



NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 521

COURSE TITLE: CONVEYANCING AND LEGAL DRAFTING I

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COURE CODE: LAW 521

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2015

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Introduction

Conveyancing Legal Drafting Law I

Legal Drafting and Conveyance just as the name implies consists of two broad areas of law, legal drafting and conveyancing. This first semester course covers general introduction to legal drafting, official letter, memorandum, legal opinion and report writings, legislative drafting, interpretation of statutes, will, codicil and customary conveyancing. The material has been developed with local authorities (statutory and case law). Also, references are made to foreign authorities where necessary.

Legal Drafting and Conveyancing deals with the practical aspect of a lawyer's work in practice. No legal practitioner whether into full time litigation or as in-house lawyer can avoid writing a legal document. An average lawyer writes at least two letters per week. This is outside drafting of agreements, deeds, legal opinion, will, report writing, bills, etc. Before doing any of these there are steps, techniques and rules to observe. This course is designed to equip you with the required skills and knowledge in legal drafting and conveyancing practice.

The keys to become a good draftsman are: understanding of this course and mastering of English language. The understanding of evolution of English language to the modern day plain English, rules and techniques of drafting and certain habits to avoid when drafting legal document are paramount. Above all, you must engage in the art drafting as the real test and lesson is in practice. The quality of your draft can tell a lot about your personal quality. Legal document speaks after the death of the draftsman.

This course consists of 23 units of study which are designed to give easy understanding of the course to the students. It is a practical and an interesting subject which a diligent student would find revealing and rewarding. It may possibly ginger you up to pick a career in drafting.

You will find some useful self examination questions, and tutor marked assignments in the course guide. These questions and assignments are important to assess your proper understanding of the course. Students are advised to attempt all the exercises and assignment as strictly as possible as if under real examination conditions. It is also advisable that students should try as much as possible to locate the answers to the exercises within the Nigerian law rather than relying on their personal experience or what they see people do. You are to manage your study time effectively.

What you will learn in this course

This course is about Legal Drafting and Conveyancing. It is an elective course for students who are registered for Bachelor of Law Degree Programme. This course may also be useful to those who want to learn about transfer of interest in land. Persons interested in working in legislative house (as legislative draftsman), probate, court and land registry in Nigeria would find this material very useful. This course is a 4 credit

units course. This means that a minimum study time of 4 hours per week for the duration of the semester.

This course, LAW 521, is designed to expose you to some key aspect of legal drafting. Attempt has been made to identify and examine legal and legislative drafting, legal writing, interpretation of statutes, wills, codicil and customary conveyancing. It is advisable that you should familiarise yourself with the laws, common terminologies and concept, rules and techniques of drafting as you will come across them frequently as the learning progresses. This is to ensure that you are better equip to handle legal drafting and conveyancing problems, make your draft readable and to avoid being liable for professional negligence.

Importance of Cases and Statutes

This study guide, like any textbook on any aspect of law makes references to judicial decisions and some statutory enactments. Any statement of law has its foundation on a judicial or statutory authority. These authorities are cited and in some case the summary of the fact and the decision of the court are stated. However, you are advised to refer to the statutes or the law report for detail in order to better understand specific aspect. Where no summary of the fact and the decision of the court are provided you are to find the law reports and read.

Course Aims

This course aims at providing the participants with basic knowledge and understanding of legal and legislative drafting, interpretation of statute, will, codicil and customary conveyancing. In essence, the aims of the course include:

- Introduction to legal drafting

- Official letter, memo, legal opinion and report writing
- Legislative drafting
- Interpretation of statutes
- Will and codicil
- Customary conveyancing

Course Objectives

At the completion of the course, you should be able:

- i. to understand legal drafting
- ii. to appreciate the relevance of English language in drafting legal document in Nigeria.
- iii. to understand the rules and techniques of drafting.
- iv. to understand official letter, memo, legal opinion and report writing
- v. to understand legislative drafting and identify the challenges of drafting.
- vi. to understand interpretation of statutes
- viii. to understand will and codicil
- ix. to understand customary conveyancing and its various modes.

Working through this Course

To complete this course, you are advised to read the study units, recommended books and other materials provided by NOUN. Each unit contains Self Assessment Exercise, and at points in the course you are required to submit assignments for assessment

purposes. At the end of the course there is a final examination. You will find all the components of the course listed below. You need to make out time for each unit in order to complete the course successfully and on time.

Study Units

There are twenty three (23) study units in this course, as follows:

Module 1

Unit 1 Introduction and definition of legal drafting.

Unit 2 English as official language in Nigeria and habits to avoid when drafting legal document

Unit 3 Stages of drafting

Unit 4 Clarity and accuracy in legal drafting

Unit 5 Expressions and words relating to Time, and Rules and Techniques of Drafting

Module 2

Unit 1 Official letter writing and words of negotiation

Unit 2 Memorandum writing

Unit 3 Legal opinion writing

Unit 4 Report writing

Module 3

Unit 1 Legislative drafting, legislative power in Nigeria and qualities of a good legislative draftsman

Unit 2 Sources of material for and challenges of drafting a bill in Nigeria

Unit 3 Stages of drafting

Unit 4 Components of a bill

Module 4

Unit 1 Interpretation of statutes and tools of interpretation

Unit 2 Rules of interpretation of statutes

Module 5

Unit 1 Will, applicable laws, advantages, age of testator and point to note when drafting a will.

Unit 2 Testamentary Capacity

Unit 3 Formal requirements

Unit 4 Alterations and Erasures in a Will, Revocation and Revival of a Will

Unit 5 Doctrine of Ademption and Lapse, Legacy and Devises

Unit 6 Executor, Restrictions to the Testator's Freedom of Disposition,
Codicil and Custody of a Will

Module 6

Unit 1 Customary modes of transfer of property

Unit 2 Customary tenancy

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each. We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will then have a clearer picture into which to paint these topics.

Each study unit includes specific objectives, directions for study, reading materials and Self Assessment Exercises (SAE). Together with Tutor Marked Assignments, these exercises will assist you in achieving the stated learning objectives of the individual units and of the course.

Textbooks and References

Certain books have been recommended in the course. You should read them where so directed before attempting the exercise.

Assessment

There are two aspects of the assessment of this course, the Tutor Marked Assignments and a written examination. In doing these assignments you are expected to apply knowledge acquired during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. The work that you submit to your tutor for assessment will count for 30% of your total score.

Tutor-Marked Assignment

There is a Tutor-Marked Assignment at the end for every unit. You are required to attempt all the assignments. You will be assessed on all of them but the best three performances will be used for assessment. The assignments carry 10% each. When you have completed each assignment, send it together with a (Tutor Marked Assignment) form, to your tutor. Make sure that each assignment reaches your tutor on or before the deadline. If for any reason you cannot complete your work on time, contact your tutor before the assignment is due to discuss the possibility of an extension. Extensions will not be granted after the due date unless under exceptional circumstances.

Final Examination and Grading

The examination for this course will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self-assessment exercises and the tutor marked assignment you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit, and taking the examination to revise the entire course. You may find it useful to review your self assessment exercises and tutor marked assignments before the examination.

Course Marking Scheme

The following table lays out how the actual course marking is broken.

Assessments	30% of course marks
A final examination	70% of overall course marks

Total	100% of course marks
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How to Get the Most from this Course

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, you study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit.

You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self Assessment Exercise as you come to it in the study unit. There will be examples given in the study units. Work through these when you have come to them.

Facilitators/Tutors and Tutorials

There are tutorials provide in support of this course. You will be notified of the dates, times and location of the tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group. Keep a close watch on your progress and on any difficulties you might encounter. Your tutor may help and provide assistance to you during the course. Do not hesitate to contact your tutor by telephone or e-mail if you need help. Contact your tutor if:

- You do not understand any part of the study units or the assigned readings;
- You have difficulty with the self assessment exercises;

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and to ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

Conclusion

We hope you will find this course interesting. We wish you the best of luck.

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Module 2

Unit 1 Official letter writing and words of negotiation

Unit 2 Memorandum writing

Unit 3 Legal opinion writing

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Unit 1 Legislative drafting, legislative power in Nigeria
and qualities of a good legislative draftsman

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bill in Nigeria

Unit 3 Stages of drafting

Unit 4 Components of a bill

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Unit 1 Interpretation of statutes and tools of interpretation

Unit 2 Rules of interpretation of statutes

Module 5

Unit 1 Will, applicable laws, advantages, age of testator
and point to note when drafting a will.

Unit 2 Testamentary Capacity

Unit 3 Formal requirements

Unit 4 Alterations and Erasures in a Will, Revocation and Revival of a Will

Unit 5 Doctrine of Ademption and Lapse, Legacy and Device

Unit 6 Executor, Restrictions to the Testator's Freedom of Disposition,
Codicil and Custody of a Will

Module 6

Unit 1 Customary modes of transfer of property

Unit 2 Customary tenancy

LAW 521 LEGAL DRAFTING AND CONVEYANCE

MODULE 1

Unit 1 Introduction and definition of legal drafting.

Unit 2 English as official language in Nigeria and habits to avoid when drafting legal document.

Unit 3 Stages of drafting

Unit 4 Clarity and accuracy in legal drafting

Unit 5 Expressions and words relating to Time, and Rules and Techniques of Drafting.

UNIT 1: INTRODUCTION AND DEFINITION OF LEGAL DRAFTING.

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1.0 Introduction

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3.2 Meaning of Legal Drafting

3.3 Why a draftsman must pay attention to the way he drafts legal documents

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 further study

1.0 INTRODUCTION

Legal drafting is a practical aspect of lawyer work. In fact, whether as an in house lawyer or a lawyer into a full time litigation it cannot be avoided. It is a legal means of communication and the development of language and the art of writing as a means of expressing one's thought aided this form of communication. An understanding of legal drafting, language, writing, English as

official and the language of the law in Nigeria and benefit of studying legal drafting are paramount for every draftsman.

