

CONDITIONS, WARRANTIES AND
EXEMPTION CLAUSES :

NEED FOR REFORM OF THE
KENYAN SALE OF GOODS ACT

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PREFACE

There is a lot of literature written by distinguished writers on the propriety of conditions warranties and exemption clauses. Much of this literature centres on the application of the consumer protection provisions of the English Sale of Goods Act 1893 in England. Not much has been written on the application of these provisions in foreign lands. This brief work attempts to fill this gap. Conditions, warranties and exemption clauses have been found to be oppressive to the buyer in England, and so the Act of 1893 has known useful amendments. But the Kenyan Sale of Goods Act, 1930 has not been amended. Besides, it is the thesis of this work that we in Kenya did not need to import foreign commercial principles because we had our own. And now that these principles were culled into our legal system from England, there is no reason why we should not amend them to keep in step with the English legal system, as well as modifying them to suit our own commercial environment in Kenya.

The work may not be exhaustive, it may also invite criticisms from many quarters, and these are welcome.

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This Dissertation is Dedicated to MR. JAMES GATHAIRU NJORGE
without whose material support I would never have been able
to get into the University.

ABBREVIATIONS

1.	A 11 E. R.	All England Reports
2.	A. C.	Appeal cases
3.	Bing B. C.	Bingham, New Cases (1834 - 1840)
4.	Camp.	Campbell (1807 - 1816)
5.	Conv. (NS)	The Conveyancer
6.	C. B.	Common Bench 1845 - 1856
7.	C. B. (N.S)	Common Bench (New Series) (1856 - 65)
8.	E. R.	English Reports
9.	E. A.	East African Law Reports
10.	H. C. C. C., NBI	High Court Civil Case, Nairobi
11.	J. B. L.	Journal of Business Law
12.	K. B.	King's Bench
13.	L. R.	Law Reports
14.	M & W	Meason and Webby (1836 - 1847)
15.	M. L. R.	Modern Law Review
16.	L. Q. R.	Law Quarterly Review

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CONDITIONS, WARRANTIES AND EXEMPTION CLAUSES:NEED FOR REFORM OF THE KENYAN SALE OF GOODS ACT (CAP 31)INTRODUCTION

The aim of this paper is to expose the need for the reform of provisions for conditions in the sale of Goods Act (cap 31). The exposition will be basically four - pronged. First a historical analysis of the origin and development of conditions and warranties will be given. This will help to show the purposes for which the principles were enunciated. These provisions, it will be seen, were meant to serve the needs of common law England which no longer prevail in modern England, and which have never prevailed in Kenya either in the pre-colonial period, the colonial period or the post-colonial period. Secondly, it will be shown how the British brought with them their law of sales and imposed it on the Africans whose concept of justice was not embodied in the law. It will also be shown that the Kenyan sale of Goods Act was derived almost verbatim from the English sale of Goods Act, 1893 which was a codifying statute enacting what had hitherto been the common law principles of sales. An examination of the African concept of sales - what may be called customary law of sale - will then be entered. It is intended that the Kikuyu customary "contracts of sale" shall be used as a detailed example of the nature of the customary economy upon which the Act was implanted. However reference will be made to other tribes for comparative purposes. We shall then examine the problems arising from the imposition. These problems shall be seen to be both social and economic.

Thirdly this work will be concerned with the examination of the doctrine of freedom of contract as the basis upon which exemption clauses have been allowed in contracts. It will crystallise that the doctrine existed in the African society and that it is meritorious. But it will also be shown that

the doctrine has known bad applications in the Sale of Goods Act. Among the Kikuyu the doctrine had good results since the parties were of the same bargaining power and they were both bound by the customary morality that dictated that one should not exploit his fellow tribesman. It will become clear that the doctrine has facilitated the growth of what are called Standard Form contracts with the ultimate result that contracts have ceased to be instruments of social cooperation and become instruments of exploitation.

Fourthly, we shall see that the Act of 1893, containing the conditions and warranties have known a lot of amendments in England with a view to making them ^Consionable to the buyer, we shall also see that as a result of these amendments the buyer in England enjoys greater protection than the buyer in Kenya because our Act has remained much the same as the Act of 1893 - it has not been amended at all. We shall be particularly concerned about the effect of the English supply of Goods (Implied Terms) Act, 1973 by which it was made impossible for the latter to exclude the statutory implied conditions and warranties by express provision in the contract. It will then be proved that while we in Kenya still retain conditions and warranties as they stood at common law England, the Englishman no longer retains them. The effect is that the doctrine of freedom of contract as explained elsewhere in this work exists in reality in England, but only as a sham in this country. The question will be why we should not amend our Act so as to keep it in step with the developments in the legal system we adopted.

The foregoing discussion will leave one point clear: that we need to reform our law of sales in Kenya. So the last part of this work will carry conclusions and recommendations derived from the elucidation of the problems discussed in the foregoing parts.

HISTORICAL ANALYSIS OF THE DEVELOPMENT OF CONDITIONS AND WARRANTIES

I. DEVELOPMENT OF WARRANTIES.

The analysis of the development of conditions and warranties must start from the premise that during the medieval times the English society was sealed by a high veil of christian morality which was enforced by the canon laws and courts. Nothing of the nature of modern sales existed in that ecclesiastical society for the concept was that it was immoral for merchants to sell goods at a price that was inflated by the need for profits. Activities of merchants were thus severely condemned as constituting an outrageous infringement of the high christian standard of morality, for they were seen as reaping where they did not sow. As a result no legal rules existed to govern the merchants in their immoral pursuits. This was the position in England at a primitive stage of economic development.

However the position did not last long for merchants continued defying the ecclesiastical morality. A distinction was made between merchants who carried on trade for public benefit (such as those operating horse-drawn carriages) and those who carried on trade for their own personal gains-profiteering. While the former were to be tolerated, the latter received severe moral condemnation. But once this distinction was made it became clear that a new moral fibre had penetrated right into the depths of christian morality.

So in the 15th and 16th centuries the second category of merchants also became intergrated into the society.

Under the Caveat Emptor rule, the buyer was on one hand disadvantaged, while the seller was on the other hand expected to know what in fact, he had no means of knowing. The buyer had ~~one~~^{no} means of redress in cases where he bought goods that were defective. This was ^{in cases} only in where ^{the defects in the} latent and the ^{goods} buyer could not discover them by reasonable examination. By the same token, the seller was liable in damages for those defects which the buyer did not discover by reasonable examination. The seller was thus expected to know all the defects of the goods, and to determine their prices with these defects in mind. In order to avert these unconscionable effects of the application of the Caveat Emptor Rule, the courts started to require that in order that a buyer of defective goods should recover damages, the contract must carry a term showing that the seller agreed that the goods were not defective. Special words such as "warrantizandō vendudit" were to be used if such a term was to be included in the contract of sale. These terms were what were known as warranties.

In the early case of CHANDLER V. LOPUS,⁴ the appellant, a goldsmith with considerable skill in jewellery sold a jewel to the respondent representing to him that it was bezar-stone. It transpired that it was not a bezar-stone and the respondent ^{sued.} The King's Bench Division entered judgement for the respondent on the basis that the seller was bound to sell non-defective goods. The appellant appealed to the Exchequer Chamber on the ground that he did not warrant the stone to be bezar-stone and that in any case he did not know that it was not bezar-stone. It was held that bare affirmation that the jewel was a bezar-stone did not amount to a warranty and hence no cause of action was open to the respondent - that even if the appellant knew that it was no bezar-stone no cause of action lay against him since he did not warrant it to be so. In effect, the buyer could not recover unless there was an express

4. (1603) 79 E. R. 3.

To govern this new order of things, the rule Caveat Emptor¹ was introduced. The gist of the Caveat Emptor rule was that once a buyer had entered ^{into} a contract for the sale of goods, he cannot later be heard to say that the seller sold defective goods. It was for the buyer to be aware and to examine the goods before he contracted for them. Commodities of trade were commonly horses at this time and although the seller was required to sell good quality horses, there was no warranty, implied or express binding him to sell good quality horses. However, the seller was liable if the defects in the goods could not be discovered by the buyer on reasonable examination. But there was no duty incumbent upon the seller to disclose to the buyer any flaws that the horse had. By the Seventeenth Century, the maxim Caveat Emptor was well known.

Lord Coke in his treatises on the subject set down the maxim in the following:

"Not that by the Civil Law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty either in Law or in deed, but common law bindeth him not, for, Caveat Emptor"²

Thus in 1534 one Fitzhebert had prophetically stated that it was the duty of the horse-buyer to examine the horse before he bought it, "for his eyes and his taste ought to be his judges."³

1. In the brief examination of the maxim Caveat Emptor, I have benefited tremendously from Prof. Hamilton's thorough account carried in his article, "The Ancient maxim Caveat Emptor" in (1931) 40 Yale Law Review 1133.

2. See Supra at P. 1165

term that the goods were not defective. The warranty under common law thus became initially an agreement strictly - so called, binding the seller to supply good quality goods.⁵ This position did not stand still for long.

Holt C. J. towards the close of the Seventeenth Century, in two leading cases established that a vendors' statement as to title would be an actionable warranty even though it was not made in Special words, or was made without knowledge that it was actually false. The first case faced the learned chief justice in 1684, is CROSS V. GARDNER.⁶ The plaintiff bought an OX from the defendant who affirmed it as his own. It turned out that the OX belonged to one J. S. who seized it from the plaintiff, and the latter sued the defendant for the return of the purchase price. The defendant averred that no cause of action lay against him since he had not warranted that they were his own. It was held that an action will lie against a seller who has possession of goods and sells them as his own while they are not. The second case was MEDINA V. STOUGHTON.⁷ Here the plaintiff alleged that the defendant, being in possession of a million lottery tickets, sold them to him affirming them to his own where-as in fact they belonged to another man. The defendant defended that he had bought the tickets bona fide from another person and that he had also sold them to the plaintiff in good faith. Holt C. J. following his own decision eleven years earlier in CROSS V. GARDNER reiterated that where a man is in possession of a thing which is a colour of title, an action will lie upon a bare affirmation that the goods are his own - for in such case, the affirmation amounted to a warranty.

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5. S. J. Stoljar (1952) 15 425
 6. CROSS V. GARDNER (1684) 1 Sh. 68.
 7. MEDINA V. STOUGHTON (1700) 91 E. R. 1297

The two cases had several consequences. First, they extended the contractual liability of the express warranty by making unnecessary special words of undertaking. Secondly, the decisions gave rise to the idea that a warranty was a special agreement quite distinct from the bargain and sale of a specific article - the bargain and sale, plus an express warranty seemed to represent two contracts instead of one. This bifurcation became even more pronounced because the bargain was effected on the instantaneous delivery of the horse for the immediate payment of the price, so that the only contract that remained over was the special contract of warranty. Thirdly the decisions promoted the bifurcation of the law of sales into sale of specific goods on one hand and sale by description or sale of unascertained goods on the other.⁸ This distinction though artificial and inefficient became the cornerstone upon which the whole conceptual framework of the law of the sale of goods was founded in the nineteenth Century.⁹

Development of the warranty in the nineteenth Century was marked by the emphasis on the distinction between sale of specific goods in which no warranty of quality could be implied, and the sale of goods by description, the emphasis will be illustrated here in two cases.

