Course Name	**: Business Law and principles**
Course Code	**: APBBA 1102**
Course Level	**: Level 1**
Credit Unit	**: 4 CU**
Contact Hours	**: 60 Hrs**

Course Description
The Course intends to cover introduction to Law which includes; classification of law, purposes of law, and generally the meaning of Law, explaining the law of contract, a more description of Company law , mechanisms of company formation, share holding in a company and its implication to company owners, debentures and borrowing, liquidation of a company and company employment contracts.

Course Objectives
- To help students attain legal principles relating to corporate business.
- To enable students gain knowledge about rights and duties of different parties involved in business/ contracts.
- To help them appreciate the exact role of law in society.
- To provides confidence to students who have a career in formation of companies and how they can manage them under legal procedures.

Course Content
Introduction to Law
- Meaning of the term Law
- The nature of law
- Purpose of law
- Kinds or classification of law
- Sources of Law
- Distinction between common law and equity
- Maxims of equity
- African customary law

The Law of contract
- Description of the term law of contract
- Basic elements of contracts
- Essentials of a valid contract
- Valid contracts against minors
- Contracts not bidding on minors unless ratified (avoidable)
- Consequences of the contract on minors
- Reality of consent
- Discharge of a contract
- Remedies for breach of contracts
- Classification of damages

Company Law

- Nature of a company
- Classification of companies
- Consequences of incorporation
- The veil of incorporation
- Statutory lifting of the veil
- Promotion and formation of the company
- Pre-incorporation contracts

Mechanism of formation of a company

- Documents required for company registration.
- Effects of registration and the role of registrar.
- Contents of the memorandum of association of a company.
- Contents of articles of association.
- Prospectus of a company.
- Issues and contents of the prospectus.
- Liability in respect of prospectus

Shares

- Definition of shares
- Methodologies of becoming a shareholder
- Payment for shares
- Transfer of shares
- Procedure for transfer
- Mortgage of shares
- Conversion of shares into stock
- Types of share capital
- Classes of share capital

Debentures and Borrowing

- Authority to borrow
- Description of debentures
- Issue and transfer of debentures

Directors and officers of the company

- Definition of a director
- Termination of directorship
- Remuneration of directors
- Powers of directors
- Proceedings of the directors director's relating to accounts

Liquidation

- Definition of the term liquidation
- Bases for winding up by the court
- Voluntary winding up
- Winding up subject to supervision of court

Employment contracts

- Contract of service and independent contractor
- The control test
- The integration test
- The economic reality test
- Relationship between employer and employee

- Formation of contract
- Duties of an employer and employee
- Termination of a contract
- Repudiation of contract by employee

Mode of delivery Face to face lectures
Assessment
Course work 40%
Exams 60%
Total mark 100%

THE NATURE, PURPOSE AND KINDS OF LAW

Definition

The law is the body of principles recognised and applied by the state in the administration of justice; or

A rule of human conduct imposed upon and enforced among the members of a given state.

From the above definitions, we may conclude that Law refers to a set of rules or principles that govern the conduct of affairs in a given community at a given time, whereby machinery is provided for an aggrieved party to enforce his rights in case any of these rules or principles is broken.

The following points are noticed from the above definitions of law:

1. **Set of rules**

Law is a set or body of rules. The rules may originate from customs, Acts of Parliament, Courts of Law or some other acceptable sources.

2. **Guidance of Human conduct**

The rules are enforced for the guidance of human conduct. Human beings follow these rules for their own safeguard and betterment.

3. **Applicable to a community**

These rules apply to a specific community. This community may be a sovereign state or a business community. The laws of different communities may be different, for example what is law in Uganda, may not be law in Kenya or Tanzania.

4. **Change of Rules**

The law changes over a period of time. It means law is not a static phenomenon. It keeps changing with time, i.e. what was law in Uganda in the 1960's may not be the law in 1990's.

5. **Enforcement**

The law must be enforced, otherwise, there would be no anarchy. The law enforcing agencies include: Police and courts of Law.

PURPOSE OF LAW

Each society or community has its laws which regulate the mutual relations and conduct of its members. The laws are enforced to ensure that the members of the society may live or work together in an orderly and peaceful way.

The main purposes of law include the following:

1. To regulate the conduct or behaviour of the people.
2. To provide justice to the members of the society.
3. To maintain the political and economic stability.
4. To protect the fundamental rights and freedoms of the individuals.
5. To establish the procedures and regulations regarding the dealings among the individuals.
6. To maintain the peace and security in the country.

KINDS OR CLASSIFICATION OF LAW

Law may be classified in the following ways:

1. Public law and Private law.
2. Criminal law and Civil law.
3. Procedural law and substantive law.
4. International law.

1. Public law and Private law

There is distinction between the law that governs the relations between the state and its citizens on one hand and that which governs the relations of the citizens among themselves on the other hand. The first one is known as Public Law and the second one Private Law.

It means that private law is that part of the law which is primarily concerned with the rights and duties of persons towards persons. Private law is also called civil law. Public law is that part of the law which the state has an interest. Public law consists of constitutional law, Administrative law and Criminal law.

Constitutional law consists of those rules which regulate the relationship between different organs of state. The organs of state are legislative, judiciary and the executive.

Administrative law is the law which relates to the actual functioning of the executive instruments of the government. Criminal law consists of wrongs committed against the state.

2. Civil law and Criminal law

Civil law (private law) is the law which governs the relations of individuals among themselves as opposed to the relations between the individual and the state, for example law of contract, law of succession, law of torts, law of property, etc..

In general individual interaction attracts the sanction of private law, so that any person aggrieved by the act of his friend or neighbour may seek the assistance of civil law.

Criminal law falls within public law, this is because, it is the duty of the state to protect its citizen and it is the state which must therefore seek redress for any public wrong (crime) committed against any citizen.

The state prosecutes the criminal on behalf of the citizen, the victim, of the criminal conduct has no direct interest in the case.

Crime is a public wrong, the commission of which may result in the prosecution and punishment of the wrong doer. The punishment is usually by a term of imprisonment or imposition of a fine.

A civil wrong is a violation of the private rights of an individual. Such violation of private rights may be a tort, a breach of contract etc..

Distinction between a crime and civil wrong

CRIME	**CIVIL WRONG**
It is a public wrong against the state	1. It is a private wrong against an individual
2. The parties are the prosecution and the accused. The prosecution represents the state, while the accused is the offender who is being prosecuted	2. The parties are the plaintiff and the defendant The plaintiff is the aggrieved party who is suing, while the defendant is the wrong doer who is being sued.
3. Punishment is usually by imprisonment or fine, or the death penalty in the case of capital offences.	3. A defendant found to have committed a civil wrong is usually order to pay to the plaintiff damages (monetary compensation)

3. Procedural law and Substantive law

Procedural law consists of the rules, which determine the way in which the court proceedings are required to be conducted in civil and criminal cases. This law guides how a right is enforced under civil law or a crime is prosecuted under the criminal law.

Substantive law consists of actual rules regarding the civil, criminal and other fields. This law defines civil and criminal wrongs and provides remedies for each type of offence or civil wrong.

4. International law

International law may be further classified as public international law and private international law.

Public international law consists of those rules which regulate the relations between states. The disputes between states can be settled by the international court of justice,

Private international law is mainly concerned with determining which national law governs a case in which there is a foreign element. For example, a foreigner commits a crime in Uganda, then private international law will decide which laws to use to prosecute the foreigner.

DIVISIONS OF CIVIL LAW

The main divisions or branches of civil law are the following:

- Law of contract
- Law of torts
- Law of Property
- Law of succession, etc..

THE SOURCE OF LAW

Sources of law refer to the various factors which contribute to and determine the content of law and the organs through which laws are created.

A source of law is that which may be pointed out as forming the basis of law, i.e. what gives it its force and validity. It means that the existence of a particular principle of law can be justified when it has a base or origin.

A source of law may be written or unwritten and this leads to the distinction between written and unwritten laws.

Legislation (constitution) is the best example of written law, while customary law may be cited as an example of unwritten law.

A distinction is also drawn between principal and subsidiary sources of law. Legislation is a principal source of law, while the works of text writers are example of subsidiary sources of law.

In general sources of law includes the following:

1. The constitution of Uganda and subsequent amendments to the constitution.
2. Acts of Uganda Parliament.
3. Subsidiary (delegated) Legislation.
4. The ;procedure and practice observed by courts of Justice.
5. The substance of common law and doctrines of equity.
6. African customary law.
7. Case law or judiciary precedent.

COMMON LAW

Unlike statute law, common law is unwritten law. It has a distinctively English origin. From the earliest times, certain oral customs of the English came to be recognised as having general application in the whole of England. Principles of law were slowly evolved from these customs and because they were of general application they yielded what came to be known as the common law.

Common law as such cuts across the whole spectrum of the legal system. It covers matters like contract, torts, property relations, status, etc..

A number of common law rules have been codified by statute and these now form part of the written law of the land.

EQUITY

The word equity as such literally means fairness or natural justice. Fairness and justice as opposed to the common law which is unfair in a number of respects and unjust in other respects.

Development of Equity

The fact that there is only a limited category of rights at common law means that in those days when there was only common law and common law courts, persons whose unrecognised rights were infringed were sent away without any remedy at all. For example, if a trustee misappropriated trust property, the beneficiary had no remedy against him. In certain cases, the remedy available at common law was quite insufficient. The usual common law remedy is that of damages. Common law did not sufficiently cater for cases such as trespass where the aggrieved party might wish to have the offending party restrained from committing further acts of trespass. All these were defects which frequently worked as injustice in a number of cases.

It was as a result of the above injustice that equity was developed. It was guided by the desire to be fair and to do justice, so where no remedy existed at common law new remedies were created, where the existing remedy was insufficient, this was supplemented by new remedies. These came to be known as rules of equity and new body of law.

DISTINCTION BETWEEN COMMON LAW AND EQUITY

COMMON LAW	**EQUITY**
Traditionally, Common Law was rigid and inflexible. It was bound by rules of bureaucracy.	Equity is based on fairness, conscience and moral code. This allows greater flexibility
The Common Law is a complete system. It was first in time and was intended to be all encompassing.	Equity supplements the common law. It is often regarded as adding a "gloss" (something good) to the common law by recognising principles of fairness.
The only remedy available under the common law is damages.	Equity has many different remedies, each appropriate to the given situation.
There is set time limits under which an action must be brought under the common law. The limitation Act impose limits on commencement of proceedings.	There is no strict time limit for bringing an action in equity, although the principle "delay defeats equity" applied to impose the overall burden of reasonableness on the claimant.

Like common law, equity is unwritten law, which may similarly be ascertained from judicial decisions and books of authority.

MAXIMS OF EQUITY

The Maxims (or sayings) of Equity. The fairness or justice of equity is best illustrated by its maxims.

1. Equity will not suffer a wrong to be without a remedy.

The only common law remedy is damages but, as has been seen this is often not adequate or appropriate. Equity provides other remedies such as injunction, specific performance and rescission.

2. He who comes to equity must come with clean hands.

   In order to expect and get a remedy based on fairness the claimant must be fair himself. This means that he should not have been guilty of any improper or inequitable conduct.

3. Delay defeats equity
   There are no set time restrictions on the bringing of an action in equity, but the claimant must commence his case within a reasonable time of the breach or incident concerned, he should not have usually delayed.

4. Equity looks to the intent rather than to the form.

   Equity relies upon the principle of fairness. The intention of the parties should be examined.

5. He who seeks equity must do equity.

   Thus a plaintiff seeking the assistance of equity must himself act or have acted equitably.

AFRICAN CUSTOMARY LAW

African customary law has been recognised as a source of law. Customary law applies subject to the following limitations.

1. It must be compatible with the written law. Thus as a source of law, customary law is subordinate to legislation or written law, and in the event of conflict it must give way to the written law.

2. It only applies in civil cases or matters. Thus, customary criminal law is not recognised source of law.

3. It must not be repugnant to natural justice.

   A custom can only be recognised as a source of law if it passes this repugnancy test. For example in Gwao bin Kilimo vs Kisunda (1938) E.A. T.Z. a custom that allowed a man's property to be attached in satisfaction of his son's debts was held not to have passed the repugnancy test and the custom therefore was inapplicable.

4. It only applies where it has not been excluded by the parties whether by express contract or by the nature of the transaction in question.

   A claim under customary law means a claim concerning any of the following matters under African customary law:

1. Land held under customary tenure.

2. Marriage, divorce, maintenance or dowry.

3. Pregnancy of an unmarried woman or girl.

4. Enticement of or adultery with a married woman.

5. Matters affecting status and in particular the status of women, widows and children including guardianship, custody, adoption and legitimacy.

Before an African custom can be relied upon, there is need to prove that it actually exists.

CASE LAW OR JUDICIAL PRECEDENT

Case Law is found in judicial decisions or judgements. It is law pronounced by the judges and this explains the common reference to judge-made law. It is also known as judicial precedent.

The Doctrine of precedent

The Doctrine of Precedent form the basis of case law. The principle behind the doctrine is that in each case the judge applies existing principles of law by following the example or precedent of earlier decisions. It is in this way that the judges may expand and develop the law.

There are four types of precedent:

1. Declaratory precedent

Where a judge applies an existing rule of law without extending it, he is merely declaring the law and his judgement forms what is known as a declaratory precedent.

2. Original precedent

It may happen that in a particular case there is no precedent (or previous decision) on which the court can rely. The judge must then decide the case on the basis of general principles of law. In this way, he lays down an original precedent to be followed in future in a similar case.

3. Distinguishing precedent

Applying an earlier decision may sometimes lead to injustice in a particular case. If the court is satisfied that the earlier case was correctly decided on its own facts, or where the earlier case is a decision of a court superior to the one now considering the case, the only way out is to distinguish the earlier case from the one on hand. This is done by establishing that the facts of the earlier decision are different from those in the case on hand in a material respect, so that the earlier case is held not to apply.

The earlier case remains law in its own circumstances, while the one on hand also becomes law.

4. Overruling precedent

A case is said to be overruled if it is expressly deprived of all legal effects so that it ceases to have any authority at all.

Overruling is usually done where it is felt that the earlier case was wrongly decided or that it was decided without regard to an existing and legally tenable authority or principle of law.