2.0 OBJECTIVES

Students are expected to have a general overview of legal drafting, the development of language and art of writing as a means of communication. Also, students will be exposed to the available definitions of legal drafting. At the end of the course students are expected to learn:

- (i) language and writing as tools for communication,
- (ii) the definition of legal drafting,
- (iii) the importance of legal drafting, and
- (iv) why a draftsman must pay attention to the way he drafts legal documents.

3.0 MAIN BODY

3.1 GENERAL INTRODUCTION

One of the greatest achievements of man is the development of language as a tool of communication. Man's language as distinct from other animals includes hissing, gurgling, clucking, cooing, noise etc. According to Glanville language developed through convention, mutual agreement and dependency. Language is generally in spoken form but it can be transferred into other media like writing and sign language.

According to Imhanobe "language is the chief means of communication as well as medium of thought; the relationship between language and thought is symbiotic and inextricable". Language is a means of expressing one's thought. In addition to language man has also developed the art of writing as complement to language as a means of communication. The combination of language and writing has enabled man to communicate with other people beyond the reach of his voice and sight thereby breaking the barrier of time and space.

Legal drafting is important in the training of a legal practitioner or legal draftsman because it equips him with the skills and art of effective use of language and writing.

WHY A DRAFTSMAN MUST PAY ATTENTION TO THE WAY HE DRAFTS LEGAL DOCUMENTS

It is important for a legal draftsman to pay particular attention the way he drafts his legal document because

1. legal drafting is a communication in a permanent form;
2. to avoid seeking of further clarification of what has been written by him;
3. the draftsman may not be available to offer clarification;
4. parties are bound by what has been written and signed;
5. to avoid cost of time and finance to effect correction on the document and
6. legal document speaks of the draftsman even after his demised.

3.2.1 DEFINITION OF LEGAL DRAFTING

There is no generally accepted definition of legal drafting. Various definitions have been advanced. Legal drafting has been defined "as the formulation and preparation of legal documents such as deeds, contracts, leases wills and trusts." This definition is restrictive as it excludes other legal writing like letter writing, legal opinion, legislative drafting etc.

According to Adubi (1995),

legal drafting is the art of legal writing. Drafting is not a science of law but an art; therefore, to a great extent, it is a highly individual attainment. It cannot be developed without some initial aptitude and it cannot be mastered without practical experience. It does not depend on aptitude and experience alone, but it has it's rules which can be explained and learned by any person of reasonable intelligence.

Adubi distinguished between the science of law and the art of drafting. According to him "so far as law is concerned, once its principle are known and understood, that is the end of the matter. To know the technique of drafting is only the starting point; it has to be handled and used in varied circumstances, and according to one's individual style."

According to Imhanobe legal drafting "is the art of drafting legal document e.g. letters, contracts, deeds, wills, legislative bills, trust, lease, criminal charges, pleadings, appellate briefs etc., legal drafting is an aspect of advanced legal writing, it is a means of communication." This definition by Imhanobe apart from agreeing that legal drafting is an art, is more encompassing as it embraces all areas of legal writing. Simply, legal drafting is an art of drafting legal document which includes will, deeds, leases, charges, letters, pleadings, bills, laws, conveyances, legal opinion etc.

Self Assessment Exercise

3.1 What is the importance of studying legal drafting?

3.2 (a) what is legal drafting

(b) Distinguish between art of drafting and science of law.

4.0 CONCLUSION

Legal business is generally conducted via spoken words or in writing. The importance of the development of language and the art of writing by man as a means of communication and their relevance to the business of law cannot be over emphasised. Every draftsman should master the art of drafting. Though there is no universal accepted definition of legal drafting, it is generally agreed that drafting is an art.

5.0 SUMMARY

At the end of this unit, you learnt the following:

*Language and writing as tools of communication.

*The important of studying legal drafting.

*The definition of legal drafting.

6.0 TUTOR MARKED ASSIGNMENT

Explain the meaning of legal distinction between art of drafting and science of law and why the study of legal drafting is important.

7.0 FURTHER READING

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

Adubi, C.O., (1995) *Drafting, Conveyances and Will*, Lagos: Light House Publishing Co.

Hayakaya S .I., (1974) *Language In Thought And Action*, Gorge Allen And Unwin Ltd

Glanville W., *Language and the Law*, 61 Law Quarterly Review.

MODULE 1

UNIT 2 ENGLISH AS OFFICIAL LANGUAGE IN NIGERIA AND HABITS TO AVOID WHEN DRAFTING LEGAL DOCUMENT

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 - 3.2 Habits to avoid when drafting legal document
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assessment
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1.0 INTRODUCTION

The official language of Nigeria is English. English has evolved as a language over three distinct periods. This has implications in the drafting of legal document in Nigeria. The changes in the development of English language up to our modern time implies that in drafting legal document there may be some habits to avoid. The essence is to ensure simplicity, clarity and precision. According to /mhanobe "this means that the language used by lawyers must be such that the reader may not only understand but must understand".

2.0 OBJECTIVES.

The Objectives of this unit is to expose you to:

- the development of English over the years,
- English language as official language in Nigeria and

- habits previously used by draftsman that are not relevant in our modern days and should be avoided

MAIN BODY

3.1 ENGLISH LANGUAGES AS OFFICIAL LANGUAGE IN NIGERIA.

The official language and language of the law in Nigeria is English language. The law is that no court in Nigeria will recognize a document except such a document is written in English or translated to English language. Section 55 of the Constitution of the Federal Republic of Nigeria 1999 as amended provides thus:

The language of the National Assembly shall be conducted in English languages and in Hausa, Ibo and Yoruba when adequate arrangements have been made therefore.

Also, in the case of House of Assembly section 97 of the Constitution provides that:

The business of a House of Assembly shall be conducted in English, but may in addition to English conduct the business of the house in one or more other languages spoken in the state as the House by resolution approve.

It is worth noting that while section 55 recognises the three major dialects in Nigeria, section 97 took into consideration the peculiarities of each state; in a state we have up to six different dialects. All that is required for the house to conduct its business with such local dialects is a resolution. These sections are highly democratic and commendable as they give every citizen right of expression as well as to participate in business of the legislatures and governance.

English language as official language of superior courts has been given judicial backing in the following cases:

In *Ojengbade v. Esen (2001) 18 NWLR (Pt746) P. 771, 790*, the trial judge, being a Yoruba used his personal knowledge of Yoruba languages to interpret a document written in Yoruba language that was tendered in evidence before him. On appeal the Supreme Court held among other things that:

The official language of superior courts of record in Nigeria is English. Therefore if document written in any other language other than English are to be tendered and properly used in evidence, they must be duly translated in English by a competent witness called by a party to the proceedings who needs them to prove his case or by the official interpreter of the court.

Also, in *Damina v. The State, (1995) 8 WWLR (pt 415) 513*, the court held that "Now it is a matter of common knowledge and indeed of judicial notice that the *lingua franca* of Nigeria and official language of the superior court in the country is English. According to Imhanobe, English language was not the official language of the British Isle. The British Isle was invaded at different times by continental Europeans who brought their language with them. He identified three distinct periods in the development of English as a language.

- (a) Period of old English. This is the first period which started with Anglo-Saxon invasion.
- (b) The period of middle English- started from the period of Norman invasion.
- (c) The period of modern English: started with the introduction of printing into the British Isle.

These periods witnessed introduction and use of Latin and Greek (first period), to the use of French words, and to the fifteen century when English regained its supremacy. In 1416, the invention of printer led to the standardisation of English language in the area of spelling, punctuation and grammar. The modern English is what is in use in Nigeria and is universally accepted. It emphasis simplicity, precision and clarity often referred to as the plain English approach. Nigeria was colonized by British and inherited English from the colonial master as he official language.

SELF ASSESSMENT EXERCISE (SEA)

- English language is the official and language of law in Nigeria. Discuss.

3.2 HABIT TO AVOID IN DRAFTING LEGAL DOCUMENT

Legal profession is a conservative one. The traditional style of drafting legal document is shrouded with archaic, redundant, excessive and intricate expressions, doublets and triplets, foreign words; jargons etc. Legal documents could only be interpreted by lawyers during this period. Lawyers were paid based on the number of words used in the document. The interest of the client who was bound to read and execute this hard and badly drafted document was not considered. This occasioned serious injustice. See Lord Diplock in *Fothergill v. Monavels Airlines (1981) AC, 280*. The modern English plain approach was an answer to the demands of clients who were fed up with the traditional style of legal writing. The modern style of drafting legal document is plain English approach aimed at promoting simplicity, precision and clarity. This makes the legal document readable to client. A good draftsman should avoid the following habits of drafting.

Archaic Words: These are words that are obsolete, not in line with Standard English and are old fashioned. Examples are 'hereinafter' 'hereinaforesaid', 'hereinunder'; 'said'; 'witness'; 'Hath'; 'hereafter'; Instead of saying 'hath' or 'doth' say 'has' and 'does'. Instead of saying the 'said vendor' says 'the vendor'. These archaic words are still used by lawyers in Nigeria because the legal profession is conservative and has resisted change and the lawyer's use of precedents without editing. This should be avoided.

Use of Passive Language: Active voice means that the subject performs the action. It must be used when the subject is stated. E.g.

"John killed the man" – Active voice

"The man was killed by John" - passive voice.

Active voice is preferred because it is simpler and direct. Passive voice leaves the legal consequences in doubt. However, passive voice should be used when the emphasis is

on what happened or where the subject is not known. E.g. "The cake was poisoned". Emphasis is on the action.