Firstly in BARR V. GIBSON the buyer bought a ship from the seller, but at the time of sale, though the said ship was supposed to be at sea, it had in fact got ashore and had since become a semi-wreck. The value had dropped from £4,200 to only £10 - a cheap bundle of timber. The issue was whether a warranty of quality would be implied by law since the seller had neither promised nor affirmed merchantability (as to sea-worthiness). Holding that no such implication could be found because the chattels were specific and ascertained, PARKE B. intimated:

8. See Stoljar (1952) 15 M. L. R. 425

9. The artificiality of the distinction, and its inefficiency will

"In the bargain and sale of an existing chattel by which property passes, the law does not, in the absence of fraud, imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship does not, imply any contract that it is then sea worthy, or in a *serviceable* condition, But the bargain and sale of a chattel as being of a particular description does imply a contract that the article sold is of that description".¹¹

Secondly in CHANTER V. HOPKINS¹² the buyer bought a smoke - consuming furnace from the seller and clearly indicated that he needed it to fit it into his brewery. The furnace proved to be totally unsuitable. Like in BARR V. GIBSON the issue was whether or not a warranty of quality would be implied by law as to the suitability of the furnace on the buyers' brewery. Lord Abinger C. B. made this oft-quoted statement in the judgement:

"A good deal of the cases on this subject, ^{come} from the unfortunate use made of the word "warranty". Two things have been confounded together. A warranty is an express or implied statement of something which the party to a contract, and though part of the contract, yet collateral to the express object of it. But in many of the cases, the circumstances of a party selling a particular thing by its proper description has been called a warranty, but it would be better to distinguish such cases as non-compliance with a contract

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10. (1838) 150 E. R. 1196., 3M & W 390.
 11. As per Parke B. at P. 1200
 12. CHANTER V. HOPKINS (1838), 150 E. R. 1484.

which a party has engaged to fulfill, as if a man offers to buy peas of another, and he sends him beans, he does not perform his contracts, but that is not a warranty, there is no warranty that he should sell him peas, and if he sells him anything else in their stead, it is non-performance of it. So if a man were to order copper for sheathing ships - that is a particular copper, prepared in a particular manner, if the seller sends him a different sort in that case he does not comply with the contract and though this may have been considered a warranty and may have ranged under the class of cases relating to warranties, yet it is not properly so!"¹³

I quote the learned Chief Baron extensively because he clearly elucidated what in his opinion a warranty was. He lays a distinction between non-compliance with the contract, and non-compliance with an express collateral agreement to deliver goods of a stated kind. The former he calls non-performance of the contract, and the latter a breach of warranty. The effect of the two 1838 decisions was that they constituted a departure from earlier cases that had established that not only a warranty of quality implied especially in such situations where the buyer had had no opportunity to inspect the goods, but also that this implication did not depend upon the distinction between the sale of specific chattels on the one hand, and the sale by description on the other.¹⁴

HOLT C. J. in the earlier decisions of CROSS V. GARDNER and MEDINA V. STOUGHTON had clearly established that a warranty of title was to be implied

13. As per Lord Abinger at P. 1486 - 1487

14. These earlier decisions include: CROSS V. GARDNER Supra, GARDNER V. GRAY 4 Camp. 144 ~~where~~ at P. 145, ELLENBOROUGH L. J.

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in those cases in which a seller, in possession of the goods, sold them to the buyer saying that they were his own goods. The learned Chief Justice was evidently seeking to protect the buyer from the harshness of the Caveat Emptor rule. He did not enter into the confusions which Parke B. in Barr V. Gibson and Lord Abinger in Hopkins V. Chanter drifted into later, in the dichotomy between specific goods and goods sold by description. It is submitted that the ox in CROSS V. GARNER and the ship in BARR V. GIBSON were goods clearly identified and ascertained and there was no reason why different decisions were reached. One really wonders why the distinction between specific and non-specific goods was ever introduced in the law of sale of goods. But the justifications and criticisms of the dichotomy is deferred for now for an opportune chapter. Suffice it to state here that the bifurcation was incorporated into the sale of Goods Act, 1893 and it has found its way into Kenya in the sale of Goods Act.

Under section 2 (i) of the Kenyan sale of Goods Act, a warranty means;

"an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives ~~use~~^{rise} to a claim for damages but not to a right to reject the goods and treat the contract as repudiated".

Bumbley v Kampala Agencies Co Ltd.

This definition raises several questions. Firstly, is a warranty really an agreement? Secondly, in what sense is the warranty collateral to the contract of sale? ¹⁵

15. Stoljar analyses this question adequately in 15 M.L.R. 425

Thirdly, is it necessary to examine the nature of the ^{term} of a contract before we determine whether to compensate the aggrieved party to the contract or not?¹⁶ Before attempting answers to these questions, it is necessary to show briefly how the courts have interpreted this definition.

In WALLS, SON & WELLS V. PRATT & HAYNES,¹⁷ the plaintiffs bought common English saifon from the defendants. On the back of the sale note a condition ran, "Sellers give no warranty express or implied as to the growth description, or any other matter" The plaintiff sold some of the seeds to a third person who, when his seeds grew, noted that they were actually the giant saifon which were of poor quality. The third party sued the plaintiffs for breach of contract and recovered damages and the plaintiff in term brought this action for damages against the defendant. The majority decision in the Court of Appeal (Farrell L. J. and Vaughan Williams L. J.) decided in favour of the defendant on the basis that, the plaintiff, having received, accepted and resold the seeds could not treat the term common English saifon as a condition, but could only treat it as a warranty, that the defendants had effectively excluded themselves from liability using the exclusion clause on the back of the sale note. Fletcher Moulton L. J. in his dissenting opinion stated:

16. REYNOLDS 79LQR 534

17. Wallis, Son & Wells V. Pratt & Hayness (1910) 2KB 1003

"But from a very early period of our law it has been recognised that such (contractual) obligations are not all of equal importance. There are some which go so directly to the substance of the contract, or, in other words are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. In the former class, he has the alternative of treating the contract as being completely broken by the non-performance and he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract"

His Lordship's explanation of a warranty is to the effect that a warranty is a contractual obligation that, unlike the condition, does not go to the very core of the contract. This interpretation of the statutory definition by Fletcher Moulton L. J. has been followed in several English cases, as well as East African ones.¹⁹ This case begs the question whether or not the warranty is really an agreement. We have seen how it was thought that a warranty was an agreement that was ancillary to the main contract, and which remained even after the main contract is performed. Clearly this view cannot hold water today since a warranty is just a term of a contract of sale and not a second agreement collateral to the main. [It is only that a warranty breached can be made good by an award of damages and not repudiating the contract - a warranty then is not a very important term of the contract.] *Principally*

18. Fletcher - Moulton L. J. at P. 1012

19. OMER & Another V. Besse & Co. LTD (1960) EA 907, CREDIT FINANCE LTD. V. HARCHARAN (1961) EA 231.

But the crucial question begged by the definition of warranty under the sale of Goods Act is whether there is any need of classifying obligations under the contract as warranties and conditions. It is submitted here that what is more important is not the categorisation of contractual obligations as either warranties or conditions per se, but the understanding of the nature of the breach complained of. A party should be able to obtain damages for breach of contract not because the obligation breached is a warranty but because the nature of the breach is such that the party would be adequately compensated or remedied by an award of damages. A further elucidation of this argument will be given after the historical analysis of the development of conditions.

II. DEVELOPMENT OF CONDITIONS.

A condition as a term of contract was introduced in the law of sale of goods by the decision of TINDAL C. J., in the case of YOUNG V. COLE.²⁰ The plaintiff, a stock-broker sold for the defendant four Guatemala bonds and paid him the amount. After the bonds had been in the hands of the purchaser for two days they were discovered to be unmarketable. The purchaser returned them to the plaintiff and the plaintiff returned the purchase price to him. The plaintiff brought action against the defendant for money had and received as a reimbursement of the money he had paid to the purchaser. Holding that the plaintiff was entitled to succeed, TINDAL C. J. stated:

"The plaintiff delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds such as were saleable on the stock-exchange. It seems therefore that the Condition on which the

plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead. It is not a question of warranty, but whether the defendant has not delivered something which though resembling the article contracted to be sold, is of no value".²¹

The use of the term condition by the learned Chief Justice was interpreted by William J. in the later case of DAWSON V. COLLIS²² to mean that henceforth a distinction was made between a warranty and the condition which in this context was taken to mean total failure of consideration. The interpretation given in DAWSON was to the effect that the defendant in YOUNG V. COLLE had provided no consideration to the contract, and so the plaintiff was entitled to return of the purchase price and to rescind the contract. In DAWSON'S case, the facts were briefly that the plaintiff agreed to sell some hops to the defendants, and the plaintiff showed him a sample. When the hops were subsequently delivered, the defendant rejected them on the basis that they did not correspond with the goods bagained for. So the plaintiff sued for the return of the goods or alternatively, payment of the purchase price. The defendant pleaded that he was entitled to reject the goods since they failed to correspond with the description. It was held that the plea was bad since this failure of the goods did not give rise to a right to reject the goods but only enabled the defendant to accept the goods and then sue for a breach of warranty. According to this holding then, a condition refers to a term of the contract which when breached renders the contract empty of all its contents because of total failure of consideration.

21. Supra, at P. 592

22. (1851) 10 CB 523, 138 E. R. 208.

This understanding of the meaning of a condition distinct from a warranty was taken up in KENNEDY V. PANAMA ETC ROYAL AIRMAIL COMPANY LTD.²³ The defendant company carried on the business of mail transport under contract with New Zealand Government. The Company then entered into another contract with an agent of the New Zealand Government to the effect that the area of operation under the first contract was extended to Sydney and Panama. Subsequently the Company changed its name and issued a prospectus inviting application for shares to enable it to perform the recently signed contract. The plaintiff bought shares under the prospectus, but it later transpired that the agent of the New Zealand Government had no authority to enter into the contract.

The plaintiff sued the company claiming that the contract was rescinded by lack of authority on the agent's part and he therefore claimed a refund of the value of his shares.

It was held that in view of the fact that neither the agent nor the company entered into the contract fraudulently, and in addition, since the company did not fraudulently induce the plaintiff (and others) to enter into the contract to purchase shares, it was not open for the plaintiff to rescind the contract. Blackburn J. explained:

"There is ---- a very important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind, but where there has been

an innocent misrepresentation or misapprehension, it does not authorise a rescission, unless it is such as to show that there is a complete difference in substance between what was taken, so as to constitute a failure of consideration".²⁴

The interpretation given to the term condition as used in Young V. Cole in Dawson V. Colling was followed with even greater enthusiasm in the case of BANNERMAN V. WHITE²⁵ Like in DAWSON V. COLLIS, the defendant had bought some hops from the plaintiff. He had indicated to the plaintiff that he would not buy the hops if sulphur had been used in their growth. The plaintiff affirmed that the hops had not been sulphured. It transpired that hops had actually been sulphured to the extent that in 300 acres only 5 acres were sulphured. The defendant found that despite this fact, the sulphured and the unsulphured hops had been so mixed up that separation would not work. He subsequently refused to pay the purchase price and wrote to the plaintiff purporting to repudiate the contract. In view of the fact that the plaintiff's affirmation was not wilful or fraudulent, the court held that the affirmation amounted to an innocent misrepresentation which could not be the basis of repudiation. On the other hand however, it was held that the affirmation that no sulphur had been used was intended to be part of the contract of sale but not a collateral agreement in warranty. In the judgement of ERLE, C. J. it was stated:

"We avoid the term "warranty" because it is used in two senses, and the term "condition" because the question is whether that term is applicable. Then the effect is that the defendants required, and that the plaintiff gave his undertaking, that no sulphur had been used. This undertaking was preliminary

stipulation, and if it had not been given the defendants would not have gone on with the treaty which resulted in the sale. In this sense it was the condition upon which the defendants contracted and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used,----- The intention of the parties governs in the making and in the construction of all contracts. If the parties so intend, the sale may be absolute, with a warranty superadded, or the sale may be conditional if the warranty (condition) is broken".²⁶

From these cases, it would appear that a warranty was deemed to be a collateral or ancillary contract to the main one. It has been shown elsewhere above, how the idea of a warranty as distinct and separate contract from the main contract of sale was developed.²⁷ It was also indicated how Fletcher Moulton L. J.²⁸ conceived a condition to be a contractual obligation which goes directly to the substance of the contract that its non-performance may be regarded by the party not at fault, as a substantial failure to perform the contract. It is submitted that both the condition and the warranty are terms of a single contract and that authority for the proposition that whether a term of contract is a condition or warranty depends on the intention of the parties at the time of contracting.²⁹ This intention is derived from the true construction of the words of the contract whether oral or written.³⁰

26. at P. 860

27. see page 7, above

28. see footnote 18, above

29. SUTTON & SHANNON ON CONTRACTS" 5th ed Edited by K. W. Wedderburn. (1956) Butterworths at P. 275.

30. The Sale of Goods Act, (cap31) does not define what a condition is

30. Contd....

on the construction of the contract. see S. 13 (2).

The view expressed by early cases that a condition means that a breach of it amounts to total failure of consideration is definitely erroneous. True, the effects or the results of the two on the contract are the same, but there are several differences. The first difference is that while it is possible both under the common law and statute to exclude a seller from the liability of an express or implied condition using appropriate exemption clauses, it is not easy to visualise how the law would allow the parties to enter into an agreement in which one party states that he would not be liable for non delivery of goods ordered. Secondly total failure of consideration will enable the injured party to recover in quasi-contract all money paid, but it will not enable him to bring an action for damages unless the failure was also a breach.³¹

The Sale of Goods Act does not define a condition, but it defines a warranty as an agreement with reference to the goods but which agreement is collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages and not to a right to reject the goods and treat the contract as repudiated. From this statutory definition of warranty under S. 13 (2) of the Act one can probably define a condition in the following terms: A condition is a stipulation or term of a contract of sale which, following the true construction of the contract, goes so directly to the purpose of the contract that a breach of it gives rise to a right to reject the goods and treat that contract as repudiated. From this understanding of the distinction between a warranty and a condition, it becomes clear that courts are left ^{with} a discretion to

to determine whether a disputed term of the contract is either a condition or a warranty. In the exercise of this discretion, they are guided primarily by the words used in the contract. Theirs is not an enviable task, especially in view of the fact that S. 13 (2) also provides that a contractual term though called a warranty in the contract can be held to be a condition.

