

GENERAL PRINCIPLES OF LAW

For

BUSINESS MANAGEMENT



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GENERAL PRINCIPLES OF LAW FOR BUSINESS MANAGEMENT

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Publisher: O. M. A. Independent Publications,
EDE, Osun State.

ISBN: 975 – 052 – 347 - X

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First Published 2001,
Second Edition, 2002

Printed by GAVIMA PRESS LIMITED,
P.O. BOX 4945 GPO. Ibadan, Nig.
Tel. 2411467, 08033283182

TABLE OF CONTENT

	PAGE
<i>Dedication</i>	iii
<i>Acknowledgement</i>	iv
<i>Table of Content</i>	v
<i>Table of Cases</i>	xi
<i>Table of Statutes</i>	xxi
<i>Preface</i>	xxiii

CHAPTER ONE – THE NIGERIAN LEGAL SYSTEM –

Jade Mohammed

Definition of Law
Schools of Jurisprudence
Purpose of Law
The Nigerian Courts
Distinction between Civil and Criminal Law

CHAPTER TWO – SOURCES OF LAW –

Jade Mohammed

English Law
Nigerian Customary Law
Nigerian Legislations
Islamic Law
Judicial Precedent
International Law
Interpretation of Statutes
Organization of the Legal Profession in Nigeria
<i>Self-Assessment Questions</i>

CHAPTER THREE – CONSTITUTIONAL LAW –

Abiodun Osuntoogun & Adepoju Adeyombo

Definition and Function
Constitutional Law Concepts
Citizenship

Domicile	39
Supremacy of the Constitution	40
Fundamental Human Rights	41
The Rules of Natural Justice	45
The Rule of Law	46
Separation of Powers	47
Checks and Balances	49
Remedies for Abuse of Powers.....	50
<i>Self-Assessment Questions</i>	

CHAPTER FOUR – THE LAW OF TORTS —

Adepoju Adeyombo

Definition and Scope	54
Negligence	56
Strict Liability	58
Occupier's Liability	60
Vicarious Liability	62
Defamation	63
Passing Off.....	71
Detinue.....	73
Conversion.....	73
Deceit.....	74
False Imprisonment	75
Malicious Prosecution	76
Trespass	77
<i>Self-Assessment Questions</i>	

CHAPTER FIVE – OTHER GENERAL LAWS AFFECTING BUSINESS TRANSACTIONS —

Jade Mohammed & Abiodun Osuntoogun

Will	81
Basic considerations in drafting a Will.....	84
Formal requirements of a valid Will.....	85
Duties of Executors and Administrators.....	87

Trusts	87
Ownership and Possession.....	91
Mortgage.....	93
Concept of Personality.....	96
<i>Self-Assessment Questions</i>	

CHAPTER SIX – THE LAW OF CONTRACT —

Adepoju Adeyombo

Definition/Classification.....	101, 102
Elements of a valid Contract.....	104
Offer and Acceptance	105, 115
Consideration.....	120
Intention to create Legal Relations	127
Legal Capacity	130
Lawful Object	137
Free Consent	137
Formalities	138
Contractual Terms	138
Conditions and Warranties	139
Exemption Clauses	141
Vitiating Elements of a Contract	144
Mistake	144
Misrepresentation	148
Duress and Undue Influence.....	152
Non-Disclosure or Concealment.....	153
Discharge of Contract.....	154
Privity of Contract	158
Remedies for Breach of Contract	159
<i>Self-Assessment Questions</i>	

CHAPTER SEVEN – THE LAW OF AGENCY —

Abiodun Osuntoogun

Introduction/Characteristics.....	162
Types of Agents.....	164
Creation of Agency.....	168

Authority of an Agent
Duties of an Agent
Rights of an Agent
Relationship between Agent and Third Parties
Termination of Agency
Self-Assessment Questions

CHAPTER EIGHT – SALE OF GOODS LAW TRANSACTIONS —

Jade Mohammed

Definition/Classification of Goods
Sale of Goods and similar Transactions
Some specialized Contracts
Terms of a Sale of Goods Contract
Time, Quantity, Quality, Title, Acceptance and
Delivery, Implied Terms, Risk of Loss
Remedies
Self-Assessment Questions