Verbosity: This means that the sentence contains words more than necessary. E.g. "The assignor hereby conveys, alienates, sells, assigns, transfers, grants, confirms, the sale of the property to the assignee". The following two reasons account for the use of verbosity:

(a) The erroneous believe that the longer the document the better and the client's willingness to pay more. This tradition view is no longer tenable as the Legal Practitioners (Remunerations for Legal Documentation and Other Related Matters), Order 91 provides for the scale of charge. The length or number of words used in legal document is not relevant in calculating legal fee.

(b) The desire in translating usual words formally in Latin and French to English, to capture the desired meaning. This also is not tenable as a word is to be construed from the context of it usage.

Redundant words: These are unnecessary words that should be deleted from legal documents. When these words are deleted it makes the legal document short and precise. E. g.

"The minister shall have full powers as contained in section 2 above".

The words "full" and "above" are unnecessary and should be deleted to read "The minister shall have powers as contained in section 2."

Also "He covenanted that all things being equal he should pay the debt". "all things being equal" is not necessary.

"Within the period of four months". Delete "the period of", and say

"within four months."

Redundant words are unnecessary and can be avoided by the use of the interpretation Act and the definition section in any law.

Unfamiliar words: These are foreign words different from the official language of law and the superior courts in Nigeria. They include pidgin, slang, latins, colloquial speech and all informal and non Standard English. Examples are *experte, certerio, paripasus, naija, in toto, per annum, inter alia, Ipso facto, mutatis mutandis*. Latin word is to be used only where it has no substitute. Unfamiliar words are to be avoided in legal writing.

Inconsistency: The use of inconsistent words in some legal writing should be avoided. It takes the following forms:

- (a) Referring to the same person in the same document by different names. E.g. "Assignor/vendor", "Assignees"/purchaser", "Mortgagor"/borrower", "lender/mortgages."
- (b) When a word is used in a way that contradicts its standard usage. E.g. Assignor assigns in an assignment. Vendor conveys in a conveyance. Testator gives in a will. But it is wrong to say the assignor gives; or the testator assigns.
- (c) The use of both English and American style of spelling and dating of document.

American style:

Spelling – Center, labor

Date – January 20, 2011

British style:

Spelling – centre, labour

Dates – 20th January, 2011

In using your computer ensure your system is configured to British spelling or date. If not add the British style of dating and spelling to the dictionary in your computer which is the Nigeria style of spelling and dating of document.

Doublets and Triplets: Example are "full and final"; "last will and testament", "pay, bear and discharge", "null, void and of no effect". Any of these words is sufficient to convey the intended meaning. E.g. "pay" instead of "discharge", or "bear", "null" instead of "void" or "of no effect".

Avoid the excessive use of the word:

E.g. The word like should be used only when absolutely necessary and should not be used as substitute for either "this" or "that". See *Mounfield v. Ward* (1897) Q.B 326.

Pronouns: Avoid the use of pronouns where they will lead to ambiguity.

Avoid improper use of "will"; may" and "shall": "Will" when used for first person implies wish or intention but when used for second and third person it implies mere intention. Where the legal subject is under obligation "shall" is to be used but where the legal subject is allow discretion "will" or "may" is to be used. Some schools of thought are advocating that "must" be used instead of "shall." See the following cases.

- *Ogwuche v. Mba* (1994) 4NWLR (pt 3360) 75

- *Atayi farm Ltd v. NACB Ltd* (2003) 4NWLR (pt 810)427

- *Kamba v. Bawa* (2005) 4NWRR (pt914) 43

- *Kalamu v. Gurin* (2003) 16 NWLR (pt 847)493

"Or" and "And": "or" should be used disjunctively and "and" should be used conjunctively. See *Ezekwezih v. Onwuagbu* (1998) 3 NWLR (pt 541) 217. However to avoid absurdity and injustice "and" could be construEed disjunctively

and "or" construed conjunctively. See *Associated Artist Ltd v. IRC (1955) 2 All E.R. 583*, and *J.S Tarks and Ors v. DPP (1961) ALL NLR. 376*

SELF ASSESSMENT EXERCISE

A good draftsman must avoid certain habits in drafting legal documents. Discuss.

4.0 CONCLUSION

English language is the official language and the language of superior courts but under certain circumstance local languages are permitted. The art of drafting is guided by rules and these rules of drafting prohibit the use of certain words, phrases or expressions. The use of modern plain English aid simplicity, precision and clarity as well make the legal document readable to non lawyers.

5.0 SUMMARY

At the end of this unit we learnt the following:

- English language is the official language and language of the superior courts in Nigeria.
- That the traditional style of drafting worked great injustice on the client.
- that the modern English style of writing which emphasis precision, simplicity and clarity is the current style of drafting legal document in Nigeria and all over the globe.
- That there are habits to avoid when drafting legal document.

6.0 TUTOR MARK ASSIGNMENT 2

Modern style of drafting legal documents emphasis precision, simplicity and clarity. Discuss.

7.0 FURTHER READINGS

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

Adubi, C.O., (1995) *Drafting, Conveyances and Will*, Lagos: Light House Publishing Co.

Asprey, M., (1996) *Plain language for lawyers*, 2nd edn, Sidney: Federation Press

Merville, L. W. (1991) *The Draftsman handbook*, 2nd edn, London: Longman.

Black Law Dictionary.

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Rylance, P., (1994) *Legal Writing*, Blackstone Press Limited.

Soetan O., (1997) *Elements of Legal Drafting* Lagos: Dredew Publishers.

MODULE 1

UNITS 3: STAGES OF DRAFTING

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 - 3.5 Editing the draft
4. Conclusion
5. Summary
6. Tutor marked Assignment
7. Further Reading

1.0 INTRODUCTION

Every journey starts with a step. When drafting legal document there are steps and stages a lawyer or draftsman must follow. Though there is no must follow steps, it is generally agreed that five stages and steps should be followed in drafting a legal document.

2.0 OBJECTIVES

The Objectives of this unit is to introduce you to the stages and steps to follow in drafting legal documents. You will learn how to take instruction, analysis the instruction, plan, compose and edit of the draft.

3.0 Main Body

3.1 TAKING AND UNDERSTANDING INSTRUCTIONS

A legal draftsman cannot act without having received instructions from his client. He must take fullest instruction from his client on what his client has in mind and want. In fact the draftsman raw material is the instruction he receives from his client which constitute the fact of the case. It is important the draftsman considers the following in taking instructions.

(a) When conducting of interview: Just as the saying goes that there is no second chance to make first impression. A lawyer and good draftsman must win the client's confidence.

This a draftsman can do by

- appearing efficient in his action from the start of the interview,
- Being in control during the entire period of the interview,
- feeling and identifying himself with the mood of the clients but not in a mournful mood,
- looking and feeling pleased to see the client,
- having a good and clear office environment,
- paying attention to the client.

The advantage of skillful clients' interview was captured and expressed by Sally Lloyd-Bostock in the following words:

a lawyer who is easy and pleasant to talk to will have happier clients, but that is not the only advantage. If interactions with clients are handled well, there is evidence that the result will be effective handling of case, more co-operative and competent clients (who pay their bill), and less time wasting...

(b) Use of checklist

Checklist is a form containing a list of matters on which instruction is to be taken. It is also called instruction forms. The advantages are that it:

- aids lawyers especially the junior ones when asking questions
- solves the risk of forgetting vital issues in conducting interview i.e. it serves as a guide when conducting interview.
- helps the draftsman to present the draft in an orderly manner without omitting anything.

A checklist should be flexible and frequently updated to accommodate recent developments.

(c) Listening and questioning clients. A lawyer must be a good listener; it is a way of gaining client's confidence. Listening attentively will enable you understand your client's instruction and enable a draftsman to ask appropriate questions. The skill of listening is that a lawyer must be active listener which shows in form of body language. The lawyer should question only when necessary. The question can be open, closed or hard. Open question allows client to narrate a story. Closed question limits the answer expected from the client to yes or no, while hard questions are designed to bring out answers not favourable to the client because client always present fact in biased language.

(d) Advising the client. The first reason that brought the client to you is to receive advice from you and your understanding of the fact is what leads to advice that satisfies the client. The lawyer/draftsman should bear in mind when advising the client that he:

- must be firm but polite in advising his client.
- may be liable for negligent advice.

3.2 ANALYSIS, CLASSIFICATION AND RESEARCH

This is where the analytical skill of a lawyer or draftsman starts. This is where the distinction between a lawyer and non lawyer is brought to bear. The lawyer knows where to find the laws. At this stage the lawyer classified the fact received from the

client and applies the relevant laws. The fact may fall generally into criminal or civil matter, or public or private law. After the classification the lawyer goes to the library for research to gather material. He uses both secondary and primary sources. The secondary source of legal materials includes books, articles, journal written by authors e.g. "Law of Contract" by Sagay. Secondary source serves as starting point of a legal research because it directs the draftsman to the primary source. The primary source of legal materials includes the Statute Law Report, the Laws and the Acts, e.g. the Constitution, Evidence Act, Laws of Federation of Nigeria etc. At this stage expert advice may be sought especially where the transaction has multidisciplinary perspectives. e.g. Contract on construction may require the lawyer seeking the expert opinion of a civil engineer. The lawyer's greatest tolls in book. Imhanobe quoted in his book Legal Drafting and Conveyance at page 14 the statement of Hon. Justice Anthony Ekundayo that:

what is anyone looking for in the legal profession anyway if he does not intend to keep a good library? A lawyer is better without a wig and gown; he may still make a living as solicitor, legal executes or as an advocate appearing before those courts that carry on happily without robes but with no library he would be showing the fate of a blind man holding a driving license.

Good draftsman must:

- (1) have a good library,
- (2) understand the use of library,
- (3) have a good relationship with his colleagues to enable him use their libraries,
and
- (4) be vast in the use of ICT as resource tool, e.g. Google, Wikipedia etc

(3) PLANNING THE DRAFT

This stage enables you to plan before drafting because it is a truism that he who fails to plan, plans to fail. This stage enables you to

- choose the right format to use as different legal document requires different format. E.g. the format for Will is different for letter or deed.