Before 1893, when the English Sale of Goods ^{Act} was enacted, the case-law ~~showed~~ what conditions and warranties meant. The warranty which is the earlier invention of the two was intended to curb the unconscionable caveat emptor rule. Special words were required to include a warranty in the contract but later this requirement became unnecessary. Warranties could then be implied from the contract.³² After 1893, implied warranties were enacted and these have become part of the law of Kenya since our sale of Goods Act carries the provisions of the English Act almost ~~verbatim~~ verbatim. These implied terms do not make the work of the judges any easier for still, they have to construe the contract itself in order to establish whether the given term is a condition or not. This uncertainty in what the judges will do makes it clear that the common law principle of caveat emptor with its shortcomings³³ was not sufficiently curbed. The warranty may have been a useful weapon to do this during its cradle-days in the Seventeenth Century, but it is certainly a cumbersome term in modern Kenya where the people did not have a caveat emptor rule.³⁴ What happened was that the rule caveat emptor was brought to Kenya, and the warranty was not left behind. In effect an unconscionable doctrine was applied in Kenya, and ineffective means of curbing it were also dumped here.

32. see Supra page 6.

33. These shortcomings have been briefly discussed on P. 3 of this work.

34. This point will crystallise in chapter two where the African customary law of sales will be discussed.

As for the condition, there was, in my submission, no reason why it ever became an important term in our law. Firstly, the term condition in its ordinary meaning denotes that where a conditional contract is entered the buyer agrees to take the goods provided that they are merchantable, fit for the purpose, and the seller has title in them. This would be another method to circumvent the caveat emptor doctrine, probably the condition was intended to reinforce the warranty in the purported protection of the buyer. But I have shown above that the debut of the term in English law was a result of William J's Misinter pretation of Tindal C. J's use of the term condition. He interpreted it to mean a total failure of consideration, an entirely erroneous view as shown above. However, it is probably clearer today than it was then, that a condition is a term of contract as much as a warranty is, but a condition ranks higher than a warranty. The sale of Goods Act carries a beatitude of implied conditions whose effectiveness in protecting the buyer will be evaluated in chapter 4. What remains to be said about the conditions and warranties is their effect on the African peoples on whom the Act was imposed, and whose commercial life was by far much defferent from the English commercial lifestyles. This will be the subject of the next chapter.

CUSTOMARY CONTRACTS IN THE TRADITIONAL AFRICAN SOCIETY PRIOR TO 1931

The common law principles of sale in respect of conditions and warranties as expressed in the foregoing chapter were enacted into the English Sale of Goods Act, 1893. The Act was adopted almost verbatim by the Legislative Council of the Kenya Colony in 1930. This became *the sale of Goods ordinance which commenced on first October 1931*. Henceforth it was to apply to all the people of that colony equally. The object of this chapter is to show what customary principles of "sale" existed in the traditional African Society, and what was the effect of the imposition of the Act on these customary communities.

The African communities were basically barter economies where no monetary system existed as we know it today. However, some communities especially coastal communities sold salt in exchange of agricultural products from upcountry. They also used cowrie shells as a medium of exchange. Among the Kikuyu people, commodities of sale were basically land and stock. Land was in exchange of cattle and goats. However commodities such as bananas yams, variety of beans, peas, maize, millet, potatoes and sugar-cane were exchanged in the barter system. Jomo Kenyatta indicates that in the barter system which remained even after the advent of the Europeans, ornaments, articles of clothing from animal skins, lancaster cotton, agricultural implements (digging sticks and hoes from Birmingham or Japan) were common items of trade. All these commodities sheep and goats were regarded as the most precious goods that a man could have, indeed Kenyatta states:

"In the Gikuyu country before the introduction of the European monetary system, sheep and goats were regarded as the standard currency. The price of almost every thing was determined in terms of sheep and goats!"²

The reason why these animals were held to be that precious was that the Kikuyu believed in God to whom they sacrificed part of their flock for thanksgiving after a good harvest or for propitiation when the rains failed. Besides it was necessary that a man owned flocks of sheep and goats, otherwise without them, he could not marry - they were necessary for the payment of bride-price. The barter exchange was thus carried on with goats and sheep as the most precious commodities whether the exchange was among the kikuyu tribesmen inter se, or with other neighbouring tribes.

Among the kikuyu tribesmen inter se, trade was based on a very agreeable concept of freedom of contract. The members of the same tribe could never be heard to have exploited one another during the exchange process. It was incumbent upon every member of the tribe to adhere to the moral principle that it is evil to exploit fellow tribesmen. This obligation as Kenyatta concedes, was a result of good moral breeding, and not the result of any legal enactment.³ Kenyatta explains the freedom of contract within the barter economy in the following terms:

"For instance, if one man has beans and he wants yams, he goes to the man who has yams and is in need of beans and tells him: "I have my beans and I want your yams!" Then they argue (haggling) as to how many yams to a basket of beans.

Supra at P. 66

Supra at P.P. 311 - 312.

each goes his way
looking

If they agree they exchange there and then: if not, for someone else who will agree with him, for the exchange depends entirely on individual buyer and seller.⁴ (emphasis mine)

Among the Kikuyu and the Embu, there existed a system of exchange which worked as follows: where one man had no grazing pastures for his herds, he passed them to another man who had the pastures to herd them for him. The latter herder took all the proceeds from the herds such as milk and blood but kept the offsprings of the herds for the actual owner. When after some time the owner takes back his herds, he gives one of them to the herder as a token of gratitude or as a price for herding services. This system could be compared with the bailee - bailor relationship in the English law of contract. For all practical purposes, the herder treats the herds as his, taking all necessary care for them. However the risk in the herds remained with the owner for if the goats or sheep died in the possession of the herder, then the herder is not liable at all. This is different from the bailee's position.

Among the Luo there existed a slightly different system: where one man has one cow while another has none, the owner of the cow passes it to the other man who in turn gives the owner one bull. He keeps the cow until it bears him a heifer after which he return the cow to the owner in addition to a second bull. This is known as the "SINGO" contract. If the cow gives birth to a bull-calf, he keeps the cow and the bull-calf until the cow bears the heifer when he returns it to the owner together with the heifer. The custom is that one cow's exchange - price is two bulls. The Meru people have a similar system to the "SINGO" contract but to them one cow is exchanged ~~for~~ ^{for} several goats payable

by instalments - they call the system "NGWATE" which means that the system forms the basis of deep intimacy between the parties. In all these systems, the owner of the cow retained the risks attendant to it, so that if it died, he was bound to produce another cow to the herder.⁵

From these customary commercial practices, several observations can be drawn. First a comparison can be made between the African customary morality in trade, and the English ecclesiastical morality in medieval times. Among the Africans, everyone was bound to be honest with others in trade as a matter of inherent obligation. Exchange at a grossly inflated rate would receive severe moral condemnation as much as the exchange of sub-standard ~~or~~ poor quality commodities. During medieval times in England ~~and~~ trade per se was regarded as an infringement of the people's christian morality. Merchants were a despised lot for they were taken to be reaping where they did not sow by inflating prices in order to make profits.⁶ The African accepted traders as legitimate members of the society as long as they adhered to the set rules of fair trading. Thus trade per se was not immoral, but became immoral if the parties departed from the traditional exchange practices.

The second observation is that while in English law as contained in the sale of Goods Act, the contract was entered into under terms divided

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5. Y. P. Ghai "Customary contracts and transactions in Kenya" a seminar paper presented in Haille Sellasie I University under the auspices of the International African Institute in April 1964. The article is contained in "Ideas and Procedures in African customary law" Edited by M. Gluckman, at P. 333.
6. Supra, chapter 1, at P. 1.

up into conditions and warranties, under the African System, no such warranties or conditions existed in the form in which we know them today. Among the Africans it could be argued, there existed the obligation to supply good quality animals, that is to say, sound or healthy animals. The "seller" of the cow or goat had to ensure that he supplied good quality cows because he was aware that failure, ^{meant he would} have to supply another cow. If the cow died after delivery to the other party, the seller was liable to supply another cow. We could therefore argue that implied term that the exchange was effected subject to the implied term that the cow would not die or fall sick. However, it is difficult to tell whether this implied term amounted to a condition or a warranty. What is clear is that a breach of this implied term by the seller did not give rise to a right to treat the the contract as repudiated and reject the goods. All the breach led to was the liability on the part of the seller to provide another cow as a form of replacement. And there was no question of refusal to do so, for it was a moral obligation incumbent upon him to comply - otherwise he would be condemned as a vile man. This implied term could not even be said to be a warranty, for a breach of warranty leads to a claim in damages. It is submitted that the replacement of the dead cow with a live one, cannot be said to be a reward or compensation for damages. It is only a supply of the goods in compliance with the requirement of the contract. Besides, we have seen that both condition and warranty in the law of sale of goods were introduced for the purposes of mitigating the harshnesses of the common law rule, caveat emptor.⁷ This latter rule did not exist in the African communities and consequently it is unlikely that anything close to conditions and warranties existed.

7. Supra chapter 1 at P.P. 2 - 3

Thirdly, it should be noticed that the barter system was practised with the object of providing certain goods to the less fortunate. The system was calculated to benefit both parties equally. The owner of the cow who obtains two bulls in exchange probably needs them for meat, blood and hide. On the other hand the person who obtains a milk-producing cow needs it for the provision of milk probably for feeding his children. Thus the barter system was one of give - and - take within the generally accepted norms of exchange in the traditional society. In the English system, one party has a monopoly in the production and sale of a certain commodity which he sells at a high monetary price on the basis that he alone has the goods. No single individual in the African society had a monopoly of any commodity, even food crops. It was true (as it is today) that certain areas in a given tribal area were geographically more suited to the production of certain food crops than others. But this did not mean that those with the food crops exploited those without. It must be clear that each party in the barter system had to transact with another person who had what that other wanted, and that the latter had some commodity which the former was in need of. On this basis there was no room for exploitation although the exchange - prices fluctuated (in food crops) with seasons.

The same principles applied where the members of one tribe traded with neighbouring tribes. The Kikuyu for example traded with the Kamba and the Masai. The Masai brought their good-quality spears, swords, tobacco-gourds and red ochre, which they exchanged with the Kikuyu's agricultural crops. The masai themselves regarded the growing of crops as an abomination so they depended on the kikuyu for the supply of food crops. The goods were gathered at inter-tribal market places at the borders where the exchanges took place, the masai providing sheep and goats and, very rarely, cows. Price or exchange - rule mechanism was determined by

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the laws of supply and demand as dictated by seasons.

A fourth observation is that since no conditions and warranties as understood in the English sale of goods law existed in the African barter systems, then no damages for breach of contract as understood in the former system existed in the latter system. There existed no monetary system by which damages would be quantified. Consequently such damages could take the form of replacement or compensation for the goods of bad quality or for the goods not supplied. To the Africans lack of capacity to contract as we know it today did not exist. Women had the capacity to enter into contracts for the exchange of food crops and household effects, but not for land and stock - the latter were dealt in by men. It was erroneously held during the colonial era that women for whom bride-price had been paid in marriage were of the status of a slave and thus they could not be allowed to exchange their husband's goods with others.⁸ This however was the colonial arrogance of the day. The position was that traditionally stock and land were held to belong to the husband and each wife was given only a small position in which to plant food crops. These food crops traditionally belonged to the wife. As for infants they had capacity to contract, but among the kikuyu the father was "vicariously liable" for the contractual breaches of his infant child. In fancy period varied from one tribe to the other. Among the kikuyu, the transition from infancy to adulthood was marked by certain ceremonies, although puberty was generally accepted as a mark of majority.⁹

8. R. V. AMKEYO 7 EALR, (1917) 7 K. L. R. 14 as per Hamilton C. J. to the effect that African marriage was merely "wife - purchase" and therefore not valid for purposes of Evidence Law.

9. see KENYATTA, FACING MT. KENYA, chapter VI.

Mistake vitiated contracts in African customary law. Such was the case where a person¹⁰ delivered bride-price to the wrong person or delivered a sterile cow knowing or not knowing that such cow was sterile. This could be compared with fraudulent misrepresentation in ordinary law of contract, but among the Africans it was of no consequence to the seller's liability whether he sold the cow knowingly or unknowingly - he was always liable.

We can therefore state quite confidently that among the kikuyu the contract was either valid or void and never voidable. The customary contract could never be said to be breached to the extent remediable by damages only. This was the situation that prevailed in Kenya before 1930 when the present sale of Goods Act was enacted by the colonial legislative for the purpose of regulating the sale of goods.¹¹

The imposition of the English law on the Africans had several effects on the African social and economic lifestyles and it is to these that we now turn.

