be bound by what the agent has done as long; as the third party took the goods in good faith and without notice of the agency's lack of authority.

ii. Under the doctrine of apparent authority or estoppel: if the principal has clothed the agent with all the indication of title or authority to act in respect of title

thereby misleading a third party and the agent has dealt with goods as though authorised to do so, the principal will be bound.

iii. Under the Factors Act of 1889 where there is an implied authority in a mercantile agent to pass good title to third parties thereby binding the principal.

RIGHTS OF THE THIRD PARTY AGAINST THE AGENT AND THE PRINCIPAL

If the principal assigns or charges property which is in the hands of an agent to a third party, the agent is bound to deliver it to the third party. If the principal directs the agent to pay the third party from money held by the agent to the use of the principal, the agent is bound to pay it.

The principal will not be liable to the third party where (s)he has directed the agent to pay but the agent has not paid the third party. The third party will have recourse directly to the agent.

The principal will be liable to third parties for money or property of the third party received by the agent but misapplied by him / her when acting within the scope of his / her actual or apparent authority.

Even if the agent is acting wrongfully or in an unauthorised way, if the money is applied for the benefit of the principal, the principal will be liable to the third party i.e. company directors acting in an ultra vires manner.

TERMINATION OF THE AGENCY RELATIONSHIP

There are several modes of termination of the agency relationship available i.e.:

i. termination by the act of the parties themselves
ii. termination by operation of law

i. Termination by The Act of the Parties Themselves.

1. The parties to an agency relationship can, by agreement, terminate it. This discharges the agency relationship; or
2. The relationship will terminate by the withdrawal of either party from the original agreement by *notice of revocation of agency.*

The above rules are subject to the following qualifications:

a. where the purpose of the agency is to secure beneficial interests in favour of the agent, the principal cannot revoke the agency;
b. where the agent has incurred personal liability as a result of acting for the principal within the scope of his / her authority, the principal cannot revoke the agency so as to escape the liability to indemnify the agent;
c. the agent has to be indemnified or given commission for what (s)he has done before revocation.

In the absence of an express term, the closure of the principal's business terminates the agency.

ii. Termination by Operation of Law

The agency relationship terminates in the below circumstances:

1. once the transaction which the agent has undertaken to perform is completed, the agency automatically terminates;
2. if the period for which the agency was created comes to an end;
3. if the subject matter of the agency is destroyed or otherwise ceases to exist;
4. if the agent or the principal dies or becomes insane;
5. if the principal becomes bankrupt;

6. where the agency is created by contract, if the contract is frustrated;
7. where the agency is created by necessity, once the necessity ceases;
8. in the case of a wife, the agency will cease if there is sufficient provision or if she commits adultery;
9. in the case of cohabitation, the agency terminates if the cohabiting parties have their marriage declared void or they divorce or via judicial separation or by the parties separating by mutual consent (subject to the husband paying maintenance);
10. if the wife deserts the husband or the husband dies;
11. if the husband becomes insane or the wife obtains sufficient needs from the husband.
12. agency of a mistress will terminate in the same manner as that of cohabitation except in this case no legal proceedings can arise to terminate the relationship.

EFFECT OF TERMINATION OF AGENCY RELATIONSHIP

As between the principal and the agent; if the principal revokes the agency by notice, (s)he is not liable for what the agent does thereafter but (s)he will be subject to the rights and liabilities which have vested before revocation.

As between the agent and the third party; the agent will be personally liable to the third party for anything (s)he does after revocation.

As regards the third party; generally, whatever the reason of termination of agency (except possibly the death of the principal) a third party who deals with the agent without actual or constructive notice of the fact of termination will be protected against the principal or the principal's estate and in some cases, (either alternatively or concurrently) (s)he will have a remedy as against the agent.