Ratio decidendi (reason for the decisions)

It is not every part of the case that forms the precedent. Normally, judges give reasons for their decisions. These are known as the ratio decidendi of the case.

Obiter Dicta (by the way)

This refers to statements made (by the way) in the course of a judgement. Such statements may be comments on the law, but unlike ratio decidendi they do not create any precedent at all. However, where there is no precedent in a particular case, the obiter dicta contained in the previous decision, thought not binding, are of persuasive authority and may be relied upon as establishing a general principle on which to rely.

Stare Decisis (let the decision stand)

Stare Decisis means (let the decision stand). Stare decisis determines the weight to be attached to particular precedents. The hierarchy of courts is such that some courts have greater authority than others. The general rule provided by the doctrine of stare decisis is that a decision made by a court higher up in the hierarchy binds all lower courts i.e. it must be followed by the lower courts. A lower court cannot therefore over-rule a higher court on any decision.

Advantages of case law

1. **Certainty**

   Certainty is especially achieved by the doctrine of precedent. The Doctrine makes it easy to know what the law is on a particular matter, and by looking at previous decisions one can predict the outcome of a particular case.

2. **Flexibility**

   Since society is not static and changes are phenomenon that must be accepted, the law too has got to change so as to accommodate those changes. Case law has room for such change because a decision which might at a given time result in injustice on a particular case may be distinguished or overruled in keeping with the demands of justice as they arise from time to time.

3. **Detailed**
   With case law, every principle of law or equity is discussed at length in a series of judgements so that in the end we have at hand the full details of any one given principle.

4. **Practicable**
   Case law is based on real factual situations. It is therefore more practical and its limitations are easier to determine.

Disadvantages of Case law

1. **Rigidity**
   The Doctrine of precedent, though it helps to introduce some measure of certainty in the law, the earlier decisions have got to be followed, the judge has less discretion and an element of rigidity is thereby introduced in the law.

2. **Over subtle**

   To be subtle is to be sharp or sharp-minded. And this is exactly what judges are meant to be. Unfortunately, they are sometimes over-subtle, particularly where they do not wish to follow a particular decision made earlier on by some other judge.

3. **Bulky and complex**

Case law is embodied in a multitude of decisions made over a number of years and contained in a number of volumes of law. It is therefore, unnecessarily bulky and complex. A person wishing to rely on a particular decision must look at a number of subsequent decisions on the same matter to ascertain whether it is still law or whether it has been overruled.

HANDOUT 02

THE LAW OF CONTRACT

A contract may be defined as an agreement enforceable by the law between two or more persons to do or abstain from doing some act or acts, their intention being to create legal relations and not merely to exchange mutual promises, both having given something or having promised to give something of value as consideration as a benefit derived from the agreement.

The definition emphasises the basic elements of contracts such as:

- An agreement
- An intention to create legal relations
- Valuable consideration

THE ESSENTIALS OF A VALID CONTRACT

Essential elements of the formation of a valid and enforceable contract can be summarised under the following headings:

- There must be an intention to create legal relations
- There must be an offer and acceptance
- There must be consideration or the contract must be under seal
- There must be contractual capacity
- There must be genuineness of consent by the parties to the terms of the contract (consensus ad idem)
- The object of the contract must be lawful i.e. it must not be contrary to public policy

In the absence of one or more of these essentials, the contract may be void, voidable or unenforceable.

A void contract
A void contract has no binding effect at all and in reality the expression is a contradiction in term.

Avoidable contract
Is binding but one party has the right at his option to set it aside or to withdraw.

An unenforceable contract
Is valid in all respects except that it can not be enforced in a court of law by one or both of the parties should the other refuse to carry out his obligations under it. However, an unenforceable contract does have some life because it can be used as a defence to a claim.

VALID CONTRACTS AGAINST MINORS

- Executed contracts for necessaries. These are defined in Sec. A 1979 as "Goods suitable to the condition in life of the minor and to his actual requirements at the time of sale and delivery".

If the goods are deemed necessaries the minor may be compelled to pay a reasonable price which will usually, but not necessarily be, the contract price. The minor is not liable if the goods, though

necessaries, have not been delivered. This together with the fact that a minor's liability for necessaries is only quasi-contractual.

If the goods (services) have a utility value such as clothing, then, they are basically necessaries whether the minor will have to pay a reasonable price for them depends on the following:

- The minor's income which goes to his condition in life. If he is wealthy then quite expensive goods and services may be necessaries for him provided they are useful.
- The goods which the minor already has is also relevant. If the minor is over supplied with the particular articles then they will not be necessaries even though they are useful and are well within his income.

• Contracts for the minor's benefit.

These include contracts of service, apprenticeship and education. However, trading contracts of minors are not enforceable no matter how beneficial they may be to the minors' trade and business. The theory behind this rule is that when a minor is in trade his capital is at a risk and he might loose it. Whereas in a contract of service there is no likelihood of capital loss.

CONTRACTS NOT BINDING ON MINORS UNLESS RATIFIED (VOIDABLE)

Loans

These are not binding on the minor unless he ratifies the contract of loan after reaching 18 years which he may now legally do. No fresh consideration is now required on ratification.

Contracts for non-necessary goods (luxury)

These are not binding on the minor unless he ratifies the contract after reaching 18 years which he may now legally do. Although the above contracts are not enforceable against the minor, he gets a title to any property which passes to him under the arrangement and can give a good title to a third party as where, for example he sells non-necessary goods to some one else who takes in good faith and for value.

CONTRACTS BINDING UNLESS REPUDIATED

These are usually contracts by which the minor acquires an interest of a permanent nature in the subject matter of the contract. Such contracts bind the minor unless he takes active steps to avoid them either during his minority or within a reasonable time thereafter, for example shares in a company, lease or property and partnerships.

CONSEQUENCES OF THE CONTRACT OR MINORS

As we have seen contracts entered into by minors will, if defective, be voidable. The effect of the term "voidable" in this context is untypical and must be considered as follows:

• Recovery by minor of money paid under a voidable contract.

When a minor has paid money under such a contract, he cannot recover it unless he can prove a total failure of consideration, i.e. that he has received no benefit at all under the contract. The court is reluctant to find that no benefit has been received. **HOWEVER,** if there has been really no consideration at all a minor will be able to recover his money.

• Effect of purchase by minor of no-necessary goods.

As we have seen, a minor acquires a title of the goods and can give a good title to a third party who takes them bonafide and for value. The tradesmen who sold the goods to the minor cannot recover them from the third party.

However as regards recovery from the minor, if he still has the property and court can order restriction for example, of non-necessary goods to the tradesmen where the minor is refusing to pay for them. As we know, he cannot be sued for the price.

• Guarantees

Section 2 of the Minor's Contracts Act 1987 provides that a guarantee by an adult of a minor's transaction shall be enforceable against the guarantor even though the main contractual obligation is not enforceable against the minor, for example if a bank makes a loan to a minor or allows a minor an overdraft and an adult gives a guarantee of that transaction then, although the loan or overdraft cannot be enforced against the minor, the adult guarantor can be required to pay.

MARRIED WOMEN

A married woman has the same contractual capacity as an unmarried woman (fame sole) or a man. However, a husband is not liable for his wife's contracts unless she is agent for the particular transaction and she can no longer be an agent of necessity in respect to domestic transaction.

CORPORATIONS

Corporations are another special case of capacity to contract. A corporation aggregate may be a body incorporated, a corporation formed by a special ACT of Parliament or a Company registered under the Company's Act 1985 or previous Acts.

The contractual capacity of a corporation is limited.

By natural impossibility

Which arises from the fact that it is an artificial, not a natural person. Thus it can only make contracts through an agent and in consequence can not fulfil contractual obligations of a personal nature.

By legal impossibility

Since corporations are subject to what is called the Ultra-vires rule, which limits what they can legally do. A corporation can only act within its powers, and actions outside the scope are called ultra-vires or beyond its powers.

At common law contracts made by corporations had to be under seal. However, kit was amended by statute in the Company's Act 1985, which provides in Section 36 that a registered Company need not contract under seal except where an ordinary person would have to do so.

PERSONS SUFFERING FROM MENTAL DISORDER

Contracts made by a person of unsound mind are valid, but if the other party knew that he was contracting with a person who, by reason of the unsoundness of his mind could not understand the nature of the contract, then the contract is voidable at the option of the insane party. The person of unsound mind must prove:

- The unsoundness of mind at the time of the contract.
- That the other party knew of it.

If necessaries are supplied to a person of unsound mind, he, like a minor, is bound to pay a reasonable price under Section 3(2) of S.G.A. 1979.

A person of unsound mind can make a valid contract during a lucid interval, even though the other party knew that he was of unsound mind at times. Furthermore, a contract made during a period of unsoundness of mind can be ratified during a lucid interval.

DRUNKARDS

Similar common law rules apply to contracts made by drunkards. The contract is voidable at the option of the party who was drunk at the time it was made, if he can show:

- That he was drunk
- That the other party knew this

A contract made by a person when drunk can be ratified by him when he is sober. Drunken persons have a quasi-contractual liability to pay a reasonable price for necessaries supplied to them. S.G.A. 1979 Sec. 3(2).

REALITY OF CONSENT

A contract which is regular in all other respects may still fail because there is no real consent to it by one or both of the parties. There is no consensus ad idem or meeting of the minds. Consent may be rendered unreal by mistake, misrepresentation, duress and undue influence.

MISTAKE

Mistake may affect the validity of a contract and a mistake which has this effect is called an operative mistake, and must be one of fact and not of law. An operative mistake renders the contract void. It will be operative only if it induces the contract. For example, if A orders goods from B's shop which is unknown to A, now owned by C, then A has made a fundamental mistake but so long as he gets his goods it will not affect the contract between A and C.

The concept of mistake has a technical meaning and what would be considered a mistake by the layman will not always amount to an operative mistake. For example, if A buys a watch thinking it is worth £100 when in fact it is worth only £50, the contract is good and A must bear the loss if there has been no misrepresentation by the seller. This is what is meant by the maxim "CAVEAT EMPTOR" (let the buyer beware).

OPERATIVE MISTAKE

Operative mistake may be classified into the following categories:

- Documents mistakenly signed
- Unilateral mistake i.e. a mistake made by one party only
- Bilateral mistake i.e. where both parties make a mistake and subdivided into:
    - Common mistake/identical; and
    - Mutual mistake/non-identical

Documents mistakenly signed

This form of unilateral mistake occurs if a person signs a contract in the mistaken belief that he is signing a document of totally different nature, in this situation there will be a mistake which avoids the contract and he will be able to plead "non est factum" (it is not my deed). However, as a result of the decision of the House of Lords the plea of mistake is available in such circumstances only if the person signing under a mistake can show that he was not negligent in so doing.

UNILATERAL MISTAKE

Unilateral mistake occurs whenever one of the parties to a contract X is mistaken as to some fundamental fact concerning the contract and the other party Y, knows or ought to know this. This latter requirement is important because if Y does not know X is mistaken, the contract is good.

Effect of unilateral mistake in common law

The cases are mainly concerned with mistake by one party as to the identity of the other party. For example a contract may be void if X makes a contract with Y thinking Y is another person Z.

EFFECT OF UNILATERAL MISTAKE IN EQUITY

If the plaintiff is asking for an equitable remedy, such as rescission of the contract or specific performance of it, then equitable principles will apply. As far as unilateral mistake is concerned, Equity follows the law and regards a contract affected by unilateral mistake as void and will rescind it or refuse specific performance of it.

BILATERAL MISTAKE

A bilateral mistake arises when both parties to a contact are mistaken. They may have made a common or identical mistake or mutual or non-identical mistake.

a) **Common or Identical mistake**

This occurs when the two parties have reached agreement but both have made an identical mistake as to some fundamental fact concerning the contract. For example X sells a particular drawing to Y for £500 and all the usual elements of agreement are present including offer, acceptance, consideration and the agreement concerns an identified article. If both X and Y think that the drawing is by Reembrant while it is in fact only a copy worth £25, the agreement is rendered imperfect by the identical or common mistake.

The circumstances giving rise to the mistake must exist at the time the contract is made.

- Effect of identical bilateral mistake at common law.
  At common law a mistake of the above kind has no effect on the contract and the parties would be bound in the absence of fraud or misrepresentation.

There are only two cases in which the common law appears to regard an identical bilateral mistakes as vitiating (weakened) element and even these cases are probably examples of precedent impossibility rather than mistake. The two categories of cases are:

i) Cases of Res Extincta

Identical bilateral mistake as the existence of the thing contracted for. For example if X agrees to sell his car to Y and unknown to them both the car had at the time of the sale been destroyed by fire, then the contract will be void because X has innocently undertaken an obligation which he cannot possibly fulfil.

If the goods are lost after the sale takes place, then the contract is good and the loss lies with the buyer if the property in the goods has passed to him.

Identical bilateral mistake as to the existence of a state of affairs forming the basis of the contract. If A and B believing themselves to be married enter into a separation agreement and later learn that they are not really married, the agreement is void as in the **Galloway vs Galloway (1914)**.

ii) Cases of Res Sua

These occur where a person makes a contract to buy something which already belongs to him such a contract is at any rate in Equity void.

Effect of identical bilateral mistake in Equity

Cases of Res Extrincta and Res Sua, Equity treats them in the same way as the common law regarding the agreement as void.

iii) Mutual or non-identical mistake

This occurs where the parties are both mistaken as to a fundamental fact concerning the contract but each party has made a different mistake. For example if X offers to sell car A, and Y agrees to buy thinking X means car B, there is a bilateral mistake which is non-identical. This may prevent a contract from coming into being between the parties because of defective offer and acceptance and may result from the negligence of a third party.

Effect of non-identical bilateral mistake at Common Law

The contract is not necessarily void because the court will try to find the "sense" of the promise, i.e. the sort of bargain which a reasonable man looking at the dealings of the parties would have thought had been made.

Effect of non-identical bilateral in Equity

Equity also tries to find the "sense" of the promise thus following the law in this respect.

MISREPRESENTATION

A representation is an inducement only and its effect is generally to lead the other party merely to make the contract. A representation must be a statement of some specific existing and verifiable fact or past event and in consequence, the following are excluded:

- Statements of law
- Statements as to future conduct or intention
- Statement of opinion

However, if it can be shown that the person making the statement had no such opinion it may be considered in law to be a misstatement of existing fact - merely puffing as in advertising or sales talk or what is called these days "hype".