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10. Ghai, Supra at P. 340
 11. see Preamble to the Act, which states:
"An Act to regulate the sale of Goods"

EFFECTS OF THE SALE OF GOODS ACT ON THE AFRICAN CUSTOMARY CONTRACTS.

An examination of the effects of the Sale of Goods Act on the African customary contracts must start from the understanding that the Act was passed in 1930, during the colonial era when the Government policy was to create "a white man's country" in Kenya. The country had to be white in all ways - the land was occupied by the Europeans settlers, the rulers were of course Europeans, and the laws had to serve the needs of the Europeans.¹² The theses of this part of this chapter is that the enactment of the Sale of goods ordinance (as it then was) was yet another effort by the Europeans in Kenya towards the direction of leading as English a life as their fellowmen in England, led.¹³ This submission, that the Europeans in Kenya wanted to lead as English a life as they were used to in England, and that the sale of Goods Act was intended to facilitate and effectuate this desire, has the corollary that the Act was intended to apply to the Europeans themselves, and not to the Africans whom the Europeans regarded as primitive and even barbarous. And it is not difficult to support this submission especially in view of the following facts.

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12. For a very thorough analysis of the methods by which the colonists attempted to make Kenya "a white man's country", see M. P. K. Sorrenson, "Land Reform in the Kikuyu country: A study in Government Policy" Oxford University Press, NAIROBI, 1967.
13. Other statutes passed in order to attain this object include the the Land Registration Laws, and laws relating to marriage, divorce and succession.

First the Act was passed by an all - white legislative council in which the Africans were not represented. It is a historical - fact that the Africans never sat in that legislative council until 1944. It is also an established fact that before 1944, Africans were said to be represented by nominated European representatives. These nominated representatives had no mandate from the African electorate to represent them in the council. They were white missionaries hand-picked by the colonial government on the criteria that they, unlike the settlers who lived in isolated farms in the highlands, knew the problems of the Africans because they worked among them in pursuant to their civilising missions. Yet it is also known that the attitude of these missionaries towards African customary practices in general was paternalistic. They were of the view that Africans did not know what was good for themselves, and that their customary ways were either abominous or barbaric and cruel. In these circumstances it could not be expected that these missionaries would object to the passing of an English Act on the basis of the fact that it was inconsistent with the African's customs. To them civilisation meant the replacement of African customs by European practices in all spheres of life, commercial life not excepted.

Secondly Government Policy at the time was much similar to the views of the missionaries. During the entire colonial period, the colonial policy could be executed by either of its three branches - executive, legislature and the judiciary. The hallowed doctrine of independence of the judiciary was non-existent. This is clearly manifested by a line of authorities the most outstanding of which is OLE NJOGO AND OTHERS V. A-G Kenya Protectorate¹⁴. By a treaty or contract with the appellants

14. (1914) 5 E. A. L. R. 70, also known as the MASAI CASE, other cases include "The Trial of Jomo Kenyatta" by Montagu Scater, SECKER & WARBURG, LONDON, 1955 and "The Meru Land Case" EARLE SEATON AND KIRILO JAPHET, EAPH, NAIROBI, 1967.

masai elders, the colonial Government made the masai move from their Ngong area to the Laikipia plateau so that the masai could leave that area for European settlement. One of the terms of the agreement was that the agreement would subsist "so long as the masai as a race shall exist". Later the masai were moved back from Laikipia to Ngong after they had grazed down the long grass of Laikipia which had hitherto impeded European settlement. The appellant's case was that the later movement constituted a breach of contract or a breach of treaty which had earlier been reached. It was held that since the masai were not a sovereign people, the colonial government could not have entered into a treaty with them. It was further held that no contract existed and that movement back to Ngong was an Act of state which could not be challenged in any court. The court here clearly deviated from the principles of justice in order to effectuate government policy that disregarded the Africans as a people with different philosophies of life. It was an indication that the Africans would not be considered as significant in the execution of government policies. This point can only be accurately summarised, by the words of a judge of the King's Bench when handling a case that originated from Botswana. He said that:

"The idea that there may be an established system of law (among the Africans) to which a man owes obedience, and that at any moment he may be deprived of the protection of that law is an idea not easily accepted by English lawyers---- It is made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilised men have to control a great multitude of semi - barbarous (people).¹⁵

The African people and their customary practices were to be ignored as insignificant, when compared with the civilised ways of the Europeans.

Thirdly, the Europeans in the legislative assembly at the time the ordinance was passed were only wishing that the English laws which they had left in England be culled into Kenya so that they could keep in step with other Europeans elsewhere in the British Empire. This fact is authenticated by two considerations. When the Attorney - General moved the motion on the Bill in the legislative council in July 1930, there were absolutely no objections to it, and so there was not much to be debated about. So the Bill sailed through the legislative council within a spell of one week. The select committee appointed "to consider the sale of Goods Bill" never added or subtracted anything from the original Bill. The second consideration lies in the intention of the Government as expressed by the Attorney - General when tabling the Bill:

"Commercial conditions have changed very considerably since the middle of the last century. Particularly have they changed sir, in so far as the commercial transactions of those who live in the more distant parts of the Empire are concerned, and yet sir, our local legislation on the sale of Goods bears the date, 1872 (referring to the Indian contract Act, 1872) and bears the obvious imprint of the early fifties, when it was first prepared. Since that date there has been a volume of extremely critical case law ----- (which) was embodied in what is generally accepted as one of the most carefully and admirably drafted statutes which adorn the statute Book of England, the sale of Goods Act, 1893. So admirable is that Act that inspite of changing conditions it has never been necessary to amend one word of it. And, sir, here we are working under an antiquated system, which may be said to represent commercial practice or the state of the law which existed at the latter date, that is, 1872".¹⁶

I quote the learned Attorney - General in extenso because his speech constitutes the only indicator of the purpose which the ordinance was intended to serve. It is clear from his speech that the ordinance was intended to enable Englishmen whose conditions had changed by virtue of having to live " in the more distant parts of the Empire". Prior to 1931, the Indian contract Act, 1872 was the law governing the sale of Goods in Kenya. It was also a British law since it contained English law as enacted in England in "the middle of the last century". To the British in Kenya this Act was antiquitous since it did not incorporate the provisions of the sale of Goods Act, 1893. India herself had amended the Act of 1872 and incorporated certain provisions of the Act of 1893. But these amendments were of no application in Kenya with regard to this fact.

The Attorney-General continued:

"The Indian contract Act, to which I refer sir, has been amended in India and brought into line with English legislation. That amendment ---- is not applicable to this territory. Zanzibar which also uses the Indian Act has amended it to bring it into line to a large extent with the English sale of Goods Act. We have done nothing of the sort, sir up to now, and I do not think we can do so now too rapidly!"¹⁷

Here we observe that other colonial governments elsewhere in the Empire had adopted the English sale of Good Act, 1893, and all for the purpose of making them feel that they do not lead a life that is

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16. Legislative Council Debates 1930, Vol.11 at P.P. 458. The Attorney General at that time was Hon. A. D. A MACGREGOR K.C.
17. see Footnote 16, Supra.

different from the life in London. Kenya colonists would be no exception.

The actual effects of the sale of Goods Ordinance upon the African customary commercial practices can only be well established by a look at the provisions of the Act and the assumptions on which it was based. We have seen that the basic assumption which the Europeans made in 1930 was that the African customs were subordinate to the European practises and that the former were to be replaced by the latter as much as possible. So the barter exchange system that prevailed in Kenya was ignored and a monetary system introduced. The monetary system itself was disruptive and at first the Africans really loathed it because their customs placed no value on money. Indeed Kenyatta has indicated that the Kikuyu people had very unwholesome attitude towards money. The Kikuyu know that with one cow, the owner would end up having two towards the end of the year. The Kikuyu could not see how one shilling could be kept and produce two shillings in a year. Their idea of savings was hiding the money in a hole dug in the ground in the house, and this obviously meant that the ideas of banking and interest were unknown to them.¹⁸ As regards the effects of the provisions of the Act themselves, we shall only look at the application of the provisions relating to conditions and warranties and attempt to gauge their impact on the Africans.

EFFECT OF CONDITIONS AND WARRANTIES ON THE AFRICAN CUSTOMARY COMMERCIAL PRACTICES.

The ordinance had been passed in the circumstances described above. The ordinance applied to both Africans and Europeans. And after independence, the ordinance was only renamed as an Act of the sovereign Kenyan Parliament, but the provisions remained the same. We are concerned here with an evaluation of the application of these provisions on the Africans and we shall confine ourselves to the provisions relating to conditions and warranties. In particular this part will examine the conditions and warranties contained under sections 12 to 16 of the Act. We have traced the origins and development of both warranties and conditions and there is therefore no need to do so here.¹⁹

Under S. 13, a buyer may waive any condition to be fulfilled by the seller, or treat the breach of such a condition as a breach of warranty only and claim damages instead of treating the contract as repudiated. We have seen that under the customary commercial practices of the African tribes terms of contract were not bifurcated into conditions and warranties and that should the goods prove to be defective the risk remained with the seller. He was bound to replace them. So in essence he was bound to supply good quality goods and there was no need for this term to be expressed while the contract was being effected. Thus the provisions of

section 13(1) were inconsistent with the African concept of sales. In the absence of a classification of terms of contract under customary law into conditions and warranties the provisions of the entire S. 3. are inconsistent with the customs.

There would be less difficulties if the section itself were certain in its meaning. Under S.13(2) the question whether an express term of the contract is a condition or a warranty depends on the construction of the contract and that a stipulation may be a condition though called a warranty in the contract. The intention of the parties is derived from the true construction of the document. This process not only introduces a technical approach to the enforcement of contracts, but it is also alien to customary law which was very certain even without interpreting the words and conduct of the parties.

Under section 14 various implied conditions and warranties are stipulated. Firstly, there is the implied condition by the seller that at the time of contract to sell he had the right to sell the goods, or in case of agreement to sell he shall have the right to sell the goods at the time when property is to pass. The best interpretation of this subsection of section 14 was made in the case of LAKHAMSHI BROS LTD V. RAJA AND SONS.²⁰ The appellant company bought 44 cases of boot polish from the respondents of which they sold 12 cases. The remaining 32 cases were seized by the Police under S. 20 of the Police Act after the cases were suspected to have been stolen. A magistrate subsequently gave an order to the police that the cases be restituted to the owner.

The appellant therefore sought the refund of the purchase - price which the respondents refused and consequently, the appellants claimed in court that the respondents had breached the implied condition under S. 14(a) or alternatively, that the respondent~~s~~ had breached the implied warranty under S. 14(b). Under the latter subsection the Act implies ^{that} a buyer shall enjoy quiet possession of the goods.

The appellants based their claim on theft for purposes of S. 14(a) saying that the respondent knew that the goods had been stolen and that they had no title to them which they could pass to the appellants. But appellants failed to prove theft, though it was clear from the evidence that they had enquired from the respondents as to where the latter had got the goods from without success. Accordingly Spry J. A. (and he was supported by two of his learned brothers) held that there was no breach of the implied condition as to the sellers' title to the goods.

Among the Africans, theft of cattle and goats was not uncommon especially in cases where there were inter-tribal raids or skirmishes. But once cattle had been stolen from neighbouring tribes they were divided up among the warriors who led the raid and thereafter every warrior was deemed to be the legitimate owner of the stock and he could exchange the cows or goats with others through the barter system without anybody raising doubt as to ownership. Theft of livestock inter se was not common, and even when it did occur, such stolen animals were stolen for purposes of being slaughtered and consumed so that they never became the subject of the barter exchange. The moral obligation

incumbent upon the seller to provide good quality animals, also urged him to not to steal the animals, and even when he stole them, not to exchange them. In any case exchange would eventually lead to discovery of the thief which would be attended by severe punishment.

But probably the most important provision of the Act which is consistent with the African customary commercial practices is that contained in section 15. Under this section where there is a contract for sale of goods by description, there is an implied condition that the goods shall correspond with the description. The Act does not define what a sale by description is. However, sale by description was defined by Channel, J. in VARLEY V. WHIPP²¹ in the following terms:-

"The term "sale by description" must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in cases like the present where the buyer has never seen the article sold, but has bought by description. The most usual application of that section (S. 15 SGA(K)) no doubt is to the case of unascertained goods, but I think it must also be applied to cases such as this where there is no identification otherwise than by description!"²²

The defendant had ordered a reaping - machine from the plaintiff who had described it as having been new the previous year and that it had worked on only 50 acres. The machine proved not new and not used on only 50 acres and the defendant rejected it. For the plaintiff it was urged that the sale was one of specific goods in which the term sale by description did not apply.