- present your draft in a logical order.
- keep together related matters and group under the same head.

The work of a lawyer at this stage is likened to that of architect in a building project. It is fundamental to the structure of a house. A good draftsman must have a good plan which starts with having clear thought of what he wants. Where precedent and checklist are used, the draftsman must pick the important issues that should be included in the draft. This planning stage often entails the gathering of relevant materials.

COMPOSITION

This is the most tasking stage mentally. Attention is paid to word choice, sentence, structure, paragraphing and grammar. However, this is made easier by using precedent. Precedents can be developed as a standard form by the draftsman, or obtained externally. Many draftsman use Kelly's draftsman. The advantages of the use of precedents are that it:

- reflects decades of experience,
- saves time,
- useful for learning, and
- ensures consistency in style.

A draftsman in using precedents must be mindful that

- (a) some of them are obsolete,
- (b) some are foreign,
- (c) they are expensive and unaffordable to young lawyers
- (d) once established, it stagnates.
- (e) he may not have a precedent that meets all his need and may need to read several precedents.
- (f) Though "cut and paste" can be used to achieve a new draft, careless cut and paste from different precedents could lead to style failure.

Precedents must be used with modification to the Nigeria context. See *Olofintuyi v. Berclays Bank (1965) NMLR 142*.

The use of ICT now makes drafting easy, every draftsman requires a basic knowledge of the use of computer in this modern days.

QUALITY CONTROL AND EDITING OF THE DRAFT

Drafting is mentally tasking and often due to pressure of work, a draftsman is blind to his own short comings. The essence of quality control and editing is to overcome this. There are two stages of editing a legal document. Firstly, the draftsman leaves the documents for a while and returns and edits it. The second is the use of colleagues, editor and linguistics experts. This is to help discover omissions, check to grammar and consistency, jargons, formatting, spellings, punctuations, typographical, figure, capitalization. The second method is preferred because is possible for the draftsman to go through his work without noticing his mistakes. Also suggestion and comments of colleagues are very useful. Errors no matter how minor must be avoided as it casts doubt on the competence of the draftsman.

SELF ASSESSMRNT EXERCISE

Discuss the stages of drafting a legal document.

4.0 CONCLUSION

According to Imhanobe "a good writing makes the reader's job easy; bad writing makes the reader's job difficult. Writing is a pervasive skill that all lawyers must possess because written communication is essential in the profession. Writing is a skill, which is learnt by writing and not merely by acquiring knowledge of the rules of writing." to help you in your lifelong commitment to writing we examined the various stages of drafting not only to make the draft technically and grammatically correct but to make the draft readable and comprehensible by the reader. It is agreed that the only road to proficiency in writing is constant and unending practice.

5.0 SUMMARY

At the this unit, we learnt –

- The various stages in drafting legal document
- The use of checklist and precedents
- How to take instruction from our client.
- How to plan, compose and edit a draft.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the stage of drafting legal document.

7.0 FURTHER READING

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MODULE 1

UNIT 4: CLARITY AND ACCURACY IN LEGAL DRAFTING

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Aid to clarity and accuracy
 - 3.2 Some useful words and phrases
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

The core duty of a draftsman is to accurately express the intention of his client by making the draft document clear and unambiguous. Documents are drafted to preserve testimony of the matters which they relate. Ambiguous and unclear documents cannot meet this aim. Ambiguity can be avoided by engaging the aid to clarity and accuracy popularly referred to as aid to clarity and accuracy. Complementary to this are some useful words and phrases which must be carefully used to avoid ambiguity.

2.0 OBJECTIVES

The aim of this unit is to expose you to the tools that will make your drafting of legal document clear, accurate and precise. You are expected to learn some

useful aid to clarity and accuracy, as well as words and phrase that must be carefully used. These will make you a good draftsman.

3.0 MAIN BODY

3.1 AID TO CLARITY AND ACCURACY

The following are aid to clarity and accuracy.

(a) PUNCTUATION

This is the use of a standard set of signs, symbols or typographical devices such as capital letters, bold or italics in hand written, typed or printed documents by which meaning is clarified and sentences are divided into grammatical or structural units. The use of punctuation evolved with the invention of printing. Examples of punctuations include coma, semi, coma, full stop, question mark, exclamation mark, bracket, and hyphen. The proper use of punctuation helps to aid clarity and removes ambiguity. Section 3 of the interpretation Act 1964, Cap 123 LFN 2004 provides that "punctuation forms part of an enactments and regard shall be had to it accordingly in constructing the enactment." This was applied by the court in *Shell B.P v. Federal Board of Internal Revenue* (1976) 1 FNLr 197. This position in Nigeria is different from the English law which disregards punctuation as forming part of an enactment because old statutes were generally not punctuated. However, it is generally agreed that punctuation aids the reader to better understand the document. A good draftsman should possess a good knowledge of grammar and working practice of Standard English for a proper use of punctuation.

(b) USE OF DEFINITION/INTERPRETATION CLAUSE

This provision is designed to serve as a dictionary for legal document. The functions include:

- to delimit the meaning of the word,
- use to save repetitions,
- to narrow the meaning of the word,

- helps the reader to understand the context in which the words are being used in the document.

In most legal documents the definition is usually introduced by “hereinafter” or “called”. E.g.

- “...in this agreement called “the purchaser or the owner”.
- “In the law unless the content otherwise admits ‘man’ includes woman, girl and boy.”

The rule of drafting demands that:

- the word defined must be written exactly the way it is used in the document,
- it is meant only for words used in a technical sense,
- the meaning given should not be generally opposite the accepted meaning e.g. “girl” to mean “boy”,
- the words defined should be arranged in alphabetical order,
- the word defined must be in inverted coma,
- there must be a connecting word e.g. “means” or “includes”,
- the meaning given the word defined.

These last three rules are the main components of every definition clause.

Note that the different between the use of connecting words “means” and “include”. “Means” connotes exhaustive while “includes” connotes not exhaustive. E.g.

“Man” means a married man. This is exhaustive.

“Person” includes corporation. This is not exhaustive.

(c) REPETITION OF PREPOSITION

This is necessary to avoid ambiguity especially in enumeration. Prepositions beginning an enumeration are repeated before each item within the enumeration. E.g.

“To the children of John and Jane”. This may mean any of the following.

- i. To the children of John and children of Jane

- ii. To John and children of Jane
- iii. To the children of the marriage of John and Jane.

See Harper (1914) 1 Ch. 70.

If (i) is intended it should be written thus: "to the children of Jane and the children of John".

(d) EJUSDEM GENERIS

This means that where a particular word of a class (usually three words of at least one common characteristic) are enumerated and is followed by general words or phrase like "or other words" or "anything else". The general words are to be construed as being limited to the class being enumerated by the particular words. However, this may be avoided by using or adding the phrase

"...whether of the sense genus or not".

See *Cotman v. Brougham* (1981) 514 or adding "without affecting the generality of the foregoing".

(e) DESCRIPTIVE WORDS

This is used to shorten the length of the document to make it concise and elegant, e.g.

Between John Okoh, Peter James and Okoro Patience all of No. 2 Okoro Street, Ikeja, Lagos (called the vendors).

It can also be used to describe price or property. The use of hereafter to introduce the descriptive words is archaic. Use the word "called" and delete "hereinafter."

(f) SCHEDULE

This is used in a document to banish excessive detail to the end of the document to guarantee free flow of information and avoid distracting the reader. Details to be banished includes map, graph, survey plan, diagramme,

long list of items, forms etc. Where there is more than one schedule. They are to be numbered serially. The schedule particularly in a legislation always has a subhead which describes the contents of the schedule. The subhead in a schedule forms part of the document and is useful in the construction of the documents. However where there is a conflict between the provision of a schedule and the main part of the document, the latter prevails. See *Egolun v. Obasanjo (1999) 5 SCNJ, 120; A.G. v. Lamplough (1878) 3 EX. D, 214.*

(g) USE OF INTERPRETATION ACT

Many confuse this with the interpretation clause. This is an Act that provides definition and interpretation of the Acts of National Assembly and other enactments. Interpretation clause on the other hand is a provision in an enactment or document. The Interpretation Act is advantageous because it:

- aids clarity,
- shortened and simplify written law by avoiding needless repetition,
- provides consistency of form and language.

The interpretation Act is relevant where the law specifically makes reference to the Act or where no definition or interpretation clause is provide for in the law.

3.3 SOME USEFUL WORDS AND PHRASES

The following words and phrases are to be used carefully to avoid ambiguity.

“And/Or”

This is the use as one word for something that has a conjunctive and disjunctive sense together. It means either or both. The use of “and /or” has been criticized by the Bench. Viscount Simon in *Bonitte v. fuerst Bros (1944) A.C. 75* stated that “the repeated use of that bastard conjunction “and /or” which I fear become the commercial courts’ contribution to basic English.” Lord Reid in *John G Stein Co. v. O’Hanlon (1965) A.C. 890, 904*

express similar view that the symbol "and/or" is not yet part of English." It should be used sparingly only when it will not lead to ambiguity.

"A, An"

"A, An". They are both used in singular sentence for indefinite and unidentified article. "An" is used where the first letter of a word is a vowel.

E.g. "an egg".

"A" is used where the first letter of a word is a consonant.

E.g. "a chair".

To avoid their use, you can use "the" .

E.g. instead of saying "a man" or "an egg". You can say "the man" or "the egg".

The latter is definite and identifies the object.

"Any"

This is an indefinite word that can be used in any of the following senses.

- To mean universality e.g. "any car"
- To mean either singular or plural e.g.
 - "any student may speak" - used in the singular sentence
 - "appointment into any ministry is through the board"- used in the plural sentence.
- For reoccurring occurrence e.g.
 - "the clerk shall work with any speaker as they assume office".