Not all statements amount to representation. Some of them are obviously of the nature of sales talk, and cannot be relied upon.

This example of representation does not affect the contract whether true or false. Silence or non-disclosure by one or both of the parties does not normally affect the contract. In order to operate as an inducement the representation must bear the following:

- Be made with the intention that it should be acted upon by the person misled.
- Induce the contract so that the person making the claim to have been misled must not have relied on his own skill and judgement.
- Be material in the sense that it affected the plaintiff's judgement.
- Be known to the plaintiff. The plaintiff must always be prepared to prove that the alleged misrepresentation had an effect on his mind.

VOID CONTRACTS

There are certain classes of contracts which are expressly declared by statute to be void.

1. WAGERING CONTRACTS

A wager is a promise to pay money or transfer property upon the happening of an uncertain event, in which neither party has any interest except to win or lose.

There are three essentials for wagering a contract:

- It must be a promise to pay money or money's worth.
- The promise must be conditional of an avert happening
- The event must be an uncertain one either because it has to happen in future or though it has taken place, the contracting parties are unaware of the result. It is not illegal but only void for insurance reasons.

DISCHARGE OF A CONTRACT

A contract is discharged when the obligation created by it ceases to be binding on the promisor who is then no longer under the duty to perform his part of the agreement. Discharge may take place in various ways:

1. Discharge by Agreement

A contract is made by agreement and it is also possible to end it by a subsequent agreement if there is new conditional for the discharge or if the discharge is under seal.

A contract may be discharged by agreement in any one of the following ways:

a) Agreement by waiver

In case of a contract still executory, a mutual agreement between the parties can release each other from their respective obligations and rights. This is known as waiver, and can take any form, although the original contract was in writing or under seal. But in a contract where one of the parties has performed his obligation and agrees to release the other party from his obligations, he is not bound by

his promises and can still demand the performance of the contract unless his promise of waiver is under seal.

b) Agreement by novation

An existing contract may be discharged when a new contract is substituted in its place either between the same parties or between different parties the consideration mutually being the discharge of the old contract. This type of arrangement between the parties is known as novation. Suppose A owes some money to B. It is agreed between A, B and C that B shall accept C as his debtor instead of A. There is novation the old debt between A and B is at an end and a new debt from C to B has been created.

c) Agreement by Accord and satisfaction

Where a party to a contact makes breach of his obligation and the other party promises to accept less than what is due under an existing contract, he is not bound by such a promise. However, if a lesser is actually paid on an earlier date at the request of the payee or something different in kind has been accepted, there is a good discharge in such a case the old contract is discharge by accord and satisfaction.

THE RULE IN PINNEL'S CASE

The rule in Pinnel's case (1602) states that payments of a lesser sum in satisfaction of a greater sum, cannot be any satisfaction for the whole sum.

CASE:

Falkes vs Beer (1884)

Mrs. Beer obtained a judgement against Dr. Falkes for a sum of £2,090 with interest. She agreed the payment of the debt in instalments and also promised that further proceedings on the judgement would not be taken.

After receiving the £2,090, Mr. Beer sued for £360 interest on the judgement debt which Dr. Falkes refused to pay.

HELD:

The interest was recoverable. Payment of the debt and costs of a smaller sum, was not consideration for the promise to accept this amount in satisfaction of a debt, interest and costs of a greater sum.

Exceptions:

1. Payment of the debt on a date earlier than that originally agreed.
2. Payment at a different place to that stipulated in the agreement.
3. Payment of a smaller sum accompanied by the transfer of another item.
4. Part-payment by a third party.

2. Discharge by performance

A contract may be discharged by performance where both parties fulfil their obligations under the contract and nothing remains to be completed. It is important for the discharge of the contract that performance must be strictly in accordance with the terms of the contract.

CUTTER VS POWELL 1795

P agreed to pay C £30 on the completion of a voyage as second mate on the ship between Jamaica and Liverpool. C died shortly before the end of the voyage and his widow claimed a proportion of thirty pounds.

HELD:

C's obligation to complete the voyage remained undischarged and no proportion of the agreed sum was payable.

3. Discharge by breach

A contract may be discharged by breach, that is, the failure of one of the parties to perform his obligation under the contract. It must be noticed at this stage that although every breach of contract provides remedies to the innocent party, this does not necessarily discharge the contract. Thus if a party breaks a term of contract going to its root, known as a condition, the other party will be released from his obligations under the contract. But if the term broken is one collateral to the main term of the contract, known as warranty, the innocent party will not be released from performance and can only claim damages. Breach of contract may occur in any one of three ways:

Failure to perform

Where a person fails to perform a contract when the performance is due, the other party can hold him liable for the breach, provided the time of performance was made as the essence of the contract.

Remuneration

It may sometimes happen that even before the time of performance arrives, one party to a contract repudiates his liabilities. Such a breach is known as an anticipatory breach. The other party may either sue for breach of contract immediately or he may wait until the contract should have been performed and then enforce his remedy. But where the party decides to wait and the circumstances arise under which the contract becomes impossible to perform, the plaintiff is left with no remedy against the party responsible for the breach of the contract.

4. Discharge by supervening impossibility or Frustration

Supervening impossibility or frustration will discharge the contract in the following circumstances:

a) Destruction of subject-matter

The first case which allowed a party to be released from liability because of some supervening event rendering performance impossible was as follows:

CASE: TAYLOR VS CALDWELL 1863

In this case a music hall was agreed to be let out for a series of concerts on certain days. The hall was destroyed by fire before the date of the first concert. The contract was held to have become void and the owner of the hall was absolved from liability to let the hall as promised.

b) Non-occurrence of a stated event

When a contract is entered into on the basis of the happening of a certain stated event, the contract is discharged if such an event does not take place.

KRELL VS HENRY 1903

H rented a room from K to view the coronation of King Edward VII. Owing to King's illness the coronation was cancelled. The defendant refused to occupy the flat or to pay the rent and the plaintiff sued him.

HELD

That the contract was discharged as the taking place of the procession was basis of contract.

c) Death or personal incapacity

In contract for personal services, the death or illness of a particular person whose action is vital for the agreed performance discharges the contract. But the personal incapacity must be serious enough and not self created to prevent the person from performing his obligation.

d) Change in law

A contract legal at the time of its formation may subsequently become illegal due to an alteration of law or the act of some person having statutory authority. The contract is then discharged.

e) Government interference

A contract is discharged by unexpected government interference causing fundamental change of circumstances from that contemplated by the parties when the contract was made.

5. Discharge by lapse of time

A contract formed for a specified time is discharged when that period of time has elapsed, where no specific time is laid down, the lapse of reasonable time may render the contract unenforceable in a court of law.

The limitation of Actions Act 1968 in some cases provides a good defence to claims for the breach of contract and in fact terminates the contract without providing any remedy to the innocent party. Where a person does not pursue his legal claim under the contract within six years, he will be barred from enforcing his claim and the other party is discharged from his liability.

6. Discharge by Operation of Law

Discharge under this head may take place as follows:

a) By merger

This takes place when the parties embody the simple contract into a contract under deed and in such circumstances an action lies only on the deed.

b) By bankruptcy

When a person becomes bankrupt, all his rights and obligations pass to his trustee in bankruptcy. But a trustee is not liable on contract of personal services to be rendered by the bankrupt.

c) By death

The death of either party will discharge a contract for personal services but other contractual rights and obligations are not affected and survive for the benefit of or against the estate of the deceased.

d) By unauthorised material alteration

Where a party to a contract in writing or under deed makes any material alteration in it without the knowledge and consent of the other, the contract can be voided at the discretion of the other party. An alteration is material which varies the legal effect of contract.

REMEDIES FOR BREACH OF CONTRACT

When there is a breach of contract, the following remedies may be available:

- A right of action for damages at common law (the most common remedy).
- A right of action on a quantum meruit.
- A right to sue for specific performance or for an injunction.
- A right to ask for rescission of the contract.
- A refusal to any further performance by the injured party.
- A right at common law when price of the contract is paid to deduct damages due in respect of breaches committed by the other party and if sued, to set up against the plaintiff such breaches of contract in diminution or extinction of the price.

DAMAGES

Damages are the common law remedy consisting of a payment of money and are intended as compensation for the plaintiff's loss and not as punishment for the defendant. The plaintiff should not be put in a better position than if the contract had been properly performed. The aim is to put the injured party in the same financial position as he would have been if the contract had been performed according to its terms.

MITIGATION OF LOSS

It must be understood that when a breach occurs, the party suffering from the breach must do all he can to reduce his loss and he cannot recover damages which have resulted from his unreasonable failure to do so. For example, the buyer must attempt to obtain supplies elsewhere.

CLASSIFICATION OF DAMAGES

Ordinary damages

These are damages assessed by the court for losses arising naturally from the breach of contract.

Special damages

In contract it covers ,losses which do not arise naturally from the breach so that they will not be recoverable unless within the contemplation on the parties.

Exemplary and aggravated damages

The object of this damages is to punish the defendant and to deter him and others from similar conduct in the future. Thus it was at one time thought that if the court had arrived at a sum of money which would sufficiently compensate the plaintiff, but as a punishment to the defendant, the damages being in the nature of a fine.

Nominal damages

Sometimes a small sum (say £2) is awarded where the plaintiff proves a breach of contract or the infringement of a right but has suffered no actual loss.

Contemptuous damages

A farthing was sometimes awarded to mark the court's disapproval of the plaintiff's conduct in bringing the action. Such damages may be awarded where the plaintiff has sued for defamation of character in spite of the fact that he has engaged in defamatory activities against the defendant. Since farthing are no longer legal tender, the decimal penny would now be used.

Liquidated damages

These are damages agree upon by the parties to the contract and only a breach of contract need be proved no proof of loss is required.

Unliquidated damages

Where no damages are fixed by the contract it is left to the court to decide their amount. In such a case the plaintiff must produce evidence of the loss he has suffered.

QUANTUM MERUIT

This remedy means that the plaintiff will be awarded as much as is earned or deserved. In the event of a breach of contract, the injured party may have a claim other than the one for damages. He may have earned out of work or performed services and for such he may be entitled to claim on a quantum meruit.

He will be awarded what the court thinks the work or services are worth. This action is quite distinct from an action for breach of contract and is in the nature of restriction for work done.

The general rule is that if a contract provides for the services to be rendered in return for payment of a lump sum, nothing can be claimed unless the work has been precisely performed. However, a claim can be made under quantum meruit if:

a) a party to an entire contract is prevented from performing the whole of the contract by the fault of the other party.
b) a party has only partially fulfilled his obligations but the other party has voluntarily accepted which benefit of the work a goods supplied.
c) the contract is divisible as opposed to entire.

SPECIFIC PERFORMANCE

Both specific performance and injunction are equitable remedies which may be awarded at the discretion of the court to a person who has suffered a legal injury where damages would not be an adequate remedy.

Specific performance is usually granted in the following cases:

- where a contract is for the sale of land
- where the contract is for taking debentures in a company
- where the contract is for the sale of rare goods which are not easily available in the market or the value of such could not be measured in money.

Specific performance is not granted in the following cases:

- where damages would provide in the following cases
- where the contract is to render personal services
- where one party to the contract is an infant
- where the contract is to lend money

Damages may be claimed in lieu of or in addition to specific performance which as a rule will provide on adequate remedy.

INJUNCTION

An injunction is an order of the court restraining the doing, continuance or repetition of a wrongful act. It may be obtained to enforce a negative, contractual term where an order of specific performance would not be available, for example where a signer agree to work only for a certain employer and then in breach of contract worked for a rival company. Although her employer would not have been able to obtain an order for specific performance of the original contract for personal services, he was successful in obtaining an injunction restraining the signer from singing for anyone else. The court will not, however, enforce contracts by injunction if damages are a more suitable remedy since it can always award damages in lieu of an injunction.

COMPANY LAW

(THE COMPANIES ACT, CAP 85, LAWS OF UGANDA 1964)

NATURE OF A COMPANY

A Company or Corporation is a legal entity separate and set apart from its members or shareholders. This legal personality is an artificial one, which is distinguishable from natural personality. The possession of a legal personality implies that a company is capable of enjoying rights and being subject to duties, separately from its members.

This principle was first distinctly articulated in the British House of Lords Judgement;

CASE: SALOMON V SALOMON & COMPANY LIMITED (1897)

In this case, Salomon carried on business as leather merchant. In 1892 he converted the business into a Limited Company by forming Solomon & Company Limited. The company consisted of Solomon, his wife and five children as members. Solomon was the Managing Director. The company then bought Solomon's business as a going concern for £39,000. The price was made up of:

- £10,000 in debentures by which the company's assets were charged.
- £20,000 in fully paid £1 shares
- The balance in cash

Solomon held 20,001 of the 20,007 issued shares. The remaining 6 shares were each held by a member of his family. Immediately after incorporation, the company experienced difficulties and a year later was wound up. It had sufficient assets to satisfy the debentures but nothing for the unsecured creditors.

HELD: The House of Lords held that the company had been validly formed and that the business belonged to the company and not to Solomon and Solomon was its agent and not it the agent of Solomon.

CLASSIFICATION OF COMPANIES

- Company limited by shares and guarantee.
- Private limited and Public limited
- Limited companies and Unlimited companies
- Group of companies

CONSEQUENCES OF INCORPORATION

1. Liability

The company being a distinct legal "persona" is liable for its debts and obligations. The liability of the members or shareholders of the company is limited to the amount remaining unpaid on the shares. For instance, where a shareholder has been allotted 100 shares shs. 100 each and he pays shs. 50,000 to the company, at the time of winding up the company, if the shares remain not fully paid for, he will be required to pay shs 50,000. It follows that the company's creditors can only sue the company and not the shareholders.

2. Property

An incorporated company is able to own property separately from its members. Thus, the members cannot directly interfere with the company property.

3. Legal proceedings

As a legal person, a company can take action to enforce its legal rights or be sued for breach of its duties. However, the action for or against the company should be instituted in the company's registered name.

4. Perpetual Succession

Changes in membership arising from the bankruptcy or death do not affect the company's existence. The life of a company can only be ended either by winding up, striking off the register of company's or through amalgamation and reconstruction as provided by the Companies Act.

5. Transfer of shares

A share constitutes an item of property, which is freely transferable, except in the case of private companies.