CHAPTER NINE – HIRE PURCHASE —

Adepoju Adeyombo

- Introduction/Definition
- Nature of Hire Purchase Contract
- Differences between Hire
Purchase and Credit Sales
- Assessment of the Hire Purchase Act

CHAPTER TEN – CARRIAGE OF GOODS —

Jade Mohammed

- Definition of Carriers
- Common Carriers
- Rights & Duties of Carriers
- Liabilities of Carrier
- Remedies for Breach of contract

Self-Assessment Questions

CHAPTER ELEVEN – INSURANCE –

Abiodun Osuntoogun

- Definition
- Insurable Interest
- Indemnity
- Subrogation
- Doctrine of Uberimae Fidei
- Types of Insurance

CHAPTER TWELVE – LABOUR RELATIONS –

Abiodun Osuntoogun

- The Labour Code-Features
- Contract of Employment
- Labour Officers
- Forced Labour
- Contract of Apprenticeship
- Women
- Children and Young Persons
- Workmen's Compensation Act
- Trade Union

Self-Assessment Question

CHAPTER THIRTEEN – BUSINESS ASSOCIATIONS I –

Jade Mohammed & Adeyombo Adepoju

Introduction

Classification of Companies

Formation of a Company

The Legal Effect of Incorporation

Pre-Incorporation Contract

Directors

Meetings of a Company

Shares and Debentures

Winding Up

Self-Assessment Questions

CHAPTER FOURTEEN – BUSINESS ASSOCIATIONS II –

Jade Mohammed

Partnership

- The Nature and Definition260
- Partnership and Limited Liability262
- Companies compared
- Types of Partnership264
- Legality of Partnership264
- Usual Articles in a Partnership Agreement267
- Presumptions in a Partnership Agreement.....268
- Treatment of Partnership Accounts Before
and After Dissolution.....272
- Partnership Goodwill273
- Duties and Liabilities of Partners273
- Legal position of Partners and Third Parties275

CHAPTER FIFTEEN – BUSINESS ASSOCIATION III –

Adepoju Adeyombo

Cooperative Societies

- Introduction.....277
- Development of Cooperative Society279
- Types of Cooperative Societies281
- Membership, Qualification and Termination283
- Registration, Procedure and Legal Effect285
- Duties and Privileges of Registered Society286
- Rights and Liabilities of Members289

Self-Assessment Questions

CHAPTER SIXTEEN – NEGOTIABLE INSTRUMENTS —

Abiodun Osuntoogun

Introduction/Attributes	290
Types	291
- Bill of Exchange	292
- Promissory Note	297
- Cheque	298
Banker Customer Relationship	304
Duties of a Banker	305
Duties of a Customer	306
<i>Self-Assessment Questions</i>	

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CHAPTER SEVEN

LAW OF AGENCY

CHAPTER OBJECTIVES

After studying this chapter, you should be able to:

- explain the nature and creation of agency;
- state the essentials a valid agency;
- explain the rights and duties of the principal and agent.

INTRODUCTION

Agency is a relationship which exists where one party known as the principal appoints another party called the agent to represent him (principal) in his (principal's) business transactions with other parties (third parties).

Prof. Achike defines Agency as: "A consensual relationship which arises when a person called the agent acts on behalf of another called the principal whereby the latter becomes answerable for the lawful acts the former does within the scope of his authority as they affect the legal relation between the principal and a third person.

CHARACTERISTICS OF AGENCY

- (1) Agent is the ego of his principal, he is the conduit pipe through which the principal acts.
- (2) Agent represents the principal, therefore the actions of the agent in relation with third parties are taken to be that of

the principal. The principle of law is Qui facit per alium facit perse, which means He who does a thing through others, does it himself.