The problem of use of "any" was manifested in the interpretation of "any action" as contained in section 2(4) of the Public Officer Protection Act where some construed it to mean "all action".

However, this controversy can be avoided by the use of "all action" if that is what is intended.

"The"

"The" indicates definite and identifiable article. It should be used instead of "a" or "an" because it is more precise.

"THAT" "WHICH", "THAT IS TO SAY"

"That" is restrictive pronoun, "which" is non-restrictive pronoun. They are not to be used interchangeable.

"That is to say" is used to explain the meaning of a principal clause. What follow cannot be contrary to the principal clause.

"NAMELY", "TO WIT"

They mean the same thing, used to indicate what is included in the previous term. E.g. "There are five regulatory bodies namely..."

See Re Brockett (1908) 1 ch.185.

"Deem" / "Deemed"

It means as if. It is a legal fiction used to create artificiality. It is used to create an imaginary state of affair. It is popularly used in application for extension of time. The deeming prayer in the application seeks that the process filled and served be deemed as proper. Where the deeming order is made, it obviates the applicant the need of filling and serving the respondent again which invariably saves time. It is better to use "as if", "is taken to be" or "is regarded as". See section 315(1) of the 1999 Constitution where the word "deemed" was used, this could be improved on.

"When"

It is used to denote time in the future and create condition precedent. E.g. "the house is to be given to Jane when she is 18 years old". In this sentence "when" is used in the same way as "if", "provide" or "in case". Where it is intended strongly to indicate the contingency, it is better to use "provided" or "if".

“Whenever”

This does not have a fixed meaning. The word gained popularity in Nigeria when President Musa Yar’Adua left Nigeria for Saudi Arabia for medical treatment in November 2009 without communicating or transmitting in writing to the National Assembly through its leadership. Sections 145 of the 1999 Constitution fell for interpretation. It provides that:

whenever the president transmits to the president of the senate and the speaker of the House of Representative a written declaration that he is proceeding on vacation or that he is otherwise unable to discharge the functions of his office, until he transmits to them a written declaration to the contrary such functions shall be discharged by the vice president as Acting President.

The argument was whether the requirement by the president was mandatory or discretionary. A school argued that it is mandatory while the other argued that it is discretionary. This argument could have been avoided if the draftsman had used the word of compulsion or discretion. E.g. “shall” or “may”.

“WHATEVER”

It means in its generality. It eliminates limitation or qualification or even the application of ejusdem generis rule.

“LESS THAN”/ “MORE THAN”

It is used in composition of periods, measurement and weight. E.g.

“The quorum of the meeting shall not be less than twelve members present”.

“Unless there are not less than twelve members present in a meeting, there is no quorum.”

Both are use with the word “not” to make it mandatory.

“WHERE”

It generally denotes place. However, when used in technical sentence to introduce a fact, it has the same meaning as "if", "so long as", "whenever". E.g. "Where you win the election".

However modern English prefers the use of "if" instead of "where" to introduce a set of fact.

"Between" and "Among"

Literarily "between" is used where there are two things or persons and "among" used where there are more than two things or persons. E.g., where a will states that:

"My trustees shall divide my estate equally between my son and the two grand children of my deceased daughter".

This can be constructed as:

(a) The son gets one half of the estate and the two grand children share the other half. If this is intended it should be redrafted to:

My trustees shall divide my estate into two equal shares, and (i) pay one of these shares to my son. (ii) Divide the second share equally between the two children of my deceased daughter.

(b) It could also be constructed to mean that the son and the two grand children of the deceased daughter each receives a third of the estate. If this is intended it should be redrafted to:

My trustees shall divide my estate equally among

- (a) my son
- (b) my grand child (peter)
- (c) my grand child (Jane)

"Subject to" "Subject as Aforesaid"

It means subject to the foregoing provisions as far as they operate. It is used to introduce a proviso, limitation or a restriction. See *Ebhota v. P.I and P.D. Co. Ltd (2005)* 15 NWLR (pt 948) 266;

E.g. "Subject to section 2."

It is better to use subject to instead of "subject as aforesaid".

Supplemental

Supplemental deed is use to either add or amend an earlier deed. To supplement connotes that there is an existing one which require amendment or addition. It avoids the necessity of repeating the contents of the earlier one which it supplements. E.g.

"This deed of conveyance is supplemental to the deed of conveyance (called the first deed) dated 10th June 2011 between the vendor and the purchaser."

4.0 CONCLUSION

Precision, accuracy and avoiding ambiguity are the targets of every good draftsman. A draftsman most resorts to all available aid to clarity and accuracy. Meeting these targets require some aid. Care must be taken in the use of some important words and phrase. Words have both grammatical and technical meanings. The technical meaning of a word is what a draftsman should stick to when drafting.

5.0 SUMMARY

At the conclusion if this unit you learnt:

- The aid to clarity and accuracy in drafting legal documents
- The use punctuation
- The use of some sensitive words and phrases which you must use carefully when drafting.
- That precision, clarity and avoiding ambiguity must be your target when drafting a legal document.

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6.0 TUTOR MARKED ASSIGNMENT

Discuss the aid to clarity and accuracy in drafting a legal documents.

7.0 FURTHER READING

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

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MODULE 1

UNIT 5: Expressions and words Relating to Time, and Rules and Techniques of Drafting

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main body
 - 3.1 Expressions and words relating to time
 - 3.2 Rules of drafting
 - 3.3 Techniques of drafting
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

One technical area in drafting is the issue of time. A draftsman must know when stated period begins and expires. Expressions and words relating to time must be use carefully to conveyed the appropriate intention. Also, there are rules and techniques of drafting which every draftsman must learn and have at heart when drafting a legal document.

2.0 OBJECTIVES

The aim in this unit is to equip you with the rules and technicalities of drafting legal document. The question of time is no longer a question of fact but of law. You will learn expressions and words relating to time.

3.0 MAIN BODY

3.1 Expressions and Words Relating to Time.

In computation of time there is the problem of whether to reckon exclusively or inclusively the stated date or dates in legal document. We shall consider some of these expressions.

“ON”- when used it is interpreted as inclusive of the stated date. E.g. on 10th November 2011, includes the stated date. It means the whole day.

“FROM”

When used the stated date is construed exclusively. E.g. from 10th November, 2011. It excludes the 10th and starts running on the following day 11th November, 2011. See *Cartwright v. Mc Cormick (1963) 1 WLR P. 187* and *Stewart v. Chapman (1951) 1 K. B. 796*.

“AT”

This is used where it is intended to take into account fraction (hours) of the day. E.g. “commences at 10.00am”. The interpretation is that parties intend to reckon with fractions of day.

“AFTER”

When an event is stated to take place after a named date the date of the event is to be excluded. E.g.

“This agreement commences after the payment of the sum of 1 million naira”.
See *Brown v. Black (1912) 1 K.B, 316*.

“TO”

If a legal document expresses “from 10th November to 15th November, 2011. Because of the use of “from”, 10th is excluded but it is not clear whether 15th is included because of the use of “to”. To avoid ambiguity it is better to add “both dates inclusive” or “the 15th day inclusive”.

"TILL" OR "UNTIL"

This does not give clear indication of inclusiveness or exclusiveness.

To avoid ambiguity use "till and including" or "till but excluding" e.g.

"till but excluding 10th November ..."

"till and including 10th November ...".

"AT THE EXPIRATION OF".

It may mean

- not later than the expiration of, or
- at or after the expiration of.

If within a reasonable time is intended, it should be so stated. See *the Good of Ruddy (1972) L.R, 2P and D 330*.

"DAY"

This means the period of 24 hours starting at a midnight and ending on the following midnight. Generally it is used to mean the whole day but where fractions, that is, commencing at a particular hour of the day is intended, it should be clearly stated by using the word "at". See *Belfied v. Belfied (1945) L.R 231, Cartwright (supra)*

"CLEAR DAY"

Simply means the period of 24 hours starting at midnight, excluding fractions of a day.

"WORKING DAY"

This means Monday to Friday excluding public holiday, Saturday and Sunday. In *Essien v. Essien (2009) 9 NWLR (pt 1146) 306*, the court of Appeal took judicial notice of Saturday as a work free day. An act to be done on public holiday shall be deemed duly done if done on the next day. See section 15(3) of interpretation

Act. However, where the act is to be done within a particular period not exceeding six days holiday shall be left out of account in computing the period.

“A WEEK”

This is a seven (7) clear days starting midnight of Saturday to the midnight of the next Saturday. However parties can state in their agreement that the period begins at midnight of any particular day of the week to the midnight of the corresponding day in the next week. E.g.

“Midnight Monday to midnight Monday”.

“MONTH”

Generally, month can be lunar or calendar month. In Nigeria a month is referred to as a calendar month. For example section 86 of Property and Conveyancing Law 1959 of the former Western Region of Nigeria provides that the word “month” in any deed, will, contracts, order, or other instruments means calendar month. On the meaning of calendar month section 18 of the Interpretation Act defines it thus:

“a calendar month ends upon the day in the next ensuing month having same number as that on which the computation began. But if the next ensuing month has not the same number as that on which the computation began, then the calendar month on the last day of the next ensuing month.

E.g. calendar month from

28th March expires on 28th April

29th January expires on 28th February

31st August expires on 30th September

See *Doods v. Walker (1981) WLR 1027*

Akeredolu v. Akinremi (1985) 2NWLR (pL10) p 787

The calendar month is calculated according to the Gregorian calendar.

“YEAR”

A year is a period of 12 months usually calculated from 1st January to 31st December. When a contrary intention is intended it should be clearly and expressly stated.

“WITHIN A REASONABLE TIME”/ “AS SOON AS POSSIBLE”

“Within a reasonable time” is common in commercial documents and in some cases implied. E.g. at common law time is not of essence in the sale of land but completion should be within a reasonable time. See *Monkland v. Jack Barclay (1951) 2 K.B. 252*. The phrase should be avoided as it is difficult for two persons to agree on what is a reasonable time. Where possible specify the time frame.