6. Borrowing

A Company can borrow money and provide security in the form of a floating charge. A floating charge is said to float like a cloud over the whole assets of the company at any given time.

7. Formalities, Publicity and Expenses

Formalities have to be followed, there is publicity and therefore loss of privacy and the exercise is expensive.

THE VEIL OF INCORPORATION

The fact that separate corporate personality of a company prevents outsiders from taking action against its members even though the outsiders can find out who they are and how many shares they hold, has led to comparison with a veil. The corporate personality is the veil and the members are shielded behind this "veil of incorporation".

However, the internal affairs of the company are never completely concealed from view since publicity has always accompanied incorporation.

Lifting the veil of incorporation

A negative consequence of incorporation is that the legal personality of the company may be disregarded in certain circumstances by a device known as lifting the veil or mask of incorporation. In such a situation the law looks at the people behind the company rather than the corporation.

It has been observed in Dunlop Nigerian Industries Ltd. V Forward Nigerian Enterprises Ltd & Farore, that in particular circumstances; e.g. where the device of incorporation is used for some illegal or improper purpose, the court may disregard the principle. That a company is an independent legal entity and "lift the veil" of corporate identity so that if it is proved that a person used a company he controls for an improper transaction he may be made personally liable to a third party.

The legal technique of lifting the veil is recognised under two heads:

- Statute and
- Case law

a) STATUTORY LIFTING OF THE VEIL

1. Where the number of members is below legal minimum.

Under S.33 of the Cap. 85, if a company carries on business for more than 6 months after its membership has fallen below the statutory minimum (seven for Public and two for Private companies) every member during the time the business is carried on after the six months and who knows that the

company is carrying on business with less than the required minimum membership is severally liable for the company's debts incurred during that time.

2. Where the company is not mentioned in the Bill of Exchange.

By S.109 of Cap. 85 an officer of the company is personally liable if he signs a bill of exchange, cheque etc. on behalf of the company without mentioning the company's name on it in legible (clear) characters.

3. Holding and subsidiary companies

According to S.150 of Cap 85, where companies are in relationship of holding and subsidiary companies, group accounts should be presented before the holding company in general meeting. In this regard the holding and subsidiary companies are regarded as one for accounting purposes, and the separate nature of the subsidiary company is ignored.

4. Reckless or fraudulent trading

It is provided under S. 327 of Cap. 85 that if during the winding up a company, it appears that any business of the company has been conducted recklessly or fraudulently, those responsible for such business may be held liable without limitation of liability for any of the company's debts or liabilities.

5. Investigation into related companies

Where an inspector has been appointed by the Registrar to investigate the affairs of a company, he may, if he thinks fit, also investigate into the affairs of any other related company. Also report on the affairs of that other company so long as he feels that the results of his investigation of such related company are relevant to the main investigation.

6. Taxation

Under the Income Tax Act, 1997, the veil of incorporation may be lifted to ascertain where the control and management of the company is exercised in order to determine whether it is a Ugandan company for income tax purposes.

b) LIFTING THE VEIL UNDER CASE LAW

1. Where the company acts as agent of the shareholders.

Where the shareholders of a company use the company as an agent, they will be liable for the debts of the company.

2. Where there has been fraud or improper conduct.

The veil of incorporation may also be lifted where the corporate personality is used as a mask for fraud or illegality.
Thus in Gilford Motor Company V Horne the defendant was the plaintiff's former employee. He agreed not to solicit its customers when he left the employment. He then formed a company, which solicited the customers. Both the company and defendant were held liable for breach of coven ant not to solicit.

3. Determination of residence

The court may look behind the veil of the company and its place of registration in order to determine its residence.

PROMOTION AND FORMATION OF THE COMPANY

PROMOTION

Promoters Defined

A promoter is defined as any person who undertakes to take part in forming a company. Or who, with regard to a proposed newly formed company, undertakes a part in raising capital for it, prima facie a promoter of the company, for he has taken part in setting going a company formed with reference to a given object. Thus a person may be a promoter though he has taken comparatively minor part in the promoting proceedings.

Consequently, a promoter may do anyone or more of the following activities:

- Arrange the preparation of the memorandum and Articles of Association,
- Procure capital
- Prepare a Prospectus
- Obtain directors for the company

However, a person employed in a professional capacity e.g. as a solicitor, valuer or accountant is not a promoter.

Position of a Promoter

A promoter stands in a fiduciary relationship to the company and consequently owes it certain fiduciary duties. It follows that a contract made between him and company is voidable at the company's option unless he has disclosed all material facts relating to the contract to an independent board and the company has freely agreed to its terms.

Remuneration of a promoter

Promoters do not possess an automatic right to remuneration from the company for their services since a company cannot enter into a contract before it comes into existence.

However, in practice, the company's articles allow directors to pay preliminary expenses from the company's funds.

PRE-INCORPORATION CONTRACTS

In promoting a company, promoters usually enter into contracts with third parties and when they do so, they purport to do so on behalf of the unincorporated company. Such contracts are not binding on the company because it is not yet in existence and consequently has no capacity to contract. In addition, the company when it is incorporated cannot ratify contracts entered into by the promoters.

CASE: KELNER V BAXTER (1866)

A, B and C entered into a contract with the plaintiff to buy goods, "on behalf of the proposed Gravesand Royal Alexandra Hotel Company". The goods were supplied and consumed in the business.

Shortly after incorporation, the company collapsed and the plaintiff sued A, B and C on the contract for the price of the goods.

HELD:
It was held that the defendants were personally liable on the contract.

FORMATION OF A COMPANY

The Companies Act makes provision for public and private companies on the one hand and limited and unlimited companies on the other.

A public company must have a minimum of seven members at its formation, but no maximum limit. A private company on the other hand should have at least two members. In addition, a private company should have provision in its articles of association for a restriction on the right of transfer of its shares and debentures to its existing members. A private company may be converted into a public company by altering its articles to exclude the restrictive provisions on the transfer of its shares. While in the case of a public company minimum of two directors are required, only one is required in the case of a private company.

A private company commences business immediately upon incorporation whereas a public company requires a trading certificate in order to do so.

Furthermore, it is not necessary for a private company to hold a statutory meeting and report thereon as is required of a public company. In addition the quorum at general meetings is two for a private company as contrasted to three for a public company.

The company whether public or private may be limited by shares or by guarantee or be an unlimited company. A company limited by shares is one where its memorandum of association limits the liability of its members to the amount, if any, unpaid on their shares.

A company limited by guarantee is one where the liability of members is unlimited to such amount as they may have undertaken to contribute to the assets of the company in the event of winding up. An unlimited company is one in which there is no limit on the liability of members.

MECHANISM OF FORMATION

A Company formed by registering it with the Registrar of Companies in Kampala and obtaining a certificate of incorporation.

In order to effect this the following documents must be submitted to the Registrar:

1. Memorandum of Association
2. Articles of Association
3. A statutory declaration by a legal practitioner engaged in the formation of the company or by a person named in the articles as directors or Secretary of Company.
4. A statement of nominal capital.

If the company is a public company the following additional documents are required to be registered:

5. A statement with the names and particulars of directors and secretary.
6. Prospectus or statement in lieu of prospectus.

EFFECT OF REGISTRATION AND THE ROLE OF REGISTRAR

If the Registrar is satisfied that the documents are in order and that stamp duties and fees have been paid, he enters the name of the company in the register of companies and issues a certificate of incorporation. The issue of the certificate of incorporation is conclusive evidence that all registration requirements have been complied with and that the association is a company authorised to be registered and is duly registered under the Act.

THE MEMORANDUM OF ASSOCIATION

The Memorandum of Association of a company, which is required to be registered for purposes of incorporation, is regarded as the company's most important document in the sense that it determines the powers of the company. Consequently, a company may only engage in activities and exercise powers, which have been conferred upon it expressly by the memorandum or by implication there from.

CONTENTS OF THE MEMORANDUM

The Memorandum of Association of a company limited by shares must state the following:

1. The name of the company with "Limited" as the last word.
2. The registered office of the company is situated in Uganda.
3. The objects of the company
4. That the liability of the members is limited
5. The amount of share capital and division thereof into shares of a fixed amount.

If the company is limited by guarantee, the memorandum should state that each member undertakes to contribute to the assets of the company in the event of it being wound up.

In addition, the memorandum must state the names, address and descriptions of the subscribers thereof who must be at least two for a private company and seven for a public company.

NAME OF THE COMPANY

The Promoters of the company may select the name of the company subject to the restrictions in S.20 of the companies Act, i.e. a company will not be registered by a name which:

- Is identical with that of an existing company or so nearly resemble it as to be calculated to deceive e.g. "Lale" and "Raleigh".
- Contains the words "chamber of commerce"

A Company may change its name by special resolution and with the written approval of the Registrar.

REGISTERED OFFICE

The memorandum must state that the registered office is situated in Uganda. However, the actual address must be communicated to the Registrar of companies within 14 days of the date of incorporation or from the date it commences business.

THE OBJECT CLAUSE

The objects must be lawful and should include all the activities which the company is likely to pursue. The objects or powers of the company as laid down in the memorandum or implied there from determine what the company can do.

Consequently, any activities not expressly or impliedly authorised by the memorandum are "ultra vires" the company. The ultra vires doctrine restricts an incorporated company under the Companies Act to the pursuit only of the objects outlined in its registered memorandum of Association.

THE LIABILITY OF MEMBERS

The memorandum of a company limited by shares or by guarantee should indicate that the liability of members is limited. With respect to a company limited by shares, the liability of a member is the amount, if any, unpaid on his shares. With regard to the liability of a member of a company limited by guarantee, this is limited to the amount he undertook to contribute to the assets of the company in the event of winding up.

A Company may also be registered with unlimited liability. In such a situation the members hereof act as guarantors in respect of the company's obligations. While a creditor of such a company has no right of action against the members themselves, his action being against the company. In turn looks to the members to discharge its debts by providing the necessary funds.

SHARE CAPITAL

The memorandum requires that a company having a share capital must state the amount of share capital with which the company is to be registered and that such capital is divisible into shares of a fixed amount.

The amount of capital with which a company is to be registered and the amount into which it is to be divided are matters to be decided upon by the promoters and will be determined by the needs of the company and finance available.

ALTERATION OF THE OBJECTS

A Company may by special resolution alter the provision in its memorandum with respect to the objects of the company to enable it:

- To carry on its business more economically or more efficiently.
- To enlarge or change the local area of its operations
- To attain any of its objects by new or improved means
- To carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company.
- To restrict or abandon any of the objects specified in the memorandum
- To sell or dispose of the whole or any part of the undertaking of the company
- To amalgamate with any other companies or body of persons.

ARTICLES OF ASSOCIATION

The Articles of Association contains regulations for managing the internal affairs of the company i.e. the business of the company. They are applied and interpreted subject to the memorandum of association in that they cannot confer wider powers on the company than those stipulated in the

memorandum. Thus, where there is a conflict or divergence between the memorandum and Articles, the provisions of the memorandum must prevail.

CONTENTS OF THE ARTICLES

- Quorums at meetings
- Rights attaching to different classes of share
- The number of directors and their rotation
- Number of members with which it proposes to be registered
- Transfer of shares

The articles must be printed, divided into paragraphs, numbered consecutively, be signed by each subscriber to the memorandum in the presence of at least one witness who must attest the signature.

ALTERATION OF THE ARTICLE

It is provided that subject to the provisions of the Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles. A special resolution is one, which is passed by a majority of not less than three-fourths of such members, as being entitled to a vote in person or where proxies are allowed, by proxy at a general meeting of which not less than twenty-one days notice specifying the intention to propose the resolution as a special one has been given.

SHARE CAPITAL
It is only public companies, which can raise funds from the public through the sale of their shares.

A Private Company has limited sources of funding, which include banks, insurance companies and other financial institutions.

WAYS OF RAISING CAPITAL
Due to limited funds available to shareholders for purposes of running large companies with heavy capital involvement, it is normal to resort to the public, through invitation to subscribe for shares or debentures in the company as a means of raising additional funds. There are three basic mechanisms by which this is effected:

- Direct offers to the public are usually done by means of a prospectus issued by the company.
- Offers of sale. In such a situation the company sells the issue of shares or debentures.
- Placing. This is done by issuing house undertaking to place the securities with or without buying them itself.

UNDERWRITING

Upon the formation of a company, the promoter, where appropriate ensures that the share offered to the public is underwritten. However, where an existing company is desirous of raising capital, it is the directors' duty to ensure that new shares are underwritten. The aim of underwriting is to ensure that the issue of shares is successful. Underwriting is a form of insurance against possible poor reception of the issue by the public. (an underwriting agreement means an agreement entered into before the shares are brought before the public, that in the event of the public, not taking the whole of them or the number mentioned in the agreement, the underwriter will, for an agreed commission, take an allotment of such part of the shares as the public has not applied for.)

Underwriting commissions are different from brokerage i.e. sums payable to a share broker who agreed to place shares not to take shares.

PROSPECTUS

A Prospectus is defined as:

"any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures of a company and includes any document which save to the extent that it offers securities of consideration other than cash, is otherwise a prospectus."

ISSUE AND CONTENTS OF THE PROSPECTUS

A prospectus issued by or on behalf of the company should be dated and such date, shall, unless the contrary is shown, be taken to be the date of the publication. A copy of every such prospectus signed by every person named herein as a director should be delivered to the Registrar on or before the date of publication. The prospectus should also state that a copy thereof has been delivered to and registered with the Registrar of Companies.

Contained in the prospectus are the following:

- The number of founders or management or deferred shares and the interest of the holders thereof in the company's property and profits.
- The share qualification and addresses of directors.
- Names, description and addresses of directors
- If the shares are offered to the public for subscription.
- Contain particulars of contracts relating to property acquired.
- The names and addresses of the auditors
- If there are different classes of shares.

ALLOTMENT

The company upon application may make an allotment of shares of a company for them by prospective subscribers. The application, in line with ordinary contractual principles is only an offer to the company, which may or may not be accepted by the company. Directors normally make the allotment of shares at a meeting of the board thereof.

An allottee becomes a member of the company when his name is entered on the register of members.