- (3) The Principal is liable for lawful acts of his agent but not for his tortuous or criminal acts.
- (4) Agency is an exception to the doctrine of privity of contract, i.e. a stranger to contract cannot claim under it.
- (5) Agency creates two types of relationships: a bi-partite relationship between the principal and the agent and a tri-partite relationship between the principal the agent and the third party.
- (6) The law of agency does not apply to social or other non-legal obligations.
- (7) Agency relationship arises in circumstances where the law considers it essential to arise; such as in agency by estoppel or agency of necessity.
- (8) Agency creates a fiduciary relationship that is to say a relationship of trust and confidence.

DISTINCTION OF AN AGENT FROM OTHER SIMILAR BODIES

- (1) An agent is not the same with a servant because a principal is liable for the contract of his agent but a master is not liable for the contract of his servant. An agent can however serve in dual capacity; he can act as an agent as well as a servant.
- (2) An agent is in many respects in the position of a trustee but the office of an agent is different from that of a trustee, in that each performs a different function.

However the same degree of confidentiality is required from both.

CLASSIFICATION OF AGENTS

An agent may either be a general agent, a special (particular) agent or a universal agent.

A general agent is one whose authority to act for his principal arises out of and in the ordinary course of his business trade or profession. For example a special (particular) agent is one who is employed or engaged to do a specific or particular thing on behalf of his principal. At the end of that particular assignment, his authority comes to an end.

A universal agent is one who has unrestricted authority to act on behalf of his principal. For example a donee of power of Attorney can carry out the assignment stated in the power of Attorney unhindered.

TYPES OF AGENTS

(1) Agents that are not personally liable for their contracts

These are agents that are not personally liable to their principals for contracts executed by them on behalf of such principals.

The opposite of the first one is an agent called del credere Agent. A del credere agent is one who undertakes to indemnify his principal against any loss which may arise as a result of default of third party to pay the price of the principal's goods supplied to him by the agent.

In the case of *Omorieg V. B. Portland Cement* the Supreme Court held that "where there are no words in a contract of agency which suggest that a higher reward is being paid to the agent in consideration of his assuming liability for any amount due from

customers on credit sales, and there is nothing in the course of conduct between the parties from which such arrangement can be inferred, the agent is not a del credere agent and is not liable to his principal for such amounts due to customers". Therefore, a del credere agent is entitled to a higher remuneration known as a del credere commission.

(2) Confirming House

In a foreign trade, an exporter who receives an order to supply goods to a foreign customer may seek to obtain confirmation from a third person either within the country of the foreign customers or the customer's country. The essence of the confirmation is to find out the reputation and financial standing of the foreign customer. The confirming house for an agreed commission gives confirmation or assurance to the bargain between the parties and is liable to the supplier if the foreign customer refuses to pay or perform. In the case of *Sobell Industries V. Cory Bros Co.* where Turkish buyers placed a large order for radio sets with the plaintiff and the defendants confirmed the order. After receipt of part of the consignment the buyers refused to take delivery of the rest, it was held that the confirmers (defendants) were liable for damages for non acceptance.

(3) Mercantile Agent

A Mercantile Agent is defined by Section 1 of the Factors Acts 1889 as "A person who, having in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods. A mercantile agent has a right of lien over his principal's goods in respect of his commission.

(4) Factor

A factor is a mercantile agent who takes custody of goods from his principal for the purpose of sale. He is the apparent owner of such goods and can sell in his own name and receive the purchase price. He has a right of lien over the goods. Under common law, a factor did not have the right to pledge the goods but now the definition of a mercantile agent in the Factor's Act has made such a thing possible. See the case of *Weiner V. Harris* where the plaintiff sent jewellery to Fisher for the purpose of sale, Fisher instead of selling it, pledged the jewellery with the defendant. The court held that since Fisher was a mercantile agent within the Factors Act, he had the implied authority to pledge the goods entrusted to him.

(5) Broker

An agent employed to negotiate contracts on behalf of their principals for the sale or purchase of properties or goods for a commission called brokerage. Unlike a factor, a broker has no possession of the goods, therefore, he has no lien on the goods and as such can only sue in his principal's name – A broker can act in dual capacity he can be an agent for both the buyer and the seller at the same time.