21. (1900) 1QB 513

22. (1900) 1QB 513, at P. 516

The term sale by description led to the bifurcation of goods into specific and unascertained goods. The Act does not define unascertained goods but it defines specific goods as "goods identified and agreed upon at the time the contract of sale is made."²³ At first it was thought that whether a transaction constituted a sale by description or not depended on whether the goods were specific or unascertained. But VARLEY V. WHIPP and GRANT V. AUSTRALIAN KNITTING MILLS²⁴ are authorities for the proposition that a sale by description may refer to specific or ascertained goods. In this respect one cannot help wondering why the dichotomy between specific and ascertained goods is maintained. There was nothing like sale by description among the Africans. But the seller of a cow who delivered it to the buyer who finds out that the cow was in fact sterile was bound to replace it with a fertile one. It mattered not that the parties had not expressed in the contract that the cow must be fertile, but each of them was aware that should it turn out to be so, the seller had an obligation to replace it. It need also be noted that the distinction between specific and unascertained goods was non-existent among the Africans.

Section 16 opens with a proclamation of the common law rule, Caveat Emptor, and then goes a head to lay down exceptions thereof. S. 16(a) provides that where the buyer expressly or by implication makes known to the seller the purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or ^ujudgement then there is an implied condition that the goods shall be reasonably fit for such purpose. So in DOOLA SINGH V. UGANDA FOUNDRY²⁵ the court of appeal for East Africa held that a seller

23. see S. 2(1) sale of Goods Act, Cap 31 (K)

24. (1936) A. C. 85 .

25. (1945) 12 EACA 33.

who had been asked to supply parts of a saw-bench ought to have known by implication that such parts were required for purposes of being assembled into a saw-bench which should be capable of doing the ordinary function of saw-benches. This holding followed FROST V. AYLESBURYDAIRY CO. 26 Here a seller who supplied milk that had been adulterated by typhoid germs was held not to have supplied goods fit for the purpose. The purpose had not been communicated to him, but he knew or ought to have known that the ordinary purpose of milk is human consumption.

In the African customary contracts a buyer need not have told the seller that he wanted ^a cow for ^a purpose. All the time it was clear that the cow must be fit for the purpose for which cows are ordinarily kept. Thus there was no need for express or implied communication to the seller, it was enough that what the buyer wanted was a cow. There were no patent names for the goods the Africans traded in. They could have descriptions of the goods showing where they were derived from, or what they were made of but no patent names as we know them today existed. So the onerous provision to S. 16 (a) that the protection accorded by the section to the consumer was vitiated by the purchase of the goods using their patent names was non-existent.

The unconscionable nature of the provision is found in the fact that the Africans today are illiterate and ignorant of the law. The goods they find in the market today bear different names designed by the companies that manufacture them competitively. Thus to distinguish one make of, for example, toilet soap from another the consumer must state that he wants 'REXONA' not 'PALMOLIVE' or 'LIFEBOUY', And when

he has effectuated his choice in this manner, he has waived the protection under S. 16 (a) and therefore has no remedy against the seller if the soap is not fit for its purpose. There has however been several cases that have mitigated the unconscionable nature of the proviso by showing that what is important is that the buyer, whether he buys by patent or not, relied on the seller's skill or judgement. One such case is BALDRY V. MARSHALL.²⁷

The buyer in BALDRY'S case ordered a "Bugatti car" but also inquired whether the car would be fit for the purpose intended. It was found that the car was not fit for tours which the buyer had intimated to the seller. It was held that although the purchase was made under a patent name, yet the buyer showed reliance on the seller's skill and judgement by further enquiry of its capabilities. While this is a meritorious method of circumventing the harshnesses of the proviso, it is submitted that there is no rationale to the principle that unless the buyer shows reliance on the seller's skill, then he is to shoulder the risk if the goods do not satisfy his purpose. Besides, there is no logical basis of the contention that when a person orders his goods by their patent names he does not rely on the seller's skill.

Thus the proviso may lead to very undesirable effects on the Africans, who are largely ignorant about the technology used in manufacture of the goods and who should be taken to be always placing reliance on the seller, who is better placed to advise on the qualities of the goods. I wish here to show the economic misery that the country can fall into because of this apparently simple proviso to S. 16 (a). It is a well known fact that Kenya is an agricultural country depending a great deal

on coffee exports. Yet according to a research carried out by the present winter on the sale of agrochemicals in Kenya it is shown that for the last few years, bogus chemicals masquerading as genuine coffee sprays have been sold to farmers through their co-operative unions.²⁸

The chemical in question is called Ortho-Difolatan 80%, which is imported from America and other European countries by local companies which resell them to the cooperative unions and large coffee estates. Ignorant farmers who may order the coffee spray as Difolatan 80% to distinguish it from other less effective coffee sprays, may go without remedy in court because they ordered it in its patent name. No litigation has yet been started against the importers and none is expected anyway. The small-scale farmer in Meru or Nyeri buys his coffee sprays from his cooperative union, which in turn buys the same from the local importers under the trade name. When the small-scale farmer goes home, applies it and the coffee, instead of being saved from CBD deteriorates, the farmer and the country's life-blood is severed. One cannot fail to foresee a depression in the country's economic development because the farmers applied limestone on to their coffee not knowing that the same contained no Difolatan. Although the Government has since expressed the desire to pass a legislation compelling the agro-chemical importers to take samples of their imports to the relevant Government analysis for certification that they are of the right quality, the farmers still continue to suffer because the sale of Goods Act, S. 16(a) which ought to protect them has been emptied all its contents by the proviso thereto.

3. This Research was provoked by Reports appearing on a local weekly Newspaper that a certain agro-chemical company was selling "Limestone" instead of Ortho-Difolatan 80% to farmers in the

It would be necessary to consider the effect of the application of S. 16 (b) of the Act on the African customary law of sales. Under that section the buyer is protected from buying defective goods by the provision that where he buys such goods by description there is an implied condition that the goods shall be of merchantable quality. The protection is vitiated by the fact that the buyer examined the goods that the defects complained of were revealable by such examination. The Africans had provision for the examination of goods before sale whether those goods were cows or food crops. The buyer had the right to examine the cows and even select the one he wants from the herds of the seller, but the examination did not exclude the seller from the obligation to replace the cow if it died or fell sick. The seller was strictly liable. It is clear then that this provision was not calculated to represent the Africans concept of commercial transactions. Be that as it may, the Act was applied to the Africans even after independence. The result of the application of this provision as to merchantability in the sale of Goods Act can be exemplified by the following decisions.

We shall start with the leading English decision on merchantability: HENRY KENDALL V. LILLICO.²⁹ Here the owner of pheasants sued the manufacturer of cattle and poultry groundnut foods claiming damages for the loss of pheasants that had died as a result of feeding on toxic groundnuts extractions bought from the manufacturers. Lord Reid, when addressing his mind to the issue of whether or not the foods were of a merchantable quality, held that for the goods to be unmerchantable they must be in such a form that they were of no use for any of the purposes for which such goods would normally be used. His Lordship reviewed earlier decisions and modified the definition of merchantability to this:

29. (1968) 2 All E.R. 444.

"If the description in the contract was so limited that goods sold under it would normally be used for only one purpose then the goods would be unmerchantable under that description if they were of no use for that purpose"³⁰

Thus a distinction was laid between fitness for the purpose under S. 16(a) and unmerchantability under S. 16(b). Goods are unfit for the purpose under S. 16(a) if they are unfit for the particular purpose which the buyer made known to the seller, in reliance on the latter's skill, and the goods were not bought by their patent name. On the other hand, goods are unmerchantable, if, in the form in which they are tendered, they were of no use for any of the various purposes for which goods of that kind are bought. But if the goods are purchased for the singular purpose for which such goods are purchased then S. 16(b) requires that they must be fit for that singular purpose. Here then we see an intersection between the provisions of S. 16(a) and S. 16(b), either of them may be called into application in circumstances that show that the goods in question are normally used for one purpose only. The difference between the two subsections of S. 16 is in the provisions.

Under S. 16(b), if the buyer had examined the goods at the time of the contract the condition of merchantability is vitiated. This then brings us to the Zanzibari case called ABDULLA ALI NATHOO V. WALJI HIRJI.³¹ Here, the respondent delivered one hundred bags of onions to the appellants as ordered. At the time of delivery the appellant's agent was there. He could have examined the goods when they were being weighed but did not do so. One day later, when the appellant examined the bags he found that most of the onions were so bad as to be unsaleable, and he rejected the goods. The appellants refused to take them back, and the respondents resold them at a loss. He then took action for damages for breach of an implied condition under the relevant section of the English sale of Goods Act - breach of implied condition as to

³⁰ Kendall v. Lillico (1968) 2 ALL E. R., 444, Lord Reid at P. 450
³¹ (1957) EA 207

merchantability.

It was held by WINDHAM, C. J. that where a buyer like in this case has the opportunity to examine the goods but does not do so at the time of the contract, and only does so after he has accepted the goods and property in them has passed, he cannot seek the protection of the sale of Goods Act under S. 16(b). To such a buyer, the common law doctrine of caveat emptor applies in full swing. The novel point about this case is that mere opportunity to examine is adequate to allow caveat emptor full play. It is my humble submission that this case was badly decided because it runs counter to the provisions of the Act.

The proviso to S. 16(b) reads as follows:

"Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed"

The key words are "if the buyer has examined the goods there shall be no implied condition-----" relating to the merchantability of the goods. These words have, in my opinion, only one logical construction: that where the buyer has had the opportunity to examine the goods, and he has actually examined them, the implied condition on merchantability is no longer protecting him. Windham, C. J. could never have arrived at a more erroneous decision, with all due respect, by holding that mere opportunity to examine the Goods was sufficient to deprive the buyer of the protection of S. 16(b) of ~~the~~ sale of Goods Act.

It need be observed that this foreign Act which was culled into Kenya by foreigners but ratified by the neo-colonial legislature brought with it the very harshnesses it was supposed to curb - the harshnesses of Caveat Emptor. Under S. 16(b) and the proviso thereto, we see that the rule is largely in operation because the protection purported to be provided by the section is not always there. First we have seen the Misinterpretation given to the proviso in NATHOO V. WALJI (Supra). Secondly the confusion between the two subsections of the same section are always against the buyer who seeks protection under them. We have seen that the two sub-sections have got a common grey area where they meet - ie where the goods are normally used for only one purpose. The buyer is not sure which of the two subsection to rely on and what risks he is undertaking when relying on either. Even the proviso under S. 16(a) is onerous as we have shown elsewhere above. Thirdly, there exists another grey area where both subsections become useless to the buyer aggrieved by the seller's malpractices. This can best be explained by the English case: SUMNER V. ~~MEBB~~.³²

Here the buyer bought^a a bottle of Indian Tonic Water which, known to the seller was required for the purpose of being resold to Argentina; The seller further knew that the tonic contained quantities of salicylic acid which was prohibited into Argentina under Argentine laws. From these facts the buyer could not rely on S. 16(a) because he ordered the tonic by its trade name and there was no finding as to the buyer's reliance on the skill and judgement of the seller. Yet S. 16(b) could not be invoked since the tonic could be sold elsewhere other, than Argentina, so it was merchantable. The buyer went without remedy and no right

thinking member of the Kenyan society would not see the unfairness of this situation particularly bearing in mind the knowledge that such a buyer has no remedy in the tort of negligence, since neither the retailer nor the manufacturer were negligent under the rule in DONOGHUE V. STEVENSON.³³

It is only a pity that while we had our own system of commercial contracts under the customary law, the Europeans, holding themselves to be more brilliant than ourselves, imposed on us an alien Act with a Caveat Emptor doctrine which, they knew was harsh and unmitigated. But probably we should not blame the Europeans because after independence we could have dropped the Legislation or amended it to cater for our customary interests. Thus the blame should fall where it is due, on the shoulders of those who ratified the colonial mischief of 1930, in 1963.

CHAPTER THREE

FREEDOM OF CONTRACT DOCTRINE AS THE BASIS UPON WHICH EXEMPTION
CLAUSES ARE APPLIED IN THE SALE OF GOODS.

We have seen that condition and warranties were devised for the purpose of mitigating the harshnesses of the caveat emptor doctrine. We have also seen in chapter Two that the provisions of sections fifteen and sixteen of the sale of Goods Act do not adequately protect the buyer and that the implied conditions under section 16, are fraught with problems which leaves the buyer exposed to the same harshnesses the section was intended to curb. Under this chapter it will be seen that all the implied conditions and warranties may not protect the buyer if the seller bases his contract on certain terms and conditions called exclusion clauses. It will be seen that under the doctrine of freedom of contract, the parties to the contract are free to enter into a contract under such terms and conditions as they deem fit. In exercise of this freedom, the seller prepares contractual documents carrying terms that exempt him from liability should he breach any of the conditions of the contract. The effect is that a seller who excludes himself from liability by using appropriate words in the contractual document is not liable even when the condition breached is an implied condition under the sale of Goods Act. The caveat emptor rule is left in full play on the buyer. This chapter will also examine briefly this effect of exemption clauses on the buyer in the Kenyan situation. But let us first look at the meaning of the doctrine of freedom of contract and its philosophical foundations.