CONSEQUENCES OF IMPROPER ALLOTMENT

An allotment, which is made by a company contrary to Sec. 49 and, 50 of the Companies Act is voidable at the instance of the applicant, within one month after the holding of the statutory meeting of the company or if the company is not required to hold a statutory meeting, within one month of the date of allotment. A director who knowingly contravenes or permits or authorises the contravention of Section 49 to 50 is liable to compensate the company and the allottee for the loss, damages or costs which the company or allottee has sustained.

RETURN OF ALLOTMENT

A Company limited by shares or by guarantee and having a share capital must make a return of the allotment of share to the Registrar of Companies within one month of the allotment.

The return should give names, addresses and descriptions of the allotees, nominal amount of shares allotted and the amount paid or payable on each share.

LIABILITY IN RESPECT OF PROSPECTUS

CIVIL LIABILITIES

a) Damages for misrepresentation where a statement in a prospectus, which induced a person to subscribe for shares or debentures, contains a material misrepresentation. Resulting into loss or injury to the subscriber the company may be held liable following an action by the subscriber, if any, of its officers knew the statement to be false or had no reason to believe it to be true.

b) Rescission

In the event of a person subscribing for shares or debentures of a company basing himself on a prospectus which contains an untrue or misleading but not necessarily fraudulent statement, such person may bring an action for rescission of the contract and the rectification of the register of members or debenture holders.

c) Action for negligence at common law

STATUTORY REMEDIES

- Compensation under Sec. 45 of the Companies Act

Sec. 45 indicates that compensation is available to persons who suffer loss or damage arising from an untrue statement in a prospectus inviting persons to subscribe for shares or debentures of a company.

SHARES

A share has been defined in Borlanda Trustee V Steel Bros & Co. Ltd as "…….the interest of a shareholder in the company measured by a sum of money for the purpose of liability in the first place and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders interest……."

The holding of a share therefore carries with it certain property rights and liabilities in the company.

ISSUE OF SHARES

Directors at a duly convened meeting of the board invariably issue shares.

BECOMING A SHAREHOILDER

Who can be a shareholder?

- **Infants**

A minor can be a member of the company except where the articles of association prevent this.

If he is a member, he is subject to the general contractual rights and liabilities of a minor. This means that if he has bought shares, he can repudiate the contract at any time before he reaches 21 years of age or within a reasonable time thereafter.

- **Personal representative**

  A personal representative of a deceased shareholder can be registered as a member. This is subject though to the directors' right to refuse registration.

- **Trustee in bankruptcy**

  A bankrupt shareholder remains a member. However, votes as directed by his trustee in bankruptcy.

- **Another company**

  Another company can become a member of a company, be appointing a representative thereon. However, a company cannot buy its own shares, as this is likely to lead to reduction in its registered capital.

THE PROCESS OF BECOMING A MEMBER

A person may become a member of the company by subscribing to the memorandum of association. Under sec 28 of the companies Act, upon registration of the company the subscribers to the memorandum become members.
Alternatively, membership is achieved through agreement to be a member.

This includes:

- Those who apply for allotment of shares
- Those to whom shares are transferred or transmitted
- Directors who have signed and delivered to the Registrar of Companies an undertaking to take and pay for their qualification shares.

PAYMENT FOR SHARES

Normally shares are paid for in cash. However, they may also be paid for in kind.

Issue of Shares at a Discount

The law does not allow the issue of shares at a discount. The full nominal value of the shares must be paid because otherwise the capital yardstick of the company would be misleading.

The position with regard to shares may be contrasted with that in respect of debentures, which may be issued at a discount provided that they are not rapidly converted into shares.

ISSUE OF SHARES AT A PREMIUM

The issue of shares above their nominal value is permissible. However, the amount of the premium thereby realised, whether in cash or otherwise must be transferred to a share premium account in the company's balance sheet.

Share Certificate and Estoppel

Within two months of allotment or transfer of shares, a company is required to issue a share certificate in respect thereof. The certificate constitutes a statement by the company that the holder owns shares which are described in the certificate and is also "prima facie" evidence of the title of that person to the shares.

The certificate operates as an estoppel against the company in two instances:

1. That the person to whom it is granted is a registered shareholder who is entitled to the shares mentioned in the certificate.

2. That the amount certified to be paid has been paid.

TRANSFER OF SHARES

Public limited companies can transfer shares, while private limited companies place restrictions on the transfer of their shares and provide for rights of pre-emption i.e. that the shares should be offered to existing members of the company for sale.

There is also another statutory restriction on the transfer of shares. To the effect that the transfer of any security or creation of or transfer of any interest in a security to or in favour of a person resident outside Uganda is invalid. Except where the Minister of Finance has sanctioned it.
Directors are given absolute discretion to refuse registration of any transfer of shares without giving reasons.

FORM OF TRANSFER
A proper instrument of transfer is required to be used in effecting the transfer of shares. A proper instrument is one, which is executed by or on behalf of the transferor and transferee respectively.

PROCEDURE FOR TRANSFER

- Sale of all shares on a share certificate

If the transfer involves the sale of all the shares which are mentioned in share certificate, the seller is required to hand to the buyer the instrument of transfer as well as the share certificate. The company will in turn send the buyer a new certificate.

- Sale of only part of shares on a certificate

If the seller is only selling some of his shares, which are mentioned, in a single certificate, the procedure of certificate must be complied with. The company will in turn send a new certificate to the buyer.

- The duties of seller and buyer

The seller must hand over to the buyer a valid instrument of transfer and relevant share certificate.

In return the buyer must pay the price for the shares

PRIORITIES

There may be competing claims to the shares. If one, of the claimants is on the register, he will have priority over the shares unless he had notice of the prior equitable claim.

THE COMPANY LIEN

This is usually regulated by the company's Articles, which give the company a lien on the shares of a member, who has not fully paid for them. The lien covers the amount unpaid on the shares.

FORGED TRANSFER

These are null and void in that they do not affect the real owner. Consequently, a person who lodges a transfer for registration impliedly warrants that it is genuine. If it is not, he is liable to indemnify the company from liability.

MORTGAGE OF SHARES

There are two types of mortgages:

- Legal mortgages
- Equitable mortgages

A legal mortgage is one where upon borrowing money, a borrower executes a transfer of his shares, by way of mortgage, to the lender. The transfer is registered with the registrar of companies and the company. The instrument of transfer indicates the terms of the mortgage and also provides for re-transfer when the loan has been repaid. The lender is entitled to payment of dividends on the shares and to vote at the company's general meetings.

Should the mortgagor default in repaying the loan, the mortgagee may sell the shares without recourse to the court, since he is the legal owner thereof.

An equitable mortgage is where the borrower disposes his share certificate with the lender as a security. If the borrower defaults, the lender can apply to court for the sale of shares.

The usual practice is for the borrower to deposit the relevant share certificate plus a blank transfer signed by him, with the lender. If the borrower defaults, the lender has an implied power to sell the shares.

TRANSMISSION OF SHARES

This is a form of transfer of shares by operation of law arising either from the death or bankruptcy of the shareholder.

CALLS ON SHARES

It is common for the articles to give the director's power to make calls on members regarding sums of money which remain unpaid on their shares. The call must be made in accordance with the articles, otherwise it will be regarded as null and void.

SHARE WARRANTS

A Company, which is limited by shares, may, if empowered by its articles issue share warrants respecting fully paid-up shares. Share warrants are regarded as negotiable instruments. Essentially the shareholder is handed in the place of a share certificate a document indicating that the bearer is entitled to the shares ordered in the warrant. Such bearer is entitled to all the rights of a shareholder, except where there is contrary provision in the articles. His name, will not, however, appear on the register of members. Instead an entry will be made on the register indicating the details relating to the issue of the warrant.

Dividends will normally be paid in the form of coupons or otherwise to the holder of the warrant.

CONVERSION OF SHARES INTO STOCK

Fully paid shares or any class of them may be converted into stock by the company if there is authority for doing so in its articles of association. Conversion into stock has the effect of merging into one fund of a nominal value equivalent to that of the total of shares with the member instead of holding particular identified shares.

The theoretical advantage of this arrangement from a member's perspective is that the stock is easily divisible into fractions of any amount.

From the company's point of view, the existence of stock simplifies the duty of maintaining the register and issuing certificate.

THE REGISTER OF MEMBERS

Every company is under a duty to maintain a register of members in which is entered their names, addresses and descriptions. The register has to be kept at the registered office of the company.

However, if the maintenance of the register is done at another office of the company (other than the registered office) or is done on behalf of the company by some other person. It may be kept where the work is done, provided that this is not outside Uganda. In addition, a company should give to the Registrar of Companies notice of where the register is kept. Except where this is done at its registered office.

Companies are also required to show in the register the number of shares held by each member and the amount paid on those shares. The date at which each member was entered in the register and the date he ceased to be a member must also be included.

ANNUAL RETURN

Every company must deliver an annual return to the registrar of Companies within 42 days after the holding of an annual general meeting. Essentially, details relating to members and their shareholding must be supplied.

CAPITAL

Capital refers to the net worth of the business i.e. the amount by which the value of the assets exceeds the liabilities.

TYPES OF SHARE CAPITAL

1. **Nominal Capital**
   This is the amount with which a limited company is registered. At registration a company is required to state the nominal capital, which is divisible into shares of a fixed amount. This amount remains constant until it is increased or reduced.

2. **Issued Capital**
   This is a portion of the nominal capital, which has been issued out to the shareholders. Usually only part of the nominal capital is issued, leaving the company to issue further shares normally at a premium.

3. **Paid up Capital**

This is the amount, which has been issued by the company and actually paid for by the shareholders. For instance if the issued capital is worth shs. 10,000 and shs 50 have been paid up capital will be shs 5,000 leaving uncalled capital of shs. 5,000. The Company may later resolve to make a call of shs. 50 on each share.

4. Reserve Capital

A Company, by special resolution decides that any part of its share capital, which has not been called up, shall not be called up except in the event of its winding up. Such capital is known as reserve capital and as such it cannot be mortgaged.

CLASSES OF SHARE CAPITAL

Shares may be issued with special rights relating to payment of dividend, voting, return of capital, etc as the company may decide. However, it is normal to divide shares into three main classes:

- Ordinary shares
- Deferred (founders) shares
- Preference shares

1. Ordinary Shares

Ordinary shares comprise the residuary class of shares in which is vested everything after the special rights of other classes, if any, have been satisfied.

They bear the main financial risk of the business in the event of the company failing and the greater reward, if it is successful.

2. Deferred (Founders) Shares

These shares are entitled to a fixed dividend relative to the profits available to the company following the declaration of dividends on the preference and ordinary shares.

3. Preference Shares

These confer on the holder some preference over other classes in respect either of dividend or of repayment of capital or both.

REDEEMABLE PREFERENCE SHARES

These are preference shares which may be bought out by the company in exception to the general rule relating to the maintenance of a company's capital that a company must not buy its own shares. However, there are certain conditions attached to a company's redemption of its shares:

- The shares must be fully paid up
- The redemption must be out of the company's profits or fresh issue of shares done for purposes of redemption.

VARIATION OF CLASS RIGHTS

Shares may be issued with certain rights. Variation considers the circumstances and mode by which such rights may be altered. Where the class rights are defined in the company's memorandum of association, they can only be varied if the memorandum provides a method of alteration. Alternatively, provision for variation may be made in the articles provided such articles are mentioned.

ALTERATION OF SHARE CAPITAL

Company capital can be altered other than reduction in the following ways:

- Increasing its share capital by new shares of such amount as it thinks expedient.

- Consolidating and dividing all of or any of its share capital into shares of larger amount than its existing shares.
- Converting all or any of its paid-up shares into stock and reconverting that stock into paid-up shares.
- The memorandum fixes subdividing its shares or any of them into shares of smaller amount then.
- Concealing the shares, which at the date of passing the resolution have not been taken.

The powers to alter capital can only be exercised by the company in general meetings by means of ordinary resolution.

REDUCTION IN CAPITAL

A Company has no powers to reduce its capital except in accordance with the Act. This is necessary in order to ensure that creditors have reliable fund for satisfying their claim by preventing undue depletion thereof by the company.
Under Sec. 68, the reduction of capital must be authorised by the company's articles.

There are three specific instances of reduction under the Act:

- Extinction or reduction of liability on any of its shares in respect of shares capital, which is not yet paid up.
- With or without extinguishing or reducing liability on any of its shares, cancelling any paid-up share capital, which is lost.
- With or without extinguishing liability on any of its shares paying off any paid-up share capital which is excess of the needs of the company.

FORFEITURE AND SURRENDER OF SHARES

Forfeiture and surrender of shares are effectively reductions of capital without the court's consent although the share can be reissued.

The directors have power to forfeit the shares of members if so authorised by the articles. The power is only exercisable in respect of non-payment of a call or an installment. In any other event the forfeiture will be a reduction of capital contrary to the company's Act.
Upon the forfeiture of shares, they may be sold or otherwise disposed of in a manner decided upon by the directors.

Forfeiture effectively vests the ownership of the shares into the company, which may sell or reissue them. The buyer thereof, if any becomes liable for future calls, while the forfeiting shareholder ceases to be a member in respect of the forfeited shares. However, he remains liable in respect of liabilities on such shares, which were incurred before the date of forfeiture. Essentially forfeiture is in nature of a penalty.

MAINTENANCE OF CAPITAL

Companies' legislation and case law try to ensure that the company's capital is maintained.

PURCHASE OF OWN SHARES

A Company is precluded from becoming a member of itself by buying its shares. Allowing the company to buy its own shares amounts to a return of capital to the shareholder and is misleading as far as the capital holding of the company is concerned.

However, company may buy its own shares in the following cases:

- The court may order the company to buy shares from an aggrieved oppressed shareholder.
- The company is permitted to buy its redeemable preference shares.
- A Company may transfer its shares to a trustee provided they are fully paid up.

DIVIDENDS PAYABLE OUT OF PROFITS

A dividend is essentially a share of the company's declared profit relative to a member's shareholding. The company's articles of association usually regulate the payment of dividends. The basic rule is that dividends should not be paid out of capital. Dividends are normally declared at the company's general meeting. The legal rule relating to the payment of dividends may be summarised as follows:

- Dividends should not be paid if this would lead to the company being unable to pay its debts when they fall due.
- It is permissible to pay dividends out of profits without making up for losses on fixed capital.
- Dividends should only be paid after making good the loss of circulating capital during the year.
- Losses of previous years, however, great need not be made good before payment of dividend.
- Profit of previous years may be distributed by way of dividend from a reserve fund.
- A profit, which has been made on the sale of the company's fixed assets, can be distributed to members by way of dividends.