“As soon as possible” means shortest possible time or within a practicable time. It is imprecise, unspecific and its construction depends on circumstances of each case. This phrase has been given ordinary meaning by the court, if possible should be avoided as it is capable of more than one meaning. See *Varesests Administratrix v. Motor Union Ins. Co.Ltd (1925) 2.K.B.127*.

Both phrases should be avoided as much as possible. However, where there is uncertainty or the performance of act or obligation depends on prevailing circumstance their use become inevitable.

“NOT LATER THAN” / “NOT EARLIER THAN”

In both cases the stated date is inclusive in constructing the period of time.

“FORTHWITH” / “IMMEDIATELY”

Both words means prompt or without delay. They are imprecise and their meaning depends on the circumstance of each case. “Forthwith” is archaic and should be replaced with immediately. In *London Borough of Hallingdon v. Cutler (1967) 2 ALL E.R. 361*, where section 17(1) of the U.K Housing Act fell for interpretation and the court held that:

Forthwith" is not a precise time and provided that no harm is done. "Forthwith" means any reasonable time thereafter... It may involve action within days. It may not involve action for years...

SELF EXAMINATION ASSESSMENT

Discuss the various expressions and words relating to time.

3.2 RULES OF DRAFTING

According to Adubi drafting does not depend on aptitude and experience alone, but has its rules which can be explained and learned by any person of reasonable intelligence. The following rules should be observed by a good draftsman.

- (a) Every draft should cover the instruction from the client. This can be achieved by the use of precise, accurate, clear and Standard English words.
- (b) The draftsman should observe the use of short and simple sentence. This can be achieved by using statutory definitions, definition clause, schedule and paragraphing techniques, and avoid the use of verbosity, acronyms and archaic words etc. Use subject, verb and object style of sentence structure.
- (c) The draftsman should conceive general design. That is, the arrangement of both the idea and the draft in order and sequence.
- (d) Maintain accuracy and precision. All superfluous, verbosity, jargons should be avoided.
- (e) Observe arrangement and order: here draftsman should ensure that each sentence should bear such an order that most readily or clearly brings out the meaning of the sentence. To achieve this, George Coode's four elements of legal sentence should be observed. The four elements are to be followed in this order of case (where), the condition (e.g. "if"), the legal object or (natural or artificial person) and the legal action (legal consequences).
- (f) Avoid the common mistake in English language like

- (i) Subject verb agreement – There must be subject verb agreement (rule of concord) e.g. “The judge is delivery the judgment.”
- (ii) Fragment: This is incomplete sentence that lack either subject or verb. It should be avoided.
- (iii) Choppy sentence: Collection of sentences that do not link one to the other.
- (iv) Run off sentence: A sentence that contains two or more independent clauses wrongly joined.
- (v) Loose sentence: Joining of two sentences by wrong connective e.g.
 - “Lawyers do not like to study syntax so they write poorly”.
 - Not “lawyers do not like to study syntax and they write poorly.
- (v) Parallel structure: Sentences in sequences must follow the same structure.
 - e.g.
 - “ Lawyers like to sing, to write and to read.”
 - Not “lawyers like to read, to write and sing – This is bad.
- (g) Do not start a sentence with a conjunction, e.g. “and” or “but”
- (h) Document should be drafted in paragraph, short, in clauses and sub clause.
- (i) Active voice should be used instead of passive voice in most cases.
- (j) Draftsman should ensure the draft is checked by himself and colleagues,
- (k) Avoid abbreviations.
- (l) Vary the length of your paragraph but generally short.
- (m) Refer to people and companies by name.
- (n) Do not use all capital.
- (o) Use punctuation properly.
- (p) Minimize your use of proviso
- (q) When writing an amount, it better to use numerals not words.

3.3 Techniques of drafting

- (a) The Arrangement and Order: This is different from order of the idea on the document. Each sentence should bear such an order that will most readily and clearly bring out the meaning of the sentence.
- (b) Paragraphs: Documents should be drafted in paragraphs which should preferably be short. In some cases, they may be drafted in clauses and sub - clauses' duly numbered.
- (c) Sentence: Use short sentences wherever possible.
- (d) Use the active voice instead of the passive. Active voice makes the meaning clearer.
- (e) Checking the Draft: Check to ensure that:
 - (i) all names, places, figures and other technical words agree with the instruction received.
 - (ii) draft is sent to clients for perusal.
 - (iii) it is advisable to get a third party (another lawyer) who has not been involved to go over the draft. He would be quicker at spotting faults and other drafting errors.

4.0 conclusions

The problem of computation of time can be solved by understanding expression and words relation to time, rule and techniques of drafting. Knowing how to include or exclude stated date, the meaning of month and year, some imprecise phrases will reduce the problem of interpretation.

5.0 Summary

You learnt

- Your certain expressions and words relating to time

- The rules of drafting
- The techniques of drafting.

6.0 Tutor Marked Assignment

Discuss the rules and techniques of drafting.

7.0 Further Reading.

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

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MODULE 2

Unit 1 Official letter writing and words of negotiation

Unit 2 Memorandum writing

Unit 3 Legal opinion writing

Unit 4 Report writing

UNIT 1 LETTER WRITING AND WORDS OF NEGOTIATION

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Letter writing
 - 3.2 Types of letter writing
 - 3.3 Important of letter writing
 - 3.4 Format of letter
 - 3.5 Words of Negotiation
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Readings.

1.0 INTRODUCTION

Lawyers are letter writers, at least an average lawyer writes a minimum of two letters a week. The quality of a letter reveals the quality of the writer. Letters must be written in clear, straight to the point and simple language to meet the reader's needs and make it comprehensible to the readers. There are different types of letters but the concern of a draftsman is the formal letter.

2.0 OBJECTIVES

The objectives of this unit are to introduce and expose you to different types of letters, the technicalities, skills, importance and format of writing formal letter. You will also learn about words of negotiation.

3.0 MAIN BODY

3.1 LETTER WRITING

This is a means of communication. It is a permanent record of message. In writing a letter, the duty of the writer/lawyer is to ensure that the letter encapsulates the entire instruction of his client. Letters are written to make demand, to give notice, to represent the interest or instruction of the client. In writing a letter the writer/lawyer must avoid misrepresentation and before writing he must first consider whether writing a letter is necessary in the circumstance. In cases where a call or meeting will end the matter, a letter should be written.

3.2 TYPES OF LETTERS

Letters are variously classified into

- (a) Informal
- (b) Semi formal
- (c) Formal Letter

We are concerned with formal letter in this unit.

FORMAL LETTER: This is also known as official or business letters often they are written to readers and recipients outside the organization. However, sometimes it is used for in-house communications e.g. letter of promotion, congratulation, condolence to a staff. This kind of letter requires the use of Standard English, simple, accurate and direct words. In writing this letter rules and techniques of drafting, habits draftsman must avoid when drafting and aid to accuracy and clarity must be observed. The lawyer must be careful in the choice of words.

3.2 IMPORTANCE OF LETTER WRITTING

The importance of letter includes:

- (a) It may be used as evidence in the event of a dispute between the parties to the transaction.
- (b) It provides wide range of information.
- (c) It is a permanent record of the transaction.
- (d) It is a means of representing the company's image.
- (e) It is useful and efficient for targeted mass mailings.
- (f) It is more formal than memo.
- (g) It can be used as a follow up of conversation or telephone call.
- (h) It can lead to institution of action in court. See *Trade Bank Plc. V. Chami (2004) ALL FWLR (pt235)118*.

3.4 FORMAT OF A FORMAL LETTER

The format of a letter covers

- (a) The layout of the letter
- (b) How the writer indents and aligns the paragraph.
- (c) The writer's application of punctuation.

In writing a letter, writers adopts the following styles to promote elegance and simplicity-

Open punctuation: This style omits punctuation except apostrophes outside the body of the letter.

Closed punctuation: This applies punctuation especially the comma at the end of every line of the addressees' address, salutation and complimentary close.

Full-block format: This aligns all the paragraphs to the left hand margin of the letter head paper, with no indenting.

Semi block format: This aligns the date, complimentary close and signature to the right hand margin of the letter head while the paragraphs are indented.

Note that the modern style prefers open punctuation style and the full block style because of elegance, simplicity and economy of time.

LAYOUT OF A LETTER

The layout of a formal letter are:

(a) LETTER HEAD

Every firm is required to have a letter head paper for official letters, usually printed in A4 or A5 paper and should be well designed as it speaks of the image of the firm to the recipient. Rule 40 of the Rules of Professional Conduct for the Legal Practitioner 2007 provides and permits lawyers to use a letter head, envelope or visiting card, his name and address, qualifications and national honours. This should be reconciled however with Rule 39 (2) (3) of the Rules of Professional Conduct for the Legal Practitioner 2007 which prohibits advertizing, touting and publicity. The letter head should contain office address, telephone number, email, website, qualifications and honours. Avoid unnecessary information on a letter head.

(b) REFERENCE NUMBER

This is inserted by the office secretary. It aids filling, tracing and cross reference. It should be printed on the Letter head paper to remind the typist the need to insert both your reference and the other party's reference where known. E.g.

Your Ref:

Our Ref:

(c) DATE:

The letter should bear the date of dispatched. There are two style of dating. The British style and the American style.

American style: "November 10, 2011"

British style: "10 November, 2011."

Be consistent with one style and do not use 10/11/2011 in an official letter as it depicts lack of professionalism.

(d) NAME AND ADDRESS OF RECIPIENT:

This address here must match with what is written on the envelope. Your relationship with the recipient and protocols are factors that will influence how you address the recipient. If the recipient is a female state the marital status e.g. Miss, Mrs. or Ms. You can state the name and designation of the recipient.