(6) Auctioneer

This is an agent licensed by law and authorized to sell goods or property for another at a public sale called auction. He may or may not have the possession of goods to be sold. He is the agent of the seller but on the bang of the hammer, he also becomes an agent of the purchaser for the purpose of signing the memorandum of sale, etc. He has no authority to sell on credit and cannot warrant the goods he sells.

(7) Partners

It is a presumption of law that each member of a partnership is an agent of other partners.

(8) Bankers

In a limited sense, a banker is an agent of the customer. This applies in payment of cheques drawn by customers and in accepting deposits. Another example is in buying of shares on behalf of customers.

(9) Estate Agents

They act on behalf of their principals in dealings relating to land or landed property.

CREATION OF AGENCY RELATIONSHIP

Capacity to act as principal – what a person cannot do himself he can not do by means of an agent. It means therefore that a principal must have contractual capacity before he can appoint someone else to act for him. Those who lack contractual capacity to contract for example an infant a lunatic, etc., cannot overcome this contractual capacity by employing an agent to enter into a contract on their behalf.

CAPACITY TO BE APPOINTED AS AN AGENT

An agent does not enter into a contract on his own behalf but on behalf of his principal. Therefore, it is not necessary for an agent to have a contractual capacity.

CREATION OF AGENCY

(1) By Agreement (express or implied)

It is essential to note that though no formality such as writing or deed is required for the valid appointment of an agent (which means an agent can be appointed orally) yet an old common law rule is that an agent to execute a formal document must be appointed by a deed. The commonest way in which agency relationship arises is by an express appointment of the agent by the principal. In *Abina V. Farhat*, the court held that a deed signed by an agent on verbal authority was ineffective. But in *Coke V. Jead*, the court held that a lease executed under seal was valid because the lease was for a term of less than three years. In *Abina*, the lease was for seven years.

Implied Appointment

Implied authority may arise in two ways. One, it may arise from express authority conferred. Thus in *Ryan V. Pilkington*, the court held that an estate agent who was instructed to find a purchaser for a private hotel had an implied authority to accept deposit from the prospective buyer. Secondly, an agreement to create agency may also be implied from the conducts of the parties.

(2) Agency by Estoppel

It is a principle of law, which prevents a person from asserting the reverse of what he has previously represented, if another party has acted in reliance on that representation. In *Saul Raccah V. Standard Co. of Nigeria Ltd.*, *Watkins* was employed to act as an agent for the defendant for the purchase

of groundnuts. In September 1921, the agent was instructed not to purchase groundnuts from the plaintiff again. The agent refused and induced the plaintiff to purchase more tons of groundnuts. The defendant refused to pay. The court held that the plaintiff honestly believed that the agent still retained the authority of the defendant and the defendant must pay.

In Scarf V. Jardine, a member of partnership retired without notifying the public the court held that the retired partner was bound by contracts made by remaining partners with persons who had previously had dealings with the firm.

Conditions for Estoppel to operate are:

- (i) There must be a representation by the principal or his representative who has authority from him to make such.
- (ii) The representation must have been made intentionally or negligently.
- (iii) The representation must be made to the aggrieved third party or to the entire world under such circumstances of publicity as to justify an inference that the aggrieved third party knew of it.
- (iv) The representation must be one of fact and not of law.
- (v) The aggrieved third party must have relied on and acted on the representation thereby altering his position as a result of it.

(3) Agency by Ratification

Lord Jowitt gave an accurate description of ratification when he said "Agency may be created by ratification where A purports to act as agent for B either having no authority at all or having no authority to do that particular act, the subsequent

adoption by B of A's act has the same legal consequences as if B had originally authorized the act. But there can be no ratification unless A purported to act as agent, and to act for B and in such a case alone can ratify".