DEBENTURES AND BORROWING

Authority to borrow

The memorandum on the power to borrow money imposes restrictions. In practice the power to borrow money is inserted in provisions of the articles with an indication that the directors may borrow money up to a certain limit. The excess over that limit requires the sanction of the general meeting. Once it is established that the company has power to borrow money; then there is an implied power to charge its property for purposes of securing the repayment of the money borrowed.

DEBENTURES

A debenture is defined as a document acknowledging the indebtedness of the company, which is normally, but not necessarily secured by a charge over property. Where the debenture is not secured the document will be referred to as a naked debenture or unsecured loan stock.

The document will also contain a promise to repay the principal sum borrowed on a given date with interest at specified intervals.

THE TRUST DEED

The trust deed contains the company's covenant to repay with interest the money borrowed. It will specifically charge the company's property and indicate when the charge becomes enforceable. This is usually done where the company defaults in the payment of interest. The deed also provides powers to deal with the charged property and to appoint a receiver to enforce the security.

ISSUE AND TRANSFER OF DEBENTURES

Debenture holders are not members of the company. Their interest can be paid out of the company's capital in contrast dividends on shares can only be paid out of profits. Again in contradiction with shares, debentures can be issued at a discount since they are not part of the company's capital. In the same way, a company can buy its own debentures, whereas it cannot buy its own shares. Debentures are convertible into shares.

PRIORITY

If there were insufficient assets to pay all the debenture-holders in full, the available amount would be distributed in proportions to the amount owing to each of them.

CHARGES

Fixed Charge

This is a mortgage of defined property and the company cannot deal with it without the mortgagee's consent. For example company's factory, land or interests, ship etc..

On the winding up of the company, the debenture-holder whose debenture is secured by a fixed charge will rank as a secured creditor.

Floating Charge

The floating charge affects the company's property, which is constantly charging, such as its stock in trade. A floating charge is ambulatory and shifting in its nature. Hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

Remedies of Debenture Holders

The mode of enforcement of a debenture is dependent upon the type of security underlying it. However, the normal procedure is for the debenture holder or their trustees to arrange the appointment of a receiver.

Alternatively, if the financial position is such that the receiver's remuneration cannot be met, it may be preferable for the trustee to take possession of the security. Where the debenture is in effect an ordinary mortgage of a specified piece of property, the debenture holder may exercise his power of sale without necessarily having to appoint a receiver.

DIRECTORS AND OFFICERS OF THE COMPANY
A director is defined to include "any person occupying the position of a director by whatever name called".

Appointment

Every public company registered under the Companies Act must have at least two directors. While other companies must have at least one director.

The company's articles of association regulate the appointment of directors. The first directors may be named in the articles. This means that the subscribers to the memorandum of association usually appoint them.

The proper procedure is for the subscribers to meet and for a majority of them to sign a document at the meeting indicating the number of directors and the names of the first directors.

Subsequent directors may be appointed in accordance with the articles, which normally regulate the mode of increase, reduction, casual vacancies and retirements. Such directors should be appointed at a general meeting and should be voted for individually unless a unanimous resolution to the contrary has been passed.

As regards qualifications for appointment, a person of over seventy years of age cannot be appointed a director unless:

- The company is a private one
- The company is not a subsidiary of a public company
- The articles otherwise provide

An undischarged bankrupt cannot be appointed as a director. And a person who is convicted of the following offences cannot be a director:

- An offence connected with the promotion, formation and management of a company.
- If during winding up a person has been guilty of an offence for which he is liable.
- If the person has otherwise been guilty while an officer of the company of any fraud in relation to the company.

The company is required to notify the Registrar of Companies of any change among its directors or Secretary and the notification must contain a consent signed by the new director or secretary to act in that capacity.

Publicity Requirements

A register of directors and secretaries must be kept at the registered office of the company. It should contain the present name, former names, residential address, nationality, business occupation and particulars of any other directorships held by each director. Similar particulars should be registered in respect of a secretary to the company. The above details should be sent by way of return to the Registrar of companies within 14 days of appointment of directors or secretaries or change thereof.

Termination of Directorship

1. Resignation

A director may resign his office at any time. The company's articles usually make provision for resignation. Article 88 indicates that the office of a director shall be vacated if the director resigns his office by notice in writing to the company.

2. Retirement

There is usually provision in the articles for the retirement of directors by rotation. Article 89 stipulates that one-third of the directors shall retire by rotation in each year. Such retiring directors are eligible for re-election.

3. Removal

The shareholders have authority to remove directors by ordinary resolution at a general meeting.

REMUNERATION OF DIRECTORS

Directors are in principle not regarded as servants of the company. Rather they are its controllers. Consequently, they are not entitled to remuneration except where there is provision to that effect in its

articles of association. Articles usually indicate that directors shall be entitled to such remuneration as shall be determined by the company in general meeting by resolution.

POWERS OF DIRECTORS

The business of the company is managed by the directors who may exercise all such powers of the company as are not by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act and to such regulation, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

Table A, grants to the directors some specific powers in relation to lien, calls, share transfers, borrowing and dividends. The rest of their powers have to be deduced from Article 80.

PROCEEDINGS OF THE DIRECTORS

The directors normally act as a board, unless the articles otherwise provide, at a meeting. They decide issues arising by a majority of votes cast. Any director can call a meeting, every director is entitled to a reasonable notice of directors' meeting. Otherwise, proceedings at the meeting will be void.

THE MANAGING DIRECTOR

While the law gives most of the company's powers to the general meeting and the board of directors, in practice, the detailed and regular decisions affecting the company's business are taken by persons to whom the board of directors delegates its powers of management. The person to whom such powers are delegated is normally the managing director.

THE SECRETARY

The other significant officer of the company who may be said to form part of the management of the company is the secretary. It is mandatory on the company to have a secretary who at the same time must not be its sole director. Anything required to be executed by a director and the Secretary can not be done by the same person acting in both capacities.

The board of directors rather than the general meeting can appoint the secretary. Any officer of the company may be empowered by the board to act in the absence of the secretary.

The Secretary is entrusted with ensuring that the documentation of the company is accurate and orderly and that the necessary requisite returns are made to the company's Registry and that the company's registers are in proper form.

In addition, he carries out the orders of the directors and the company's clerical work such as issuing notices of meetings, sending circulars, writing letters, preparing the agenda for directors' meetings and general meetings of the company and writing up the minutes of these meetings. Furthermore, the secretary is under a duty to certify share transfers.

AUTHORITY OF CORPORATE INDIVIDUAL

Directors and Officers

It is clear that as a primary organ of the company, the directors' collective exercise of power as a board binds the company, which in relation to that exercise may be regarded as the principal. Similarly, a

managing director, to whom the board has delegated its functions can bind the company. The difficulty affecting the company to bind the company is most pronounced with regard to the actions of an individual director or official of the company.

THE INDOOR MANAGEMENT RULE

Nevertheless, an individual director may be able to bind the company in transactions with outsiders on the basis of the application of the constructive notice doctrine as modified by the indoor management rule or the rule in Royal British Bank V Turquand (1956).
In this case, the constitution of the company stipulates that the directors could borrow on bond such sums as should, from time to time by a general resolution of the company be authorised to be borrowed. Without such resolutions, two bonds for £2,000 were issued to the bank under the common seal of the company and were signed by two directors.

In liquidation proceedings, the bank sued Turquand, the Liquidator on the security bond. The defendant pleaded that since the borrowing had not been authorised by the requisite resolutions, the bonds were not binding on the company.

Held: It was held that the bonds were binding on the company. It was indicated that, while persons dealing with a company are fixed with notice of its public documents, in this case the deed and statute of settlement, they are not bound to do more.

In this respect all that the bank was required to do was to read the settlement. In so doing, it found that there was permission to borrow by the company on certain conditions, that is by resolution of the company. The bank then had a right to infer that a resolution authorising the borrowing had been passed.

The essence of the rule is that persons who are dealing with the company are assumed to know the contents of its public documents, and that therefore any transaction they enter into with the company is authorised by those documents. However, they are not bound to do any more i.e. they need not inquire into the regularity of internal proceedings and may assume internal regularity.

The relevant documents, for purposes of the constructive notice doctrine include the memorandum and articles of association and special and extra-ordinary resolutions of the company. Registration of such documents constitutes notice to the world.

The indoor management rule has been considerably qualified in view of subsequent case law formulation and the application of agency principles.

THE APPLICATION OF AGENCY PRINCIPLES

RULE 1

Although an outsider who is dealing with a company is deemed to know the contents of its public documents, where the act proposed to be done is explicitly contrary to the documents, it cannot bind the company unless it has been ratified.

RULE 2

A second modification of the indoor management rule is to the effect that it is inapplicable where the relevant third party has knowledge that the internal procedures required have not been complied with or they are suspicious circumstances putting him on inquiry in that regard.

RULE 3

A third limitation on the rule in Turquand is that an officer of the company who is held out by it is having authority to represent it, will bind the company irrespective of defective appointment or excess of authority except:

a) where the outsider knows that the officer has been irregularly appointed or is exceeding his authority.
b) Circumstances are such as to put him on inquiry
c) It is clear from the public documents that the officer has no actual authority

RULE 4

A fourth qualification of the indoor management rule is that where an officer purports to exercise authority which he does not usually have, an outsider is not protected, if the officer exceeds his authority unless the company has held him out as having authority to act in the matter and the outsider has relied on the representation in which case the company is estopped.

RULE 5

The last qualification of the Turquand rule in the Ugandan context is that if a document purporting to be sealed or signed on the company's behalf turns out to be a forgery it does not bind the company.

ACCOUNTS AND COMPANY AUDITORS

A company with share capital is required at least once a year to make a return to the registrar of companies. The return should include details of its registered office, register of members, debenture holders, indebtedness, members and directors. Failure to make the return attracts a fine against the company and any officer who is responsible in that regard. Every company is also required to maintain two types of accounts:

- The accounting records of its day to day transactions which should reflect the continuous history of the company's dealings.

- Regular annual accounts, comprising the profit and loss account and balance sheet, both of which should give an overall view of its financial performance. The responsibility of preparation and maintenance of the accounts lies with the directors.

ACCOUNTS

Every company must keep proper books of account relating to:

- All moneys received and expended by it in respect of which the receipt and expenditure takes place.

- All sales and purchases of goods.

- Its assets and liabilities

For this purpose, the books kept must give a true and fair view of the state of the company's affairs and explain its transactions.

DIRECTORS' DUTIES RELATING TO ACCOUNTS

The company directors should within eighteen months after incorporation and, subsequently, once at least in every year lay before the company in general meeting a profit and loss account or income and expenditure account in case of a company not trading for profit.

The directors should also lay before the general meeting in every year, a balance sheet made up to date of the profit and loss account or income and expenditure account as the case may be.

DIRECTORS' REPORT

The directors' report should be attached to the balance sheet circulated to members and published by way of return to the Registrar of Companies and maintained at the company's registered office.

AUDITORS' REPORT

The auditors are required to make a report to the members on the accounts examined by them and on every balance sheet, profit and loss account and all group accounts laid before the company in general meeting during their tenure of office.

AUDITORS

Appointment

The first auditors of the company are appointed by the directors at any time before the first annual general meeting and hold office until the end of that meeting. However, if they have not been appointed before the meeting, the general meeting may appoint them. The general meeting may also remove any auditor appointed by the directors and replace him with another nominated and chosen at the general meeting.

Qualification

An auditor must be a member of the professional bodies specified in the Accountants Act. The following persons are disqualified from acting as auditors:

- An officer or servant of the company
- A person who is a partner of or in the employment of an officer or servant of the company
- A body corporate
- A person who by reason of being an officer or servant of the company or a partner or servant of an officer or servant of the company cannot be appointed auditor of the company's holding company.

DUTIES OF THE AUDITOR

The primary duty of an auditor is to audit the accounts of the company including its annual balance sheet and profit and loss statement and to prepare a report, which states:

- Whether the accounts have been properly prepared.
- Whether they give a true and fair view of the state of affairs.
- Profit and loss aspects of the company

To achieve the above the auditors must carry out investigations which will assist him to determine whether proper accounting records have been kept and whether they comply with the entries.

For this purpose, the auditor has a right of access to all relevant documents to enable him to do his duty.

The duty to investigate gives rise on the part of the auditor to exercise care in carrying out that function.

DIRECTORS' DUTIES

1. Duty to a holding company or subsidiary

A director of a subsidiary company owes duties either to its shareholders or its holding company.

2. Duty to a person or body in fiduciary position to the company.

The general rule of the courts is that an agent employed by a trustee is answerable only to the trustee who employed him and that he cannot be considered a constructive trustee and be held liable as such merely because he knew of the trusts.

3. Duty to shareholders

A much more pertinent legal concept is that a director does not owe duties to individual shareholders.

4. The duty to act bonefide in the interest of the company.

This statement clearly gives directors the power and discretion to determine what is in the interest of the company and thereby respects their business and commercial judgement.

5. Duty to exercise powers for a proper purpose.

The directors' powers must be exercised for a given purpose.

6. The requirement upon a director to avoid conflict of duty to the company and his interests.

There are three aspects to this fiduciary principle.

a) The use of a company's property, information or opportunity.

A director of a company is precluded from benefiting from the company's property, information or opportunity in circumstances in which his duty to the company and his interests conflict. If he does so he is liable to account for any such benefits to the company.

b) Contracts with the company

The position of a director contracting within company at common law is that unless the company articles permit, a director cannot validly enter into a contract with his company except where, following full disclosure, the general meeting has approved or ratified the contract.

c) Competing with the company

Competing with the company would place the director in a situation-giving rise to a conflict between his private interests and his duties.

7. The duties of care and skill.

The duty of care and skill is at variance with his descriptions as a trustee in his relationship to the company.

MAJORITY RULE, MINORITY PROTECTION AND INVESTIGATIONS

The Rule of Foss v Harbottle

It has been a long time in law that where it is legally necessary to enforce a duty owing to the company, the only plaintiff is the company itself. This notion stems from the Rule in Foss v Harbottle.

However, since the company is in reality a fiction the power to litigate on its behalf must be vested in some person or group. It has, in this respect, been suggested that the Rule in Foss v Harbottle rest on the basic premise of majority rule and control by the majority in general meeting of the use of the corporate name in litigation.