(e) ATTENTION:

This is to be used only when necessary. It is necessary where there is a previous dealing with the person in an organization and where the letter is directed to that particular person. It should be

- Underlined
- In bold print and
- No full stop at the end of the line. E.g.

Attention Mr. John Okoh

(f) SALUTATION:

You can use "Sir", "Dear Sir" or "Dear Mr. Kunle,". The use of dear is a sign of respect. Where the recipient's name is mentioned, it makes it less former and shows knowledge of the identity of the recipient or indicates earlier contact with the recipient. Do not use "Dear sir/ madam" to a colleague. You can use "My Dear Johnson". To a group of colleague use "my dear colleagues". There is the new trend of omitting the salutation and complimentary close by the secretary and are left to be handwriting by the writer when signing the letter. This makes the letter friendlier, extra ordinary and gives it raw and personal touch. This is used for letters to contemporary or subordinates.

(h) HEADING:

This is also called the subject head. It is the summary of the message. It should contain names of the parties and description of the matter. The prefix "re" means in the matter of and is better used where the letter is a reply.

(i) BODY OF THE LETTER:

This is the part of the letter that contains the message. The length depends on the message. It could be a paragraph or more. Generally, the body of the letter should contain:-

(a) Introduction: contains the introduction of yourself, your client, previous dealings (where there any). E.g.

"Your letter dated..... refers"

"With reference to your advertisement"

" We are solicitors to....."

(b) The message: use simple, straight forward and appropriate words in the letter. Begin a paragraph with topic sentence .E.g.

"We write to inform..."

(c) The closing remark. This section is very important as it determines whether you will achieve the desire result or not. Use polite words, even when replying to a rude letter. Be firm particularly in a letter of demand. Make your demand and do not beg. The following rules as stated by Imhanobe are instructive.

- Do not threaten what you cannot carry out.
- Be mindful of how ordinary reader would see the threat.
- Avoid threat that will leave the reader an option that is not favourable to you.

(j) COMPLIMENTARY CLOSE:

The closing depends on the salutation and perusal reference.

In strictly formal letter use

"yours faithfully"

"Your sincerely"

In less formal letter use

"yours truly"

"Yours sincerely".

Do not use

"Faithfully yours" or

"Forever yours"

Writing to business associate you can use

"Best wishes"

"Regards".

Do not omit the comma at the end of complimentary close.

"Yours faithfully,"

(k) NAME AND SIGNATURE:

You signature on a letter makes you the author of that letter and places the error, mistakes or glory on you. You must read the letter carefully before appending your signature.

Note:

- Create space for signing.
- Sign on top of your name
- Indicates clearly when signing for someone. E.g.,
"for: The Dean."

(l) ENCLOSURES:

This is necessary where there is an attachment to the letter. This is indicated by "Encl"

(m) Copy:

This is necessary where the letter is to be sent to a third party. The aim is to bring to the notice of the recipient the other person or persons you are sending the letter to. It is indicated by "C".

(n) Addressing the Envelope:

Address the envelope properly considering the addressee's address. If it is a personal letter which you do not intend another to read indicate by writing on the envelope "private and confidential" or "personal"

3.5. WORDS OF NEGOTIATION

To avoid binding your client to agreement while negotiation is ongoing certain words or phrases have been designed to enable you negotiate freely without binding your client. These words are called words of negotiation. This is to encourage peaceful and out of court settlement of disputes. They are:

- (a) Subject to contract
- (b) Without prejudice

"SUBJECT TO CONTRACT"

This is used where the intention is not to create a binding contract. It should be written in capital letters across the top of the letter and for emphasis as well as to remove any doubt it should also be in the text of the letter usually near the beginning of the letter. The essence is to encourage out of court settlement. See *Maja Junior v. UAC (1973) CCHCJ/73 (unreported suit) delivered 3rd Sept 1973*, where Justice Odesanya held that

...the formula indicates especially in contract for sale of land, the parties intention not to be bound until the execution of a formal contract...

See the following uses.

* *UBA v. Tejumola & son Ltd. (1988) 2 MUR pt 79, 662.*

* *International Textile Ind. (Nig) Ltd v. Aderemi (1999) 8 NWLR (pt 614) 268.*

"WITHOUT PREJUDICE".

This is used in contentions cases to enable parties in dispute to enter into sincere discussion to reached amicable settlement on the basis that nothing said or stated in the letter will be used to interfere with his right of action. Once a letter

is marked without prejudice, such letter cannot be admitted in evidence in court of law. See *Ashibuogu v. A.G of Bendel state & another (1988) (SCNJ) 130*.

4.0 CONCLUSION

Letter is a form of communication in a permanent form. A man's quality and story can be told from his letter. The official letter which is concern of lawyer must be understood by a draftsman and he must know when to bind and not to bind his client by his letter. Lawyers are letter writers and a letter is message in a permanent form which can travel to where a lawyer may not go. It speaks of the quality of the writer and an image carrier of a firm.

5.0 SUMMARY

At the end of this unit you were able to learn

- The importance of letter writing
- The type of letter writing
- The styles/layout and format of letter
- The words of negotiation.

6.0 TUTOR MAKED ASSIGNMENT

Draft a formal letter following the format discussed in this module. A is owing B the sum of N200, 000.00.00 and A has refused to pay B. B has approached you. Write a letter of demand.

7.0 FURTHER READING

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

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MODULE 2

UNIT 2 MEMORANDUM

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Introduction
 - 3.2 Uses of memos
 - 3.3 Format of a memos
 - 3.4 Factors affecting the language used in a memo
 - 3.5 Types of recipients
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

The word "memorandum" is a Latin word. It means "something to be remembered." It is often abbreviated to "memos". It is an in house correspondence used for passing information in an organization. Memos and letters are similar in

(a) language (b) tone (c) style .

The major difference is that while memo is restricted to in house, letters are use for both in house and outside the organization. Memos are shorter in length than letter because it is used in the busy work environment. The development of information communication technology (ICT) has led to two types of memos which are paper and electronic memo. In Nigeria paper memo is more in use than the electronic memos because of infrastructural challenges. Imhanobe clearly highlighted the following advantages of electronic memo.

(a) High speed dispatch

- (b) Direct input from the keyboard
- (c) Simultaneous distribution to recipients e.g. by e-mail.
- (d) Possibility of instant response
- (e) Excellent security from access restriction.

3.2 USES OF MEMOS

Memo can be used for the following

- Keeping of written record
- Serves as a reminder to recipients
- Useful for routine information
- Provides in some cases suggestions and recommendation
- Used to confirm outcome of a conversation
- Can be use to alert the recipient of a problem
- To explain procedure
- Request for a thing
- To instruct or direct groups simultaneously
- Useful for future references.

3.3 FORMAT OF A MEMO

There are two parts of a memo. They are –

- (a) The memo head
- (b) The message

MEMO HEAD: In writing memo there are different styles of memo head but the following are the basic component of memo head:

- (a) Addressed to a recipients by using "To". E.g.
"To: The Dean, SOL."

It may be addressed to a class. E.g.

"To: All academic staffs".

It may be addressed through a person to another.

E.g. "Through: Dean, SOL

"To: DVC Academics, NOUN"

- (b) The name or address of the writer; usually start with "from" e.g.
"From: Dean, SOL"
- (c) Date: Memos must be dated the same as letter writing.
- (d) Subject: This is the heading of the memo. The same as letter writing.
- (e) Reference: The same as letter writing. E.g. "our Ref". "your ref".
Useful for filling and references.
- (f) Salutation: Use "Dear Sir" or " Sir"
- (g) The complimentary close is to be omitted. E.g. "Your faithfully" is not necessary.
- (h) Name and signing: It is important that the memo is signed to confirm authorship of the document/memo. Sign above your name. Where you are signing for another, clearly indicates. E.g.
"For: The DVC Academics".

THE BODY OF THE MEMO

The paragraphing format of fully or semi blocked, or open or closed punctuations are used. The body of the memo is divided into

- (a) The opening which is linked to the subject providing the reason for writing the memo.
- (b) The middle paragraph – provides further details on the subject. Important points may be bulleted, underlined or boldfaced.
- (c) The closing paragraph: This part states briefly the desired action from the recipient.

3.4 FACTORS AFFECTING THE LANGUAGE USED IN A MEMO

The factors are

- (a) The message.
- (b) The status of the recipient.
- (c) The urgency of the action.

3.5 TYPES OF RECIPIENT

Recipient of memo can be classified into

- (a) Junior: A memo may be addressed to a junior in the office. Your concern here is clarity not courtesies. Provide sufficient information to enable him or her understands.
- (b) A colleague: Be less formal, be polite and always recognise his status. E.g. Say "Kindly send me..."
- (c) A superior: Understand first what he wants, be brief and polite and be concern about courtesies.

4.0 CONCLUSION

Another form of communication in a permanent form is the memo. Memo and letter are akin in terms of language, tone and style. However, there exist distinction between the two in areas of uses, format, recipients and length. The use of electronic memo is growing in line with the growth of ICT in Nigeria.

5.0 SUMMARY

At the end of this unit we learnt –

- Meaning of memo.
- The uses of memo.
- The formats of memo.
- Factor affecting choice of language.
- The types of recipients.

6.0 Tutor marked Assignment

A seminar is being organised for all the directors in your company. As the secretary of the company draft a memo.

7.0 Further Reading/References

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

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Soetan O., (1997) *Elements of Legal Drafting* Lagos: Dredew Publishers.

MODULE 2

UNIT 3 LEGAL OPINION

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Legal opinion
 - 3.2 Points to note when writing legal opinion
 - 3.3 Format of a legal opinion
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Readings.

1.0 INTRODUCTION

Many lawyers are faced in their day to day work with writing of legal opinion. In fact, just like letter writing, it is an aspect of legal practice that a lawyer cannot escape particularly in Nigeria where many look up to lawyers for advice.