MEANING AND PHILOSOPHICAL BASIS OF THE DOCTRINE OF FREEDOM OF CONTRACT.

In a nutshell the doctrine of freedom of contract means that any legal person, of full capacity may enter into a contract' with any legal person of full capacity under whatever terms and conditions.¹ The doctrine developed during the eighteenth and the nineteenth century at a time when Europe was undergoing a transition from feudalism to capitalism - at a time when trade and commerce had become the means of livelihood for the ruling classes of the day. For the purpose of maximising profits the traders had to be allowed to enter into contracts under whatever terms, and the courts were ready to enforce those contracts. I wish to allude to two nineteenth century decisions which show how the doctrine in question was held to apply.

The first case is PRINTING AND NUMERICAL REGISTERING CO. V. SAMPSON.²

The defendant had formed a company with others for the purpose of selling to it certain patent rights in respect of certain inventions he had made. These machines were a new invention that enabled the company to manufacture numbered ticket en masse and cheaply. So the company would make good business by selling the tickets at cheaper prices than the reigning ones. One of the terms of the contract of sale to the plain tiff company was that the defendant would sell any future inventions relating to the machine to the company. Subsequently the defendant invented new machines but refused to sell them to the company on the basis that a contract to sell future inventions to the company was contrary to public policy and void. It

1. This working definition is obviously subject to the factors that vitiate a contract such as misrepresentation, illegality capacity and undue influence etc for these see "Anson's Law of contract" by A.G. GUEST, 22nd Ed. Clarendon Press-Oxford at PP. 191 - 392.

was held that:-

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of Justice. Therefore, you have this paramount public policy to consider - that you are not lightly to interfere with this freedom of contract!"³

And on that basis the defendant was found liable for breach of contract.

In MANCHESTER SHEFFIELD & LINCOLNSHIRE RAILWAY CO. V. BROWN⁴

a fish merchant delivered fish to a railway company to carry upon a signed contract relieving the company as to all the fish delivered by him from all liability for loss or damages by delay in transit or from whatever other cause, in consideration of the rates being one-fifth lower than where no such undertaking was granted. The servants of the company accepted the fish, but as a result of pressure of business they could not carry it in time for the intended market, and the fish lost market.

Holding that the company was not liable for the loss Lord Bramwell stated:-

"I am prepared to hold that unless some evidence is given to show that a contract is unjust and unreasonable, it ought to be taken that contract is a just and reasonable one, the burden of proof being upon the man who says that it is unjust

3. As per Lord Jessel M.R. at P. 465

4. (1883) 8 A. C. 703.

and unreasonable. First of all, its justice and reasonableness are prima facie proved against him by his being a party to it, and if he means to say that what he agreed to is unjust and unreasonable, he must show that it is so".⁵

From these two cases, one cannot help observing that the doctrine of freedom of contract was held to be supreme over other principles governing the contractual obligations of the parties. In SAMPSON'S case we observe that the doctrine was jealously guarded and was the most important principle under the concept of public policy in contracts. In Manchester's case the railway company that had evidently entered into the contract with the fish merchant, aware that such contract was unjust and unreasonable to the merchant, escaped liability on the basis that the doctrine of freedom of contract raised a presumption against the merchant that, the contract he voluntarily entered into was just and reasonable. The doctrine could not be side-stepped unless the merchant discharged the heavy burden of proof to show that the contract he freely entered into was unjust and unreasonable.

During the eighteenth century the dominant political philosophy placed great emphasis upon the concept of human liberty. Every man, it was said should be free to pursue his own interests in his own way and it was the duty of the state and the law to give effect to the wills of the parties as expressed in their agreements. This is the reason why it was said at that time that the fundamental function of law was to facilitate and effectuate private choice.⁶

5. supra (1883) 8 A. C. at PP 717 - 718

6. William Burnet Harvey: Introduction to legal system in East

I do not intend to delve into the details of the philosophical foundations of the doctrine of freedom of contract here but I will refer to the foundations only briefly.

One of the staunchest philosophers in the seventeenth and eighteenth centuries was Thomas Hobbes.⁷ He belonged to the natural law school of jurisprudence at a time when natural law was being used by the rising petty-bourgeoisie to phase out feudalism that had hitherto existed. Hobbes stipulated that natural law consist of rights which are the liberties which every man has to use his power as he himself likes for the preservation of his own nature. This was in contrast to the prevalent feudalist view that the feudal lords were supreme over the serfs by nature as much as the feudal lords were ordained by nature as such. The bourgeois individualism was thus orchestrated by the philosophers of the day. The individual was born with natural rights such as the right to equal opportunities and abilities, and the right to freely exchange the products of his labour. These rights it was urged were god-given, and so at the day of Divine Judgement in the life after death, every person shall be required to give an account of how he made use of these natural and inborn rights to contract. Hobbes stated that in order that the individual rights can be effectuated, and in order that the society does not become fraught with war by man against man in pursuit of their own preservation through the exercise of their individual rights, the state machinery, with coercive powers became necessary to compel performance of an individual's contractual obligations.⁸

7.

For a more detailed account on Hobbes see:-

(1) "Legal Philosophy from Plato to Hegel" by H. CAIRNS, JOHNS HOPKINS PRESS, LONDON, 1967, at PP. 246 - 271.

(2) "Development of Legal Philosophy" by P.B. MIHYO Kenya Literature Burea. The entire book of 187 Pages is terribly relevant on this issue.

The teachings of Hobbes, Montesquieu, Rousseau and John Locke⁹ led to the eighteenth century revolutions in Europe in which feudal landlords were dethroned and bourgeois government established. So in the France of 1789, the Declaration of the Rights of Man and Citizen, in keeping with the American Declarations of Human Rights before its independence in 1776, was a reflection of the individualism that was overcoming social classes. In 1861, Sir Henry Maine stated:-

"The movement of progressive societies has hitherto been a movement from status to contract"¹⁰

And in so saying, he had been influenced by the trend of events that showed that relationships between persons, their duties and their rights were henceforth to be governed not by status but by contracts. In the feudal state, the rights and obligations of the individual depended on what his status in the society was. If he was a serf, his rights were minimal, and his duties were exorbitant-a serf for example had no right to own land. The serfs' relationship with the feudal lords was governed by his position as a serf Vis - a - Vis the feudalists' status as such. After the bourgeois revolutions the worker and the employer would enter into a contract of employment freely and voluntarily and under such terms as both parties would agree. In the bourgeois state the individual could enter into such production enterprises as he deemed fit for himself and he would sell his commodities by fair exchange at the market prices."

Montesquien wrote "The spirit of laws"

Rousseau Jean Batiste wrote "The social contract"

John Locke wrote "An essay concerning Human understanding 1690"

The three philosophers are also collectively known as the contractarian contracticians.

MAINE, H. "ANCIENT LAW" Everyman Ed. 1917, at PP. 99 - 100.

Critically analysed, the philosophical foundation of the doctrine in question is found to be wanting for the following reasons.

① First the doctrine is based on unrealistic assumption of equality of all men. This assumption is unrealistic because we know that in real life different persons have different economic as well as political abilities. We cannot therefore assume that two individuals may contract freely and voluntarily at arms' length when one of them, because of his economic or political muscle, is capable of influencing the will of the weaker individual. ② Secondly, the philosophy was intended to facilitate the exploitation of the natural and human resources of Europe by individual merchants who had already accumulated economic power as a result of the growth of trade and commerce. The idea was not to establish a better system than the feudal one, but to establish a system that would facilitate the exploitation of the haves by the have-nots while everyone chanted such slogans as "Liberty, Fraternity and Equality"¹² and "Democracy", when the exploitation of the people in the European competitive markets could no longer be possible partly because of the growth of market protective tariffs, the European merchants found their way into foreign lands in search of new markets for their manufactured goods and raw materials. So the British came to Kenya, and they naturally brought with them their law of sale of Goods. These laws in form of the sale of Goods Act enacted in 1893, reflected the freedom of contract doctrine in their provisions. We have seen elsewhere that the Act of 1893, was adopted in Kenya by the European dominated legislature in 1930.

Under section 55 of the Kenyan sale of Goods Act, it is provided as follows:-

11. This is the "Laissez - Faire" or free enterprise philosophy which was well enunciated by Adam Smith in his "Wealth of Nations" published in 1776.

12. This slogan was used in the French Revolution.

"Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement-----"

The spirit of the natural law philosophy of the seventeenth and eighteenth centuries is clearly evident in these terms. The law should not dictate the terms under which contract for the sale of goods are to be entered. The parties are masters of their own destinies and their will as expressed in the agreement should be effectuated. The effect of this provision is that the implied warranties and conditions under the Act are not to infringe the freedom of contract doctrine. The parties are free to exclude statutory implied duties or obligations by express agreement.

In practice the freedom of contract doctrine has allowed sellers of goods to prepare contractual documents couched in such terms as to exclude their liabilities in respect of the implied conditions and warranties. All what the buyer does is he signs the document with or without reading its terms and pays the price. Should the goods turn out to be defective, for instance, that is when the seller quickly draws the buyers' attention to the contractual terms. These are known as standard form contracts or adhesive contracts. They are made by the large scale producers of certain commodities or services, who prepare the documents en masse for the gullible consumer who signs the document, usually in a hurry and take delivery of the goods.

What makes the position of the individual buyer even more absurd is the fact that the freedom of the individual to contract has been extended

to the corporate person - the company. A group of individuals (natural persons) form an association with its rights and duties. It, like the natural person, can enter into contracts with the natural person, under such terms as it deems fit. The natural persons who form the unnatural person are usually a wealthy lot who finance the company and, as a result of the combined economic muscles of the persons, the company invariably becomes very powerful and capable of influencing individual consumers. Apart from the private companies such as the East African Industries, the statutory corporations such as the Kenya Railways and Kenya Posts and Telecommunications also derive contractual documents whose terms are not the product of free bargaining with the consumer. The consumer's position is not one that enables him for example to determine the prices of the goods he purchases. His is to accept the goods as they are, and at the dictated prices or go without the goods. This position comes about as a result of the fact that usually the multinational corporations are the sole producers and suppliers of the specific categories of goods and so the buyer has no choice to make.

I wish to demonstrate the injustice that is played on consumers by the extensive use of exclusion clauses¹³ by using relevant decisions. The oft quoted case of L'ESTRANGE V. GRAUCOB¹⁴ bears testimony to the harshnesses of exclusion clauses. The plaintiff signed a contract document for the purchase of an automatic slot machine from the defendants. The signing took place without the plaintiff reading

13. I do not wish to examine the unconscionability of the standard from contracts in general. This has been done elsewhere by P. J. SCHOFIELD 1968 J. B. L. 352 - 360.

14. (1934) 2KB 39 4 (C.A.), (1934) All E.R. 16

it, and without his being induced by fraud or misrepresentation to do so. The machine later proved to be entirely unfit for the purpose for which it had been bought and the plaintiff claimed damages for breach of implied condition under S. 16(a) of the Sale of Goods Act. The defendant in response relied on the exclusion clause in the contractual document which in the relevant part stated that "-----any express or implied condition, statement or warranty statutory or otherwise not stated herein is hereby excluded". The plaintiff averred that he did not read the document and he had no means of knowing that the document contained such an exclusion clause. It was held that, the contract, having been signed by the buyer, the implied condition as to fitness of the purpose had been effectively excluded by the express condition in the contract. It was immaterial that the buyer did not know that the contract contained such a condition. This devastating decision has been followed by Kenyan courts in several decisions.¹⁵

— The exclusion clauses have become so common place that people no longer even talk about them. Railway and bus tickets, carry exemption clauses excluding the corporation from liability, in the event of injury to passengers or loss of luggage. Launderers issue receipts that carry terms limiting their liability in the event of loss of clothes while in their possession (through fire or burglary) to a certain multiple of the cleansing charges. Launderers also disclaim liability where clothes are bleached in the process of washing, or shrink, or belts and beads are lost.¹⁶

15. Notably, OMER SALEH V. BESSE CO. LTD (1960) E. A. 907 and
ABDULLAH FATEHDIN V. ROOTES LTD. NBI H. C. C. No. 320 of 1966
(unreported)

16. CURTIS V. CHEMICAL CLEANSING CO. (1951) I A II E. R. 631

We have seen under chapter two that the freedom of contract doctrine applied with desirable results because firstly the object of exchange was not to exploit those who didn't have by selling them defective goods at exorbitant prices. We saw that the barter-exchange that prevailed was meant to remove inequities resulting from the fact that some tribesmen lacked certain things. Secondly the people were almost equal in terms of economic wealth, so that there was no question of some people monopolising the production of specific goods which they would sell at their self-made prices to the consumers. In fact we have established that certain social contracts existed, such as the "ngwate" among the Meru which made it possible for people without cows to obtain them from their fellow tribesmen. Thus freedom of contract doctrine operated considerably to the advantage of all in the society.