It may be contended in this required that since Articles 8 vests in the board of Directors all the company's powers which are not required to be exercised by the shareholders in general meeting. It follows that in the absence of authorisation to the contrary in the principal act or articles, the power over litigation rests in the board of directors.

In the absence of any contract to the shareholders in company have the ultimate of the affairs and are entitled to decide whether or not an action in the name of the company shall proceed.

Regardless of the proper view as to which of the company's primary organs has power over litigation. It is quite clear that the company is the proper plaintiff in respect of an action brought to enforce a duty owed to it. Nevertheless, the requirement that the company itself institute an action has been rationalised on two major premises:

- That it prevents a multiplicity of suits in the sense that if each shareholder were permitted to sue, the company would be harassed by numerous actions commenced and discontinued by several plaintiffs.

- If the irregularity complained of is one, which can be effectively ratified by the general meeting it is useless to have litigation about it except with the consent of the general meeting.

LITIGATION BY A MEMBER

It has been said, "the rule in Foss v Harbottle greatly strengthens the position of the majority. Indeed if there were no exceptions to it, the minority would be completely in their hands.

Consequently, certain exceptions are recognised under which an individual shareholder may sue in place of the company:

- When it is complained that the company is acting or proposing to act ultra vires, since the matter is one that the members cannot ratify.
- Where the act complained of, though not ultra vires the company could be effective only if resolved upon by a special majority vote, usually where a special or extra-ordinary resolution is required and it is alleged that it has not been validly passed.

- Where it is alleged that the personal rights of the plaintiff shareholder have been infringed or are about to be infringed in such a way that the wrong to the plaintiff cannot be ratified by an ordinary resolution of the company.

- Where those who control the company are perpetrating a fraud on the minority.

- Any other case where the interests of justice require that the general rule prescribing suit by the company should be disregarded.

NATURE AND RATIONALE OF THE REMEDY

Section 222 (f) of the Companies Act, prescribes that "a company may be wound up by the court if the court is of opinion that it is just and equitable that the company should be wound up". The company, any creditor or member, may present a petition in this respect.

THE APPOINTMENT OF INSPECTORS

The court may upon application, appoint one or more competent inspectors investigate the affairs of a company and to report thereon in a manner required by the court. Such power is predicated upon the need to ensure a check on the powers of directors or majority shareholders that effectively control the company.

The court or the minister can exercise their powers of appointment of inspectors for carrying out an investigation in the following circumstances:

- That the business of the company is being run fraudulently or for a fraudulent and unlawful purpose or in a manner oppressive of any of its members.
- That the persons concerned with the formation of the company or the management of its affairs have in connection therewith been guilty of fraud or misconduct.
- That the members of the company have not been given all the information with respects to its affairs, which they might reasonably expect.

MEETINGS

The company's regulations normally empower the directors to manage its business. However, ultimate control of the company lies with the general meeting.

There are three kinds of general meetings at which all members are entitled to attend and vote, namely: the statutory meeting, the annual general meeting and extra-ordinary general meeting.

STATUTORY MEETING

Every public company limited by share capital must hold a statutory meeting between at least one month and not more than three months from the date of its entitlement to commence business. At least fourteen days before the meeting, the directors must send a statutory report to every member, giving details of shares issued, whether they are paid up or not, cash received by the company, the nature of consideration for the issue of shares, abstract of the receipts of the company and the payments made thereout, particulars of directors, managers, auditors and secretary of the company particulars of any contract.

The aim of the statutory meeting is to enable members to review the progress report from the directors and promoters. The failure to hold the meeting is a ground for winding-up the company although the court may, instead orders that the meeting should be held with the defaulter paying the relevant costs.

ANNUAL GENERAL MEETING

A company is required in each year to hold an annual general meeting, specifying it as such in the notices calling it, and not more than fifteen months should elapse between one annual general meeting and the next. However, if the first annual meeting is held within eighteen months of the company's incorporation, it need not hold in the year of its incorporation or the following year.

The directors normally call the annual meeting. However, if the directors do not convene one, the registrar may on the application of a member direct the convening of one and give directions as to its conduct including a directive that one person may form a quorum.
Business transacted in an annual general meetings include:

- Appointment of auditors
- Fixing auditors remuneration.
- Declaration of dividends
- Consideration of the accounts and balance sheets and reports of the directors and auditors
- The election of new directors to replace those who are retiring and any other business.

Failure to hold an annual general meeting in the manner prescribed by sec. 131 attracts criminal sanction.

EXTRA-ORDINARY GENERAL MEETING

The extra-ordinary general meeting is any general meting other than the annual general meeting and is usually convened by the directors at their discretion to deal with urgent matters which cannot wait until the next annual general meeting.

NOTICES OF MEETINGS

The requisite notice of every general meeting must be sent to all members of the company except where there is contrary provision in the articles.

With respect to an annual general meeting, 21 days written notice thereof must be given to the members.

These statutory provisions override anything in the articles providing for shorter notice. The days indicated refer to "clear" days i.e. exclusive both of the day of service and the day of the meeting. However, a shorter notice maybe given in respect of an annual general meeting if all members agree. In respect of an extra-ordinary meeting shorter notice is permissible where holders of at least 95% in nominal value of the shares or in case of a company without share capital 95% of total voting rights at that meeting if all the members agree.

Article 134 indicates that every member, legal representative of a deceased member or trustee in bankruptcy of a bankrupt member and auditor of the company are entitled to service or notice of the meetings of the company. Failure to give notice to a person entitled to receive it renders any business transacted at the meeting void, unless otherwise provided by the articles.

The notice shall state the place, day and hour of the meeting and in the case of special business, the general nature of it.

PROCEEDING AT MEETINGS

QUORUM

This is the minimum number of shareholders required to attend a meeting before business can be transacted. Although the company's articles invariably regulate the quorum, where they are silent, the Companies Act provides that in the case of a private company two members present in person and in the case of any other company three members personally present constitute a quorum. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business. Exceptionally though, one member may constitute a quorum if he holds all the shares in his class or where the registrar or the court declares that a quorum of one person is sufficient for a meeting.

CHAIRMAN

The articles usually stipulate who shall be the chairman at meetings. For instance, the model articles indicate that the chairman of the board of directors, if present and willing whom failing one of the directors, whom failing anyone selected by the members present shall take the chair. Where the articles are silent as to who should be the chairman, the members present may themselves nominate one.

The chairman's duties are essentially to ensure proper and orderly conduct of the business at the meeting, regulate the proceedings and understand the sense of the meeting. Article 60 in the model articles, gives the chairman a casting vote at the meeting.

RESOLUTION

The Companies Act provides for three types of resolutions at meetings, namely, ordinary, extra-ordinary and special resolutions.

An ordinary resolution is passed by a simple majority of those voting. It is employed with respect to matters, which do not require an extra-ordinary or special resolution.

An extra-ordinary resolution is passed by a three-fourths majority at a general meeting of which notice specifying the intention to propose the resolution as an extra ordinary resolution has been given. Under the Companies Act an extra-ordinary resolution is required for specific matters relating to winding-up.

A three-fourths majority also passes a special resolution. However, 21 days notice specifying the intention to propose the resolution, as a special resolution has to be given. A special resolution is invariably required before any important constitutional charges can be undertaken – such as the alteration of the memorandum or the articles, the reduction of capital with the court's consent.

VOTING

In the first instance each member has one vote by a show of hands irrespective of the number of shares held by him and no proxies are allowed.

Where a poll has been demanded voting may be either personally or by proxy. Each share is entitled to one vote on a poll.

PROXIES

Any member of the company, entitled to attend and vote at a meeting of the company is entitled to appoint another person irrespective of whether the latter is a member as his proxy to attend and vote instead of himself and in respect of a member of the private company the proxy has the same right as the member to speak at the meeting.

ADJOURNMENT

An adjournment of a meeting may be necessary where there is insufficient time for the conclusion of its business on the given day or because of lack of requisite quorum. The articles normally provide that in the latter case the meeting automatically stands adjourned to the same time and place in the following week when the members present shall be quorum. The adjourned meeting is taken to be a continuation of the original meeting and consequently, no further notice is required except where the articles provide the contrary.

MINUTES

Minutes of all the proceedings at the company's meeting are required to be recorded in books kept for that purpose, including loose leaf books provided that sufficient precaution is taken against falsification. Minutes signed by the chairman of the meeting or the next succeeding meeting shall be evidence of the proceedings and the meeting is deemed to have been duly held, convened and regularly conducted. The articles may provide that the minutes shall be conclusive evidence of the proceedings, in the absence of fraud.

The minutes are open to inspection by members only at the company's registered office.

CLASS MEETINGS

Apart from general meetings, of separate classes of members or debenture holders may be convened.

LIQUIDATION

The usual way of terminating the life of a company is through winding-up. Winding-up may take three forms:

- By the High Court
- Voluntarily by either the members or creditors of the company
- Subject to the supervision of the court

A) BASES FOR WINDING UP BY THE COURT

The court in the following circumstances may wind up a Company:

1. If the company has passed a special resolution for its winding up by the court.
2. Where default is made in delivering the statutory report to the registrar or in holding a statutory meeting.
3. If the company does not commence its business within a year from incorporation or suspends its business for a whole year. A winding-up order will only be granted if there is no intention to carry on business.
4. Where the number of members is reduced to below the legal minimum i.e. two in the case of a private company and 7 in the case of any other company.
5. Where the company is unable to pay its debts. This will be the case where the company has failed to satisfy an execution issued against it or to pay a debt of shs. 1,000/- within three weeks of demand for payment.

PERSONS ENTITLED TO PETITION

- **Company**

  A Company may by special resolution resolve to be wound up and may thereafter present a petition to that effect.

- Creditors

  These usually initiate winding-up proceedings and may petition for winding-up at the discretion of the court.

- Contributory

  This refers to a person who is liable to contribute to the assets of the Company in the event of its being wound up. It also includes present and some past members of the company and the holder of fully paid shares.

- The official receiver

  The official receiver who is the official receiver attached to court for bankruptcy purposes may petition during a voluntary winding up or winding up under the courts supervision for a compulsory winding up.

- The Attorney General

  The Attorney General may, present a petition for winding up where an inspector's report has been submitted following investigation of the company.

PRIORITY OF SETTLEMENT OF DEBTS

The assets of the company should be applied in the following order in settling claims:

- To meet the costs, charges and expenses of winding up including the liquidator's remuneration.
- To extinguish claims of preferred creditors

THE LIQUIDATOR

Any person, except a body corporation may be appointed a Liquidator. Usually the appointee is an accountant of not less than five years standing. A Liquidator may resign or be removed by court for cause shown and replaced.

B) VOLUNTARY WINDING UP

A Company may be wound up voluntarily in the following instances:

1. When the period if any fixed for the duration of the company in its articles, expires or where the event occurs which the articles provide shall be a ground for dissolution and the company passes on ordinary resolution requiring the company to be wound up voluntarily.
2. If the company resolves by special resolution that it should be wound up voluntarily.
3. If the company resolves by extra-ordinary resolution that it cannot by reason of its liabilities continue its business and that it is advisable to wind-up.

C) WINDING UP SUBJECT TO SUPERVISION OF COURT

The court may order a voluntary winding-up to continue, subject to the court's supervision and in such case, the creditors contributories or others will be at liberty to apply to the court on such terms and conditions as the court thinks just.

END OF HANDOUT 04
HANDOUT 05

EMPLOYMENT CONTRACTS

The law applicable in Uganda with respect to contracts of employment is the Employment Act 2000 and the Common Law.

1.0 CONTRACT OF SERVICE AND INDEPENDENT CONTRACTOR

There is a need to determine in every case of employment whether a contract of employment exists. If the parties have not expressly stated their intentions, the courts may be called upon to determine whether indeed a contract of employment exists. In doing so, the court applies the following tests: Control test, integration test (i.e. integration into the employer's organisation) and the economic reality or multiple test.

1.1 THE CONTROL TEST

Here the consideration is whether the employer has control over the way the employee does his duties, including not only the duties to be carried out but how and when the employee must perform these duties. If the master/employer has such control the contract is one of services as laid down in PERFORMING RIGHTS SOCIETY LTD. VS MITCHELL & BOOKER (1924) 1 KB 762

CASE

Mersey Docks & Harbour Board vs Coggins & Griffiths (Liverpool) 1947

Stevedores hired a crane with its driver from the harbour board under a contract which due to the driver's negligence a checker was injured. The case was concerned with whether the Stevedores or the harbour board were vicariously liable as employers.

HELD

That the issue must be settled on the facts and not on the terms of the contract. The Steredores could only be treated as employers of the driver if they could control in detail how he did his work. But although they could instruct him what to do, they could not control him in how he operated the crane. The harbour board (as general employers) was therefore still the driver's employer.

1.2 THE INTEGRATION TEST

If the employer cannot control the employee in the performance of his work, the courts will consider whether the employee was integrated into the Employer's organisation. If the work of the employee was so integrated into the business of the employer, then there was a contract of service, but if the employee worked for the business, he is an independent contractor.

Thus in CASSIDY VS MINISTRY OF HEALTH (1951), 2 KB 343 a full time medical officer carried out a surgical operation negligently. The patient sued the Ministry of health as employer. The ministry argued that as it had no control over the doctor in his medical work, he was not their employee/servant and the Ministry was therefore not liable for the Doctor's negligence. It was held that the proper test was whether the employer appointed the employee, selected him for his task and therefore integrated him into the employer's business. Since the Ministry and not the patient had chosen the doctor, he was their employee for whose negligence the Ministry was vicariously liable.

1.3 THE ECONOMIC REALITY TEST

Under this, the courts will consider whether the employee is working on his own account. Where the worker provides his own tools and equipment, this is some evidence that he is working on his own. See READY MIXED CONCRETE (SOUTH EAST) VS MINISTER OF PENSIONS AND NATIONAL INSURANCE (1968) where owner-drivers were engaged to carry cement on their own vehicles from manufacturers to customers. The owner drivers were given a lot of latitude and freedom over the way in which they did their work. They could provide substitute drivers and were responsible for the maintenance of their vehicles although the vehicles were painted the company's colours and the drivers donned the company's uniforms.

It was held that the owner-drivers were in business on their own account as independent contractors as self employed transport contractors and not employees.