Ratification is retroactive, it relates back to the time of transaction and not to the time of ratification. See *Buronu Denman* in which a British Naval Commander (defendant) forcibly freed some slaves belonging to the plaintiff. Subsequent ratification by the Secretary of state and Admiral Lords was held to render the defendant's Act as an act of the state for which he could not be made personally answerable. However, the operation of the rule may produce injustice as it could be seen in the case of *Bolton Partners V. Lambert*, an offer was made by the defendant to the plaintiff's Managing Director, an agent who was not authorized to make any contract of sale. The offer was accepted by the Managing Director on behalf of the company. The defendant later withdrew his offer but ten days after withdrawal, the plaintiff company ratified the acceptance of the offer by Managing Director. It was held to be valid since ratification dates back to the time of transaction and not to the time of ratification.

CONDITIONS FOR RATIFICATION TO APPLY

- (1) The contract must have been originally made in the name of an identified or identifiable principal.
- (2) The principal must be in existence and ascertainable at the material time the agent did the contract. See *Caligara V. Giovanni Sartori & Co. Ltd.*
- (3) The principal must have contractual capacity.
- (4) The said principal must have full knowledge of all the material facts.

- (5) Ratification must be made within a reasonable time

AGENCY BY OPERATION OF LAW

This arises in two ways – by necessity and by cohabitation.

Necessity

It arises when in an emergency condition it is essential to act in order to prevent irreparable loss. It may arise where parties have an existing contractual relationship. Or in the alternative when they have legal or moral duty. In *Lagan V. Great Western Railway Co.*, a railway Police Inspector took an injured passenger in a railway collision to an inn. He was held to be an agent of necessity of the Railway Company to such an extent as to bind the company for board and lodging supplied to the injured passenger.

CONDITIONS FOR AGENCY OF NECESSITY

- (1) It must be impossible to communicate with the principal. In *Springer V. Great Western Railway*, Springer consigned tomatoes from Jersey to London. The ship delivered them at a dock in London three days later than scheduled. The tomatoes were found to be going bad and the Railway Company sold them. The court held that they were liable since they could have communicated with the owner.
- (2) There must be real or commercial necessity. In *Sachs V. Miklos*, the court held that there was no emergency that could have warranted the sale of the furniture since they were not of perishable nature.

- (3) The person-claiming agency must have acted in the interest of his principal.

AGENCY BY COHABITATION

Where a husband and wife live together or where a man and woman live together (whether married or unmarried) the wife or the woman has authority to pledge the husband or the man's credit for necessaries suitable to the style in which they live.

This right may be rebutted by providing that;

- (1) The wife or woman is adequately supplied with necessaries.
- (2) That she has enough allowance for necessaries.
- (3) That the husband or the man has warned the tradesman not to supply goods on credit to her.
- (4) That the goods were supplied exclusively on the credit of the wife.

AUTHORITY OF AGENT

(1) Express actual Authority

Authority expressly given to the agent.

(2) Implied actual Authority

This type of authority is derived from the express authority. See *Ryan V. Pilkington (Supra)*.

(3) Usual Authority

The authority given to agent in the same trade profession or business. See *Watteau V. Fenwick*.

(4) Customary Authority

This is authority that is derived from the custom and practice of a particular place, e.g. Estate Agent acts for both buyer and seller of property and signing sale documents.

(5) Apparent Authority

This is the same with ostensible authority which arises as a result of estoppel. See *Jallco Limited and Anor V. Omoniboy Technical Services Ltd.* 1995, 4 S C N J 156.

DUTIES OF AN AGENT

- (1) Agent has a duty to perform *Bilton* an agent who was an insurance broker was held liable for not performing the duty of insuring a ship which was the express instruction from his principal.
- (2) Duty to obey and follow instructions. However, he is not bound to follow unreasonable or illegal instruction.
- (3) Duty to maintain skill and diligence in the course of performing his principal's assignment. However, the principal cannot expect more than the actual skill possessed by the agent and to his knowledge.
- (4) Duty not to delegate his duties. The maxim is *delegatus non potest delegare*, which means a delegatee cannot delegate. There are however, some exceptions which are:
 - (i) if the principal consents expressly or implied;
 - (ii) where trade usage or custom permits it;
 - (iii) where supervening events or unforeseen circumstances warrant it;