With the introduction of the sale of Goods Act in 1931, and with the belief among the European colonists that their system of law was superior to the Africans' the African barter exchange system died away. Money was introduced and the English concept of contract applied. The horrible results of the application of the sale of Goods Act of Kenya have been very briefly shown in the foregoing part of this chapter. The sale of Goods Act 1893 was found to have similar results on the consumers and several devices have been made up by the courts to curb these unconscionable effects of the same. Some of these devices are judge-made while others are statutory. Here we shall only be concerned with a brief look at the judge-made devices and their shortcomings. In the next chapter we shall examine the statutory devices in detail.

The common law or judge-made devices to curb the unconscionable exclusion clauses are headed by the doctrine of fundamental breach. Stated in a nutshell, the doctrine provides that where a seller relies on an exclusion clause which exempts him from liability under the contract, and which exclusion clause, if enforced would empty the contract of all its contents, the court will refuse to enforce such an exclusion clause on the basis that it protects the seller from liabilities arising from a fundamental breach of the contract. A fundamental breach is thus a violation of the very core of a contract so that the buyer in such a case would be left with no contract at all once the breach has occurred. In fact, the doctrine has never been properly distinguished from other phenomena in the law of contract such as "breach of condition" and "failure of total consideration". In a breach of condition as distinct from a breach of warranty, the breach is said to go so directly into the subject-matter of the contract that the innocent party is entitled to treat the contract as repudiated.¹⁷ One is unable to see the difference between this type of breach and the fundamental breach. On the other hand, we know that a contract is empty of all its contents if no consideration flows from the promise. It is not clear whether the effect of the fundamental breach is the same as the total failure of consideration. It has been held in a leading English case that whether a breach is a fundamental breach or not depends on the effects of the breach rather than the nature of the breach.¹⁸

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17. For a judicial discussion of the fundamental breach see:-
HONG KONG FIR SHIPPING LTD V. KAWASAKI LTD (1962) 20B 26 as per Lord Diplock at P. 65 - 66.
18. The House of Lords decision in Suisse Allantique's case (1967) I A.C. 361 was explained by the court of Appeal in a way which confines its application to a very restricted area, in the case of HABUTT'S PLASTICINE LTD V. WAYNE LTD (1970) 2 W.L.R. 108

Another common law device of mitigating the inequities of exclusion clauses is in respect of the principle of statutory interpretation known as the *contra preferentum* rule. This rule provide that where in the construction of the exclusion clause in a contractual document, the meaning is found to be vague or ambiguous, the court adopts the meaning which is against the party relying on the clause. In SYMONOUSKI & CO. V. BECK & CO.¹ the court of appeal applied the *contra preferentum* in the following fact-situation. The buyers contracted for the purchase of several reels of cotton thread each reel carrying 200 yards of the thread. When delivered the buyer discovered that the reels carried 188 yards each instead of the contractual 200 yards. The buyer purported to reject the goods or in the alternative claim damages for breach of contract. The seller endeavoured to exempt himself from liability on the basis that the following clause in the contractual document relieved him from such liability:-

"The goods delivered shall be deemed to be in all respects in accordance with the contract, and the buyers shall be bound to accept and pay for the same accordingly unless the sellers shall within fourteen days after arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason where of they may allege that the goods are *not in accordance with the contract*!"

Holding that an unambiguous clause is no protection to the party relying on it, the court of Appeal²⁰ emphasised that if a party wishes to disclaim liability which flows from the ordinary consequences of a breach of contract, he must do so in clear terms because, in the case of *ambiguity the clause will be construed against that party. Here the clause was held to exclude liability arising from defects of "goods delivered"*

and not on the goods not delivered. The buyer claimed damages on goods
t delivered ~~not~~ goods

delivered.²¹ Besides, it was held, the clause exempted the seller from liability arising from rejection of the goods, not liability in respect of the breach of contract.

This rule (contra preferentum) and the doctrine of fundamental breach are common law principles, which apply in Kenya by virtue of section 3, of the Judicature Act, 1967.²² The principles of contra preferentum has the disadvantage of uncertainty because the party relying on it is not sure whether the court will find it unambiguous or not. Secondly, contra preferentum rule emphasises that a seller who uses clear and unambiguous exemption clauses is capable of entering into a contract for the sale of goods with all the natural and consequential duties attendant to it, but he stands free from all those obligations. The question that one asks is: Is there any point in principle for a person to enter into contractual relations whose obligations are of no consequence to him? The courts have done their best, in my opinion in trying to circumvent the harshnesses of the freedom of contract doctrine. But the legislature which is better placed in the task of law-making than the courts seems to have left too much undone in the direction of consumer protection against exclusion clauses. It is clear now that the sale of goods act was derived wholesale from the Act of 1893 in England. The next chapter will show that the Act of 1893 has been amended considerably in order to make the conditions and warranties protective of the consumer. The chapter will show that our Act remains in the 1893 position in England and that we need to keep it up to date with English law.

21. Appeal to House of Lords Reported in (1924) A.C. 43 at P. 48.
22. Cap 8 of the laws of Kenya.

CHAPTER FOUR.

STATUTORY INTERVENTION IN THE APPLICATION OF EXCLUSION CLAUSES.

It is the contention in this work that the best method by which the unenviable position of consumers can be ameliorated is through legislation. The judges, in their duties as administrators of justice have no doubt identified the problems facing the consumer, and they have devised methods of improving their absurd position. That is the best they can do. Their stalwart work can be perceived after looking at decisions like BECK'S¹ case and HARBUTT'S² case. But as we have seen in the preceding chapter the court's efforts are not enough for the complete amelioration of the consumer's miseries. What we need, it is submitted, is a statute, the product of a well researched commission's report, carrying provisions that really look at the buyer's position with sympathy, and which does not over-exaggerate the importance of the doctrine freedom of contract for what it is worth. In England such statutes have been enacted, so that it is true to say today that the consumer in Kenya suffers more from the use of exclusion clauses in respect of implied conditions and warranties than the consumer purchasing the same or similar goods in England. The task of this chapter is to expose in a brief way, how the consumer in England has attained the favourable position he is in, bearing in mind that consumers in England and Kenya had at one time the same rules of law in respect of sale of Goods - Viz the sale of Goods Act, 1893.

As a result of public debates taking place in the English newspapers in the 1960's in relation to the exclusion of the sellers liability under the implied terms in the sale of Goods Act, 1893, the law commission began researching on how the said Act could be amended. The commission came out

1. SZYMONOWSKI V. BECK (1923) 1 K.B 457.

2. Footnote No. 18, at P. 18 *Supra*.

with recommendations³ which were passed through parliament to become the supply of Goods (Implied Terms) Act, 1973. However the Act of 1973 went further than the Report of the law commission by extending these recommendations to apply in the hire-purchase cases. The Act of 1973 amended the Sale of Goods Act 1893, in the following ways.

To begin with, under section 1 of the Act the implied condition as to title under S.12⁴ of the Sale of Goods Act, 1893 could no longer be excluded by the seller - any such exclusion clauses, the Act provided, was avoided. In addition the warranties as to quiet possession and that the goods shall be free from encumbrances could not be excluded. Further the Act of 1973 implies a warranty that the seller has an obligation to disclose all encumbrances to which the goods are attached, and which the seller is aware of and the buyer is not. Clearly these provisions constituted an infringement of the freedom of contract doctrine as expressed under S. 55 of the Sale of Goods Act. Any clauses purporting to exclude the seller from the liability under the implied terms would be void under the new legislation whether the buyer purchases as a consumer or as a businessman.

In the second place, the Act of 1973 provided that in cases of where the buyer deals as a consumer, the seller cannot exclude himself from liability arising from his breach of the implied conditions under SS. 13, 14 and 15 of the Sale of Goods Act, 1893.⁵ One learned writer⁶ has expressed the effects of the Act of 1973 on the Sale of Goods Act in the following terms:

"As against a person dealing as a consumer" the liability for breach of the seller's basic obligations arising from the Sale

3. First Report of the Law Commission on Exemption clauses.

4. Equivalent to S. 14 of the Kenyan sale of Goods Act.

5. Equivalent to SS. 15 and 16 of the Kenyan sale of Goods Act.

6. GORDON BORRIE, "Legislative and Administrative controls over Standard forms of contract in England" (1978) J. B. L. 317.

of Goods Act, 1893, to supply goods in conformity with their description and goods which are of merchantable quality and reasonably fit for their purpose cannot be excluded or restricted by reference to any contract term"⁷

This protection for the consumer - buyer is of use to him only when acting as a consumer, not a businessman. Indeed the Act distinguishes between consumer sales and non-consumer sales. ^{* True??} The non-consumer sale refers to the purchase of the goods by the buyer when dealing as a consumer, not as a businessman. The non-consumer buyer can only seek protection under the Act if only the seller does not show that the exclusion clause was reasonable - this means that a buyer dealing as a buyer - seller, not as a consumer cannot be protected under the Act if the exclusion clause is reasonable.

What is reasonable in this context is determined by certain guidelines set out in the Act and which include the following. The court is guided in the determination of the question whether or not the clause is reasonable by consideration of the relative bargaining strengths of the seller and buyer taking into account the availability of alternative sources of supply. The judges must also consider whether the exemption clause constituted an inducement to the buyer for the offer of a lower price. In addition the court considers whether the goods in a given case were manufactured to the special offer of the buyer. The burden is on the seller to show that the exclusion clause is reasonable.

Among the advantages of the Supply of Goods (Implied Terms) Act, 1973, is that the need for establishment of the fact that goods were sold by description while proving that the goods were or were not of merchantable quality is removed. However the implied condition as to the

goods' correspondence with description still remains, though no definition of what amounts to a sale by description is given. Another advantage of the Act is that no longer is it necessary in the proof of both merchantability and fitness for a purpose to show that the goods sold were of a type which the seller deals in the ordinary course of his business. Under the new Act it is enough to show that the goods were sold in the course of a business, not in the seller's capacity of a private seller.⁸ It is no longer necessary under the Act of 1973 to show that the buyer bought the goods with its trade name showing that he placed no reliance upon the seller's skill and judgement and thus waiving his rights under the implied term of fitness for a purpose.⁹ However the seller must show that the buyer placed reliance on the seller's skill and judgement so the Act shifts the burden of proof from where it lay under the Sale of Goods Act (the buyer) and places it on the shoulders of the seller. There is thus an implied condition of reasonable reliance under the Act of 1973.

A few problems still remain unsolved under the new Act. The first one relates to the failure to define what a sale by description means, and this is one of the problems which the Sale of Goods Act raises. Secondly the Act distinguishes consumer from non-consumer sales and thus fails to foresee such problems as these. If a shopkeeper buys a pick-up

8. This is in keeping with certain utterances of Lord Wilberforce in the case of *ASHINGTON PIGGERIES V. CHRISTOPHER HILL LTD.* (1971) 1 ALL E.R. 848, at pp. 875 - 876. For further discussion on this point see *SCHOFIELD* (1970) J. B. L. 7, 10 - 11

9. This principle had been allowed to reign in the case of *BALDRY V. MARSHALL* (1925) 1 K. B. 260.

van which he uses to transport his stock from the wholesalers to his premises, and uses it every morning to take his children to school and every weekend to take the family to a picnic, it is difficult to tell if he buys it when "dealing as a consumer" or as a non-consumer. Further when the same shopkeeper buys an electric lamp to light his shop we do not know, in the absence of decisions to this effect, whether he does so as a consumer or in the course of his business. All we know is that such lamps are ordinarily bought for private consumption but not whether the shopkeeper does so.¹⁰

Despite these problems, the consumer in England has a statute on which some of the inequities of exclusions clauses are pinned — the Supply of Goods (Implied Terms) Act, 1973. However no change in the law was thereby produced because the Act 1977 provides that the various obligations as to title implied into contracts of sale and hire-purchase cannot be restricted or excluded by reference to a contractual term. Provisions in the Act of 1973 in relation to implied conditions as to correspondence with description, merchantability and fitness for a purpose are repeated in the Act of 1977. The latter Act however ought to control the use of exclusion clauses in other contracts and tort cases, not merely in contract for the sale and supply of goods.¹¹

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10. For more detailed discussions on the Supply of Goods (Implied Terms) Act, 1973 see: BRIAN COOTE LL.M, Ph.D (1970) 34 CONV. (N.S.) 254, AUBREY DIAMOND (1970) 33 M.L.R. 77, DAVID YATES (1973) J. B. L. 135.
11. For more elaborate discussion of the Unfair contract Terms Act, 1977, see "Exclusion clauses after the Unfair contract Terms Act, 1977" by Richard Lawson, Oyez publishing Limited, London, 1978, PP. 81 - 105.