2.0 RELATIONSHIP BETWEEN EMPLOYER AND EMPLOYEE

This is usually a personal relationship stemming from the old rules relating to master and servant by which the relationship between a master and his servant was of a personal nature and a citizen had a right to choose for himself whom he should serve.

3.0 FORMATION OF CONTRACT

Like every contract, a contract of employment may be by deed, in writing or oral or a mixture of the two i.e. partly written and partly oral. What is important is that there is agreement between the parties on essential terms such as hours of work and wages. The contract need not therefore take any form.

4.0 TERMS

Under the Decree, a contract of service for six months or more must be made in writing, or the parties can agree that the contract be made in writing even if it is for less than six months.

The written contract must provide for the following:

a) Name of employer and the undertaking and place of employment.

b) Name of employee, place of engagement, place of employee's origin and other particulars necessary to identify the employee.

c) Nature of employment

d) Duration and method of calculation of this duration of employment.

e) Rate of wages and method of calculating the wages, manner and periodicity of payment of wages, whether advances are payable, and if so, whether they (the advances) are repayable.

f) Conditions of repatriation in case of an expatriate employee.

g) Such other matters as may be prescribed.

All other employees shall be issued with an employment card, except if the decree does not apply to those employees. Currently, the decree does not apply to employees who earn less than Shs. 500 per month. The particulars required to be contained in the employment card are, to all intents and purposes, the same as those required to be in written contracts, and are:

a) name and address of the employer

b) name and full particulars regarding the domicile of the employee

c) the nature of the employment

d) the date of commencement of the employment

e) the rate of pay whether with or without food and must contain a space for marking the completion of each day's work.

This card must be kept by the employee. The above are to be found in the Employment Regulations, 1977.

These terms are therefore prescribed by law and may not be contracted out of. It is to be noted that the terms of contract between the employer and the employee are derived from legislation, Collective Agreements for unionised employees and the individual contracts themselves. The statutory terms cover such things as wages, holidays, safety, health and social security.

5.0 DUTIES OF AN EMPLOYER

5.1 To pay wages

An employer must pay wages if there is an express or implied agreement to do so, The amount payable is a matter of agreement. In cases of illness, if the contract is for a period not more than one month, no payment during sickness shall be made - S.57(1) If the contract is written, unless the contract provides otherwise, the employee is entitled to payment during sickness for the first month of such sickness S.57(2). If the sickness goes for a second consecutive month, the employer may terminate the contract. S.57(3) But if the incapacitating illness is caused by the employee's own misconduct, the employee will not be entitled to any payment.

The method of payment, and how the wages are to be paid is usually agreed between the employer and the employee but cash payments have to be paid in legal tender (currency of Uganda) and wages may also be paid by cheque or into the employee's bank account if he has so consented - S. 29. Other forms of wages may include food, dwelling house etc...

5.1.2Deductions

An employer may not make any deductions from an employee's wages or make any agreement with the employee to make such deductions unless the deductions are permitted. The permitted deductions are the following:

a) award made by Industrial Court against the employee or other court or arbitration tribunal.

b) trade union dues for which the employee is a member

c) contributions to provident fund, pension fund or other scheme such as NSSF as approved by the Commissioner.

d) advances of wages made to the employee

e) amount payable by employee as tax but must be passed by the employer to the relevant revenue authority e.g. PAYE, Graduated Tax etc...

5.2 To provide work

In the past an employer had no duty to provide work for his employee as long as the employer continued to pay the agreed wages. But there were exceptions to this general rule namely:

a) if the employee was paid partly or wholly on a piece work or commission basis, the employer had a duty to provide work to enable the employee earn his wages. BAUMANN VS HULTON PRESS (1952).

b) if the employee's reputation and standing depend on his being active in his work, such as an actor, the employer must give him work to enable the employee enhance his reputation and standing. MARBE VS GEORGE EDWARDS (DAILY THEATRE) LTD (1928)

c) if the employee is employed to perform a particular task or to fill a particular post, the employer is in breach of the contract of employment if the employer abolishes the post or removes the employee from it. See (COLLIER VS SUNDAY REFEREE PUBLISHING CO. (1940) whereby the plaintiff was employed by the defendant for two years as a sub-editor of a newspaper. The defendant, before the expiration of the two years sold the paper and so ceased to produce it but continued to pay the plaintiff's salary. It was held that this was breach of contract as the plaintiff could rightly claim that he was no longer employed as a sub-editor.

But under The Decree the employer must provide to his employee work in accordance with the contract during the currency of the contract. If no work is so provided, the employee must nevertheless be paid his wages.

5.3 To give holidays

The decree provides that the employer must grant holidays with full pay to his employee being at least 1½ working days for each completed month of service. In computing holidays with full pay, public holidays and days of absence from work due to illness are excluded. Such holidays may be taken at a time agreed with the employer and an agreement with the employee to forego the holidays is void.

5.4 Safety

The employer is under a common law duty to take reasonable care of his employees' safety. This duty has three main components: to select proper staff, to provide adequate materials and to provide a safe system of work such as by warning employees of the dangers of handling chemical cleaning materials and to provide them with gloves and to instruct them to wear gloves at all times.

5.5 Medical care and board and lodging

Unless the contract requires the employer to do so, the employer is not bound to provide board and lodging or medical care for the employee.

5.6 References

An employer has no duty to provide his employee with references when the employee is seeking other employment unless the employer has agreed to do so.

5.7 To Indemnify

An employee is entitled to an indemnity if he incurs any expense, loss or liability in carrying out his employer's instructions, if there is an express or implied term to this effect in the contract of employment. The question of indemnity usually arises in situations when an employee is acting within his authority or as an agent of his employer.

5.8 To Treat with Respect

An implied duty of mutual respect exists in every employer/employee relationship.

In the case of Donovan vs Invecta Airways Ltd., it was stated that each of the parties should treat the other with such a degree of consideration and courtesy as would enable the contract to be fulfilled.

6.0 DUTIES OF AN EMPLOYEE

An employee has a fundamental duty of faithful service to the employer. From this general duty flows other specific duties namely:

i) Duty of reasonable competence to do his job. See HARMER VS CORNELIUS (1958) where the plaintiff was given a job after answering an advert for a scene painter. He was hopelessly incompetent and was dismissed only after a few days. The dismissal was held lawful as the employee lacked reasonable competence to do the work he was employed to do.

ii) Duty of obedience to the employer's instruction unless they require the employee to do an unlawful act or to expose the employee to personal danger.

For unlawful act see GREGORY VS FORD (1951) where an employer required his employee drive a motor vehicle which unknown to the employee was not insured against third party risk as required by law. In OTTOMAN BANK LTD. VS CHAKARIAN (1930) an employee who had been sentenced to death in a particular place refused to remain working in that place, when ordered by his employer.

It was held that the employee was in his rights to refuse to obey the employer's instruction as to do so would expose the employee to personal danger.

But in BOUZOUROU VS OTTOMAN BANK LTD (1930) where the plaintiff a christian, disobeyed his employer's orders to work in a place where the government was hostile to the christian religion, it was held that he was bound to obey the employer's instruction as there was no evidence of personal danger to him.

iii) Duty to account for all money had and received during the course of his employment. This duty is similar to that of an agent. Thus in BOSTON DEEP SEA FISHING & ICE CO. LTD. VS ANSELL (1880) where the Managing Director of a company accepted personal commissions from suppliers on orders he placed with them for goods supplied to the company. He was dismissed for breach of duty of faithful service and was sued to recover the commissions he had received. It was held that the company was justified to dismiss him and that he must account for the commissions he received to the company.

iv) Duty to exercise reasonable skill and care in the performance of his work. What is reasonable depends on the degree of skill and experience which the employee claims to have. The standard sought is that of "men and not that of angels", i.e. not perfection.

v) Duty of personal service, the relation between the employer and the employee is a personal one, and so the employee may not delegate his duties without the employer's express or implied consent.

Where the employees belong to a registered trade union, and they have a collective agreement, the agreement will also provide for such matters as wages, maternity leave, time off work, health and safety; disciplinary procedure, etc..

vi) Not to disclose confidential information.

An employee is under a duty not to disclose confidential information or material relating to his employers' business or to use such information in an unauthorised way.

An information is confidential if the owner believes that the release of such an information would be injurious to him or advantageous to his rivals.

7.0 DISCRIMINATION AT WORK

7.1 Under the Constitution of Uganda, Art.21(1) & (2) there is provision for equality and freedom from discrimination before and under the law by all persons in all spheres. Provision is also made against discrimination on grounds of race, sex, religion, ethnic origin, colour, tribe, economic standing, political opinion or disability or mental status. This constitutional provision therefore also covers discrimination at work. There should therefore be equality between the sexes and all people at work. But the decree lays down certain types of work which women should not be employed in.

These are underground work whether in a mine or otherwise subject to specified exceptions covering women in management positions, health or welfare services etc.. who may work underground as long as they are not involved in manual work.

The decree also gives special protection for women during pregnancy e.g. maternity leave starting four weeks before delivery, and protection against dismissal during maternity leave or for absence from work for longer periods attributable to illness arising out of pregnancy or confinement. In the latter case, the woman is entitled to at least a minimum of two months unpaid leave after one month paid leave before a notice of termination can be given to her.

7.2 There are also cases where the employer may be allowed to discriminate if there is sufficient reason. For example, the sex of the employee may be a genuine occupational qualification for the job. In cases of race, authenticity in entertainment, art or photography may justify racial discrimination e.g. a black-man to play, Otheino, or maintenance of ethnic authenticity in a bar or restaurant such as Chinese waiters in Chinese restaurant.

7.3. Young Persons

Persons below 18 years generally are not to be employed. Persons below 12 years may be employed on such light work as may be prescribed by the Minister. Persons below 16 years are not to be employed underground at any time except under an apprenticeship training. Nor should they be employed to work during the night in any industrial undertaking, except where the Commissioner for Labour has authorised such employment for the purposes of apprenticeship or vocational training; or in cases of emergency; or in employment which is injurious to health, dangerous or otherwise unsuitable.

8.0 TERMINATION OF CONTRACT - SS.20-28 E.D.

Like every other contract, a contract of employment may be terminated by performance, agreement, frustration or by breach, or by notice and by dismissal.

8.1 PERFORMANCE - S 20(1)(a) E.D

If an employee is engaged to do a specific job or for a specific period, the contract will come to an end after the completion of the specific job or after the expiration of the specific period.

8.2 FRUSTRATION - SS.20(1)(b) and 21 E.D.

Under this head, illness or death of the employee or the impossibility of performance not due to the fault of either party terminates the contract by operation of the rules of frustration. Therefore, a contract of employment is terminated by the death of either party or if the employer is a company, upon winding up or liquidation of the company.

But the death or winding up or liquidation of the employer will not affect rights of the parties which have already accrued. If it becomes impossible to perform the service for which the employee is engaged due to a supervening event not due to the fault of either party, the contract may be discharged. Also illness of the employee may, if prolonged, discharge the employment contract. Thus in POUSSARD VS SPIERS & POND (1876) where a lead singer in new opera became ill during rehearsals and missed the opening night and the first month, it was held that the employment contract was frustrated and therefore terminated by the plaintiff's illness which made it impossible for her to perform, see also S57(3) E.D.

8.3 NOTICE

The employment contact may be terminated by notice. The length of notice may be provided in the contract itself, but if the contract is of an indefinite duration and is silent on the question of notice, then the minimum period of notice shall be that provided in S.24 E.D. as follows:

a) if the employment has lasted less than 12 months, one week's notice.

b) if the employment has lasted at least 12 months but less than three years, 15 days' notice.

c) if the employment has lasted at least 3 years but less than 5 years, one month's notice.

d) if the employment has lasted at least 5 years but less than 10 years, two month's notice.

e) if the employment has lasted more than ten years, three month's notice.

The same notice may also be given by the employee and in lieu of the notice, either party may pay to the other money equivalent to wages of the length of the notice period. The notice is required to be in writing. Unless it is expressly provided, no reasons need be given for termination.

8.4 AGREEMENT

Under S.22 E.D. a contract of employment may be terminated by agreement provided that the employee's rights to repatriation and other benefits due to the employer under the contract are safeguarded. If there is any dispute about these conditions, the dispute must be referred to an authorised officer who will satisfy himself that the employee has freely consented to the agreement without coercion, fraud, mistake, misrepresentation or undue influence, and that all monetary liabilities between the parties have been settled.

8.5 BY COURT

Either party may apply to court for the termination of the contract of employment.

8.9 REPUDIATION OF CONTRACT BY EMPLOYEE

If the employee resigns or goes on strike or fails to perform the contract or observe its conditions, he is in breach which entitles the employer to dismiss him and treat the contract as discharged by the employee's breach.

9.0 REMEDIES OF THE EMPLOYEE

9.1 REINSTATEMENT

Under common law, no order for specific performance can be made in respect of a contract of employment. Therefore courts do not ordinarily order reinstatement of an employee who has been wrongfully dismissed. Reinstatement is therefore not a remedy which is readily available in cases for breach of contract of employment.

9.2 DAMAGES

A claim for damages for a wrongfully dismissed employee is the only effective remedy available and the damages are based on the loss of earnings. In the case of a contract terminable by notice, the measure of damages is usually the sum that would have been earned if a proper notice had been given. An award can also be made of other benefits which were part of the earnings the employee was entitled to by nature of his employment. Like in ordinary contracts, a dismissed employee is under a duty to mitigate his losses.

9.3 REPATRIATION

Under the employment decree, 1975, an employee who has been brought to the place of employment by his employer has a right to be returned to the place of recruitment on termination of the contract of employment in the following cases:

a) on expiry of the term of contract
b) on termination due to the inability of the Employer to fulfil the contract.
c) on termination due to the inability of the employee to fulfil the contract due to illness or accident
d) on termination by agreement of the parties unless the agreement expressly provides otherwise.
e) by order of court on application of either party unless the court decides otherwise.

Note, however, that the employer may be exempted from the liability for repatriation by an authorised officer where:

a) the employee signifies in writing that he does not wish to exercise the right of repatriation.
b) the employee has been settled at his request with his consent at or near the place of employment; or
c) the employee fails to exercise his right of repatriation within six months from the date of termination of contract; or
d) the contract has been terminated by court as a result of fault on the part of the employee.

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