- (iv) where technical knowledge is not required, i.e. the duty is merely administered or ministerial.
- (5) The agent's duty to the principal is fiduciary. The following are the agent's fiduciary duties:
- (a) Agent's interest must not conflict with his duty in *De Bussche V. Alt.* The plaintiff appointed B to sell his ship for £90,000 B employed the defendant in Japan to sell the ship. The defendant's employment was approved by the plaintiff. The defendant bought the ship himself at the fixed price and sent it to B for transmission to the plaintiff. Immediately afterwards, the defendant resold the ship for £160,000. The plaintiff filed the brief to compel the defendant to account for the profit realized in the resale. The court held that the defendant was bound to account to the plaintiff.
 - (b) Agent must not make secret profit. In *Regal (Hertings) Ltd V. Gulliver* the directors of a parent company bought shares in a subsidiary company and subsequently sold them at a great profit. The House of Lords held that they must give account to the parent company.
 - (c) The agent must not disclose any confidential information.
 - (d) The agent must keep the principal's money separate from his own money, i.e. account for property and money of his principal. See *Ogbonnaya N. Godwin V. The Christ Apostolic Church* 1998 12 S C N J, 213.

PRINCIPAL'S REMEDIES FOR AGENT'S BREACH OF DUTY

- (1) He can terminate the agency contract without notice.
- (2) He can sue the agent for breach of contract.
- (3) To rescind the contract made with a third party.
- (4) To sue in quasi-contract for money had and received.
- (5) To sue in tort in the case of negligence, conversion and deceit.
- (6) To sue for account of secret profit.
- (7) To institute criminal proceedings.
- (8) He may refuse to pay commission to the agent.

RIGHTS OF AN AGENT AGAINST HIS PRINCIPAL

- (1) Agent's right to commission unless there is a breach of duty.
- (2) The principal must indemnify his agent, for loss or injury sustained and out of pocket expenses.
- (3) Agents rights to lien. The agent if unpaid has a possessory right of lien over the goods of his principal which are in his possession.

RELATIONSHIP BETWEEN AGENT AND THIRD PARTIES

- (1) Where the principal is named (disclosed principal) – where the agent makes a contract with third parties on behalf of a disclosed principal, the agent drops out and the principal assumes rights and liabilities for such a contract.

This was re-affirmed in the recent case of Chief F. S. Yesufu & Another V. Kupper International N. V. 1996, 4 S C N J, 39. However, there are some exceptions to this rule, the agent may be sued or sue personally in the following circumstances:

- (i) if an agent executes a deed in his own name, he is personally liable;
 - (ii) if he signs a bill of exchange or a written contract without disclosing that he is an agent;
 - (iii) if the agent assumes liability on his own volition;
 - (iv) where though he purports to contract as an agent the truth is that he is the principal;
 - (v) where the agent acts for foreign principal;
 - (vi) where custom or tradition makes that agent liable, etc.
- (2) Where neither the name or existence of principal is disclosed. This is undisclosed principal. The position of law is that the undisclosed principal shall also become liable as soon as his existence and identity are disclosed.
- (3) Where the principal is unnamed but his existence is disclosed, the position of law is like that of a named principal, the principal alone incurs obligation and takes the benefit under the contract.

TERMINATION OF AGENCY

This can take any of the following forms:

- (a) by act of parties if terminated by mutual agreement between them;

- (b) by revocation of agent's authority which will be effective when the third is informed;
- (c) by renunciation of agency by the agent;
- (d) by death of either party;
- (e) by bankruptcy of principal or the agent;
- (f) insanity of either parties;
- (g) by performance of the act;
- (h) frustration of the agency agreement;
- (i) by effluxion of time if agency is for a specific period.

SELF ASSESSMENT QUESTIONS

1. Define agency.
2. State and explain the ways in which the authority of an agent may arise
3. What are the duties owed by an agent to his principal vice versa?
4. Explain the circumstances in which an agent's act which is initially unauthorised may be subsequently ratified by his principal so as to become binding.
5. In what ways may a contract of agency be brought to an end?