In addition to the two Acts briefly discussed, there exists in England the Fair Trading Act, 1973, also passed as a result of debates taking place in England on exclusion clauses and other undesirable consumer trade practices. Like the Unfair Contract Terms Act, 1977, the Fair Trading Act, 1973 applies in all forms of trade either for the sale and supply of goods or for the provision of services. Section 13 of the Fair Trading Act, shows what consumer trade practices are and, inter alia, these include terms and conditions subject to which goods or services are supplied. The methods by which these terms and conditions are communicated to consumers the manner of advertising labelling, and packaging and salemanship employed on the goods or services.

One of the outstanding provisions of the Fair Trading Act, 1978 is that under S. 14 the office of the Director General of Fair Trading is created, and under S. 3. an institution called consumer protection Advisory Committee is established (hereafter referred to as the Advisory Committee). Under the Act, the Director General of fair trading keeps an eye on the businessmen and should he form the opinion that a certain practice is undesirable for purposes of consumer protection, he makes, references to the Advisory Committee. The Advisory Committee sitting as an administrative tribunal considers whether the trade practice referred to it "Adversely affects the economic interests of the consumer". Having found that the practice is adverse to the consumer, the Advisory Committee makes references to the Secretary of state who gives effect to the proposal of the committee by making an order with the force of law - viz subsidiary legislation.

Several references have been made to the secretary of state especially in connection with practices that have the effects of misleading consumers as to their statutory rights, or subjecting consumers to pressure to transact. Only one reference will be considered here by way of example.

The Director General was caused concern by the wording of certain notices displayed on trade premises, or vehicles, or in advertisements or catalogues or in documents furnished to consumers acquiring goods. The words purported to exclude or restrict the buyer's rights conferred under the implied statutory terms, and which rights were rendered inalienable by the supply of Goods (Implied Terms) Act, 1973. Such notices according to the Director General's report included: "We Regret No cash Refunds," "We willingly exchange goods but money cannot be refunded, credit notes will be given" etc. The use of such notices would mean that the sellers were not bound for example to refund the purchase-price of goods which the buyer has rejected on the basis that they are unfit for the purpose they were bought.

In Kenya today, such consumer trade practices would probably include "Goods once sold cannot be accepted" common in most cash sale receipts, and "issued subject to the company's terms and conditions" printed in regrettably small print on the back of tickets, issued by Kenya Bus Ltd. It is submitted that we here in Kenya need an equivalent of the Fair Trading Act to curb these practices. We need a Director General's office to investigate these practices, and who would report to the Minister for Commerce and Industry for enforcement through subsidiary legislation. In England, the trade practices indicated above were curbed by an order made by the secretary of state to that effect. It becomes an offence to contravene the order.¹²

12. For a thorough analysis of the provisions of the Fair Trading Act, see Richard Lawson, *Supra* at PP. 67 - 78.

In view of these legislative and administrative efforts to ameliorate the consumer's miseries, the doctrine of freedom of contract has become a sham.¹³ It has become so eroded by these measures that it is no longer plausible to say as Jessel M.R. did in Printing and Numerical Registering Co. V. Sampson¹⁴ that the doctrine of freedom of contract as a paramount principle of public policy. Therefore it is ridiculous for our country to retain an archaic provision that jealously protects an obsolete doctrine of freedom of contract which operates on the consumer adversely. By drawing our Sale of Goods Law from Britain in 1963, we indicated that we shall look to Britain for a commercial philosophy when we need one. Our commercial sector of the economy is thus controlled by archaic laws, while the British people from whom we borrowed ~~the~~ have moved steps ahead in the direction of modifying them. It is submitted that it is the high time we emended S. 55 of our sale of Goods Act to make it come into terms with the reality that the freedom of contract doctrine is an illusion, a sham, and a cloak which crafty businessmen use to exploit consumers of humble means in Kenya.

CONCLUSIONS AND RECOMMENDATIONS

The dichotomy that exists between warranties on one hand and conditions on the other is undesirable since what matters is not the nature of the terms of contract breached, but the nature of the breach. If the court finds that the innocent party to the contract cannot be adequately remedied or compensated by an award of damages, then it should allow him to treat the contract as repudiated. If the breach can be remedied by an award of

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13. There are other legislative controls such as the weight and measures regulations which we are not concerned with here.
 14. Supra, chapter Three at P. 69.

damages, then the party not at fault should be compensated with damages. Thus the term warranty should refer to those terms of the contract breach of which is remediable by damages, while a condition should refer to those breaches of contractual terms that remediable only by considering the contract as repudiated. This would help to make the law certain for the terms warranty and condition would acquire definite meanings making the work of the courts easier, and the obligations of the seller clear. In the alternative the terms condition and warranty should be scrapped from the sale of Goods Act altogether leaving the court with a discretion to determine what breach is remediable by damages and which is remediable by repudiation. In scrapping these terms from our law of sales, we should not forget that they were a judicial invention to serve the commercial needs of England in the eighteenth and nineteenth centuries and so it is arguable that they are not needed in the commercial development of twentieth century Kenya.

This is more so when we bear in mind the African customary system of exchange of goods. No such terms were known. From the discussion of African commercial system in chapter two, we gather that the African concept of commerce was coloured by a feeling of mutual cooperation and the sense that it was no good to exploit fellow tribesmen who had no goods of the kind they wanted through no fault of their own. Thus the sale of Goods Act does not represent the African philosophy of commercial life-the non-exploitative barter exchange and other methods by which those who did not have goods of a certain kind, for example cattle, were provided with them.

When the Act was passed in 1930, the European settlers intended it to apply to themselves so as to make them lead the sort of life they had been used to in England. Without regard to the prevalent African commercial systems they began applying it upon Africans whom they had

already imposed the institution of money for political as well as fiscal reasons. But it was not too late for the Africans to shake off the colonial legacy in 1963 after independence. This did not happen, instead the parliament of the day which was manned by persons whose political and economic aspirations were not different from those of the British adopted the ordinance as its own, and called it an Act to regulate the Sale of Goods. It is submitted that this is where the mistake lies - our people would have been more contented with a statute that took into consideration the African concept of commercial transactions. Then it would have been possible to set up a legal system in which the African concept of fair trading was enshrined.

Today however, it is eighteen years of independence which have witnessed the rapid growth of a commercial sector based on English law of sales of 1893. It is submitted that today unlike 1963, the African ideas of commerce have been dwarfed by the English law and the people's way of life is coloured by what is called western civilisation. Therefore we cannot call for a fall-back to our ways of life before the white colonists intervened. We can only say that the mischief is done and the restitution of the African into the pre-colonial ways is impossible. What we need is an admission of the fact that we allowed ourselves to become British puppets and that it is too late to say that we should stop aping them. Let us keep ourselves in step with their developments and see if we can become like them, at least in respect to the law on the sale of Goods. It is true that the Sale of Goods Act of Kenya represent the English law of sales as it stood in 1893. Today almost one century later the British have altered their law to suit their conditions. Kenya remains where Britain was almost a century ago. It is submitted that if the law is anything to measure economic development

with, it cannot be said that Britain is more developed than Kenya, because Britain was in our stage of development almost 100 years ago. Our Parliament should wake up and amend the law.

As for the doctrine of freedom of contract, we have seen that the doctrine applied meritoriously in the traditional Gikuyu society. The doctrine applied because the relative bargaining power between parties was almost equal. So there was no exploitation of man by man because one happened to be economically favourably placed over the other. Today the multinational corporations have subsidiaries in Kenya producing consumer goods en masse, and selling them to a vulnerable consumer under harsh terms. In principle, there is no reason why one party to a contract should be allowed to enter the contract which naturally carries natural obligations incumbent on him, and then he is left free to exonerate himself from liability using exclusion terms. If this was so, the contract as an agreement, a product of consensus ad idem (meeting of the minds) would lose its meaning. One person would be left to dictate what terms the other party has to take or leave. This is what blind adherence to the doctrine of freedom of contract has led to in Kenya. We should know that the doctrine cannot work in a non-egalitarian country like Kenya. The law should thus be passed by the legislature and administered by the judiciary without regard to this iniquitous doctrine.

RECOMMENDATION.

My view is that the three legislative measures undertaken in Britain to arrest the use of unreasonable exclusion clauses should be enacted in Kenya. In particular the Fair Trading Act, 1973 should take priority. A seat equivalent to that of the Auditor-General should be created under the Act giving that office administrative duties

to work as a watchdog for the consumer against commercial malpractices by shrewd businessmen. The office should ^{be} like an ombudsman in which cases of shady consumer trade practices should be brought after apprehension by the officials. The administrative tribunal should rule against any methods by the sellers to restrict their liability or to restrict the rights of the consumers under the implied terms. The tribunal should be able to set up rules for every trade, profession or business having regard to the needs of humble consumers and business. Rules set up by the tribunal should never be contravened since such contravention would be attended by criminal sanctions. In this way the Kenyan Act would resemble the English Act in that the Minister in charge of commerce should be able to make subsidiary legislation like the Secretary of State, outlawing certain trade practices recommended by the tribunal.

However the Kenyan legislations should watch out for the problems left unsolved in the English statutes. Such problems have been shown elsewhere in this chapter and include the lack of a coherent definition of sale by description, and failure to set out what consumer and a non-consumer sales are. The Acts should also encourage the formation of consumer societies in virtually all trades and businesses. This would enable consumers to form one body with a strong bargaining power which can match that of the sellers.

APPENDIX A.

INTERVIEW WITH MR. KABUYA MUITO, MANAGING DIRECTOR, UNICHEM (KENYA)
LTD. (HELD ON 30 - I - 81)

The aim of this interview was to investigate the truth of the newspaper story carried by "Nairobi Times" to the effect that unichem (Kenya) Ltd, had imported bogus agrochemicals into the country and sold the same to local farmers. S.I6 (a) proviso of the sale of Goods Act vitiates the protection afforded to the farmer ^{who} orders his goods by their patent name. Usually a farmer will order his farm needs by their patent names because he would like to distinguish them from other poor quality goods produced in the competitive market. So the first question shot to the managing director who seemed quite cooperative was to which kind of farmers he sells. He answered that he rarely sells them to individual farmers. Usually, he said, his company sells to cooperative unions in the central province particularly the Nyeri cooperative union.

Asked whether he sells the goods under any terms and conditions the Managing Director said that no such terms are included in the contract, and hastened to add that if a customer found the goods to be defective he would return them to him and he would accept them without any quarrel because he knows that failure to ^{accept} them would mean one customer less, and this is a customer with a strong hold because the union buys the agrochemicals in bulk.

Asked whether it is common to have the agrochemicals with certain defects the managing director stated that there are agrochemicals that are defective, either because they do not have the stipulated chemical ingredients or they have expired chemicals in them. However, he said there is an efficient system in the country to ensure that the chemicals

sold to the farmers are good quality. To start with, there is the general superintendence international body which advises the Government on what agrochemicals to be imported are, their quality and quantities. The body issues certificates of quality to every consignment of chemicals intended to be imported into the country. Secondly once the chemicals arrive in Kenya, the importers take samples to the National Agricultural laboratories at Kabete for analysis and certificates of quality are further issued. The National laboratories works in conjunction with the Coffee Research Foundation at Ruiru, and farmers who purchase agrochemicals are also required to take their samples to the latter body for analysis and certification. Thirdly, the importing companies have individual laboratories and expert analysts who ensure that the agrochemicals are of good quality before they are sold. The MD however indicated that some poor companies have neither laboratories nor expert analysts. Besides, he said, the importers cannot be compelled to take their samples to the Government bodies for analysis - it is optional.

Asked to verify the newspaper story about importation of bogus chemicals, and how these agrochemicals reached the farmer despite the efficient system of analysis and certification narrated above, Mr. Kabuya said that his company is a young one, having been incorporated in 1977. He further stated that the company has grown beyond its years because of the amicable customer relations it commands. Never for one moment, has the company delivered substandard goods to the buyers. He however explained that the bogus agrochemicals in question had been smuggled into the country through either Uganda or Tanzania by the company's rivals who later fed the story to the newspaper. He said that the importation and resale of limestone instead of Ortho-Difotatan 80% had been going on in the country and the reason why this last importation came to the surface was that one of the Estates supplied with the 'Spray' belonged to an influential politician.

The estate in question is Ebonja Estate in Kiambu.

The director also indicated that the absence of any legislation compelling the importers to take their samples to the analysis made it possible for them to sell substandard chemicals.

The director further highlighted the problem of importation of expired pharmaceuticals by local importers, which importation is also on the same basis as the agrochemicals. He was speaking from his experience soon after graduation when he worked for sometimes with the ministry of Health and discovered that the chemicals used at the medical stores were usually expired and of no use to the sick patient.

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