2.0 OBJECTIVES

The aim is to initiate you into the act of writing legal opinion. At the end of this unit you are expected to learn

- what legal opinion is,
- what you must note when writing legal opinion, and
- the format of writing legal opinion.

3.0 MAIN BODY

3.1 LEGAL OPINION

Legal opinion is the art of writing opinion on the implication of the action to be taken by the client or assessing the strength and weakness of the case of the

client. Letters and memos are means of communication but the aim of writing legal opinion is to proffer an answer to a question by the client. It is meant to inform the targeted reader (the client). A client comes to you with a problem, it is your duty to dissect the facts and give him or her legal position based on the information given to you. Understanding the fact in issue is paramount and necessary to enable you give a valuable legal opinion. The lawyer must take full instruction first from the client. The procedure of conducting interview earlier discussed should be followed.

- Take full instruction
- Understand the instruction
- Ask question to clarify your understanding
- Analyse and classify facts
- Research on the law in the area
- Write the opinion

3.2 POINTS TO NOTE WHEN WRITING LEGAL OPINION

According to Imhanobe there are three points to note when writing legal opinion.

They are:

- (a) Answer the question
- (b) Make answer clear, simple and comprehensive
- (c) Clarify the opinion limitation

ANSWERING THE QUESTION

The primary aim of writing legal opinion is to proffer answer or solution to the question posed by the client. In answering the question, be specific. For clarity the writer should refer the reader to the legal question (which is the issue) in opening paragraph of the opinion. E.g.

“Your instruction is that we advice on the constitutionality or otherwise of the continued detention of Mr. John Okoro.”

The question can be answered in concluding the opinion by saying

“The Hon. Commissioner of police has breached and is in breached of the constitution of Federal Republic of Nigeria having kept Mr. John Okoro in detention for the past three months without trial or releasing him on bail.”

The answer should be supported with relevant authorities, rules, regulation etc.

MAKING THE ANSWER CLEAR, SIMPLE AND COMPREHENSIBLE

These are the duties of every draftsman/lawyer. If the opinion is not readable and comprehensible there is no need writing. The draftsman must consider the educational and professional background of the client. If the client is a lawyer cases may be cited with reference. If a the client is a lay man avoid legal technicalities.

CLARIFY THE OPINION LIMITATIONS

Opinion may be limited by

- (a) time
- (b) circumstances, or
- (c) facts

State it clearly to enable the reader takes his decision either way.

3.3 FORMAT OF A LEGAL OPINION

Legal opinion has the following formats –

- (a) Opening: This is the introduction and reference is made to previous meeting, conversations, memo or letter where the question arose. This section contains the question to be answered.
- (b) Facts: This contains objectively a brief statement of relevant fact. This should be distilled from the instruction from the client.
- (c) Conclusion: This contains the answer to the question
- (d) Explanation section: This contains explanation of the answer and is supported with authorities e.g. Regulation, Judicial decision, Rules, Precedents etc.

- (e) Closing section: This is the advice section. Contains the action or steps you want the reader or your client to take.

4.0 CONCLUSION:

As seen above writing of legal opinion is very important as it offers answers to a legal question. To attain this, important points are to be noted and followed when writing legal opinion. There is a format of legal opinion which if followed makes the legal opinion clear and comprehensible. The ultimate aim of writing a legal opinion is to help the reader to decide on what next action to take after exposing to him the weakness and strength of his brief.

5.0 SUMMARY

At the end of this unit you learnt

- What legal opinion is
- What you should have at the back of your mind when writing legal opinion
- The format to follow when writing legal opinion.

6.0 Tutor Marked Assignment

What must the draftsman note when writing legal opinion?

7.0 Further Reading/References

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

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MODULE 2

UNIT 4 REPORT WRITING

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main body
 - 3.1 Report Writing
 - 3.2 Types of Report Writing
 - 3.3 Format of Report writing
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor marked assignment
- 7.0 Further reading

1.0 INTRODUCTIN

Government and other bodies often set up committees or body of inquiry to investigate a controversial issue and write a report in line with the terms of reference. There are different types of report writing and report writing has a special format.

2.0 OBJECTIVES

The Objectives of this unit is to introduce you to report writing. At the end students are expected to learn:

- (1) What report writing is all about
- (2) The different types of report writing
- (3) The format of report writing.

3.0 MAIN BODY

3.1 REPORT WRITTING

Committees are often set up by bodies and government with terms of references given to guide their operation and at the end of every committee's work (usually inquiry or investigations), the committee's is expected to submit its report to the body or the government. Report writing is the submission of a committee at the conclusion of its work based on the terms of reference of the establishing instrument. Writing it requires some skills and often written by the secretary who may be a lawyer.

3.2 TYPES OF REPORTS

The various types of report are as listed by Imhanobe are

- (a) Oral and written report
- (b) Extended formal report
- (c) Short formal report
- (d) Short informal report
- (e) Memorandum report
- (f) Minority report

WRITTEN REPORT

The most popular of all the different types of report is written report. It captures in-depth the challenges addressed in the report. Where there is a dissenting view, the minority may write a "minority report". The difference between report and letters, memos or opinion is that opinion is more detailed than the others. A report is written to provide detailed information to enable the reader accomplish a job.

3.3 FORMAT OF A REPORT

A report is expected to contain all or some of the following-

- (a) Cover page
- (b) Title page
- (c) Table of contents
- (d) Abstract (summary)

- (e) Terms of reference
- (f) Procedure
- (g) Findings
- (h) Conclusion
- (i) Recommendation
- (j) Appendixes (where applicable)
- (k) Bibliography (where applicable)

4.0 CONCLUSION

Report writing is appropriate where a controversial issue requires a detail investigation and where detailed information is needed to enable the establishing body accomplish a job. It is usually in form of written report.

5.0 SUMMARY

You learnt at the end of this unit.

- What report is
- Different types of report
- Different between report and letters, memo's or opinion
- The format of writing opinion

6.0 TUTOR MARKED ASSIGNMENT

Draft a report on the fuel subsidy saga in Nigeria.

7.0 FURTHER READING/REFERENCES

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

Merville, L. W. (1991) *The Draftsman handbook*, 2nd edn, London: Longman.

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MODULE 3

Unit 1 Legislative drafting, legislative power in Nigeria and qualities of a good legislative draftsman

Unit 2 Sources of material for drafting a bill and challenges of drafting a bill in Nigeria

Unit 3 Stages of drafting

Unit 4 Components of a bill

UNIT 1 LEGISLATIVE DRAFTING, LEGISLATIVE POWER IN NIGERIA AND QUALITIES GOOD LEGISLATIVE DRAFTSMAN

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Legislative Drafting
 - 3.2 Drafting process and Legislative process
 - 3.3 Legislative power in Nigeria
 - 3.4 Qualities of good legislative draftsman
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

Legislative drafting is an aspect of legal drafting. Legislative drafting means the art of drafting bill. It is different from legislative process. The custodian(s) of legislative power in Nigeria is the legislature and the qualities of bills passed into law are dependent on the quality of the legislative draftsman.

2.0 OBJECTIVES

The Objectives in this unit is to introduce you into the art of legislative drafting. You will learn what legislative drafting means, the legislative power in Nigeria and the qualities to imbibe to be a good draftsman.

3.0 MAIN BODY

3.1 LEGISLATIVE DRAFTING

This is the drafting of bill. It is the process by which policies, manifestos, or proposals are put in form of a bill for presentation to the legislature for passage into law in form of Act, Law, Bye Law or other subsidiary legislations as the case once assented to by the president, the governor, the chairman of local government or authorised body respectively. It is the process of drafting bill. The bill is earlier presented to the legislative house(s) who in turn after passage present same to the president, governor or local government chairman for his assent. Once assented to it becomes law. Legislative drafting is very relevant in democratic environment.

3.2 DRAFTING PROCESS AND LEGISLATIVE PROCESS.

Many confuse drafting process and legislative process to mean the same thing. The basic distinction between drafting process and legislative process are that drafting process is done by draftsman while the legislative process is done by the legislative houses. Legislative drafting starts with the receiving instruction to draft a bill from the sponsor to the point of making, preparing the bill ready for presentation to the house for legislative process to commence. Legislative process starts when legislative drafting ends. The legislative process entails the first reading, second reading to the committee stage when the clauses of the bill are looked into line by line to the receipt of assent by president, governor or local government chairman to make the bill a law. The drafting process requires drafting skills; the legislative process requires knowledge of constitutional law. A bill is no Act until assented to by Mr. President, no law until assented to by the

Governor and no Bye-law until assented to by the chairman of local government council. A bill is an expression or intention by the legislature until assented to. See *Obi- Akejule v. Delta State Government (2009) 17 NWLR (pt 1170) 292*.

3.3 LEGISLATIVE POWER IN NIGERIA

The power of law making is vested in the National Assembly and state House of Assembly by virtue of sections 4(1) and (6) of the Constitution of Federal Republic of Nigeria 1999, (as amended). The power to legislate on items and matters on the exclusive legislative list is the preserve of the National Assembly. The matters and items on the concurrent legislative list are to shared by both the National and the state House of Assembly, however, where there is a conflict between the law made by the House of Assembly with that validly made by the National Assembly, that which is made by the House of Assembly is void to the extent of its inconsistency and that of the National assembly shall prevail. See section 4(5) of the Constitution. Parts I and II of second schedule of the 1999 Constitution. The local Government council has power to legislative on matters/items on residual list. The national Assembly is the highest law making body in Nigeria, however the legislative powers of legislative arm is subject to

- (a) The provision of section 1(3) of the 1999 constitution which is to the effect that any law inconsistent with the constitution shall be void to the extent of its inconsistency.
- (b) Where the constitution has covered the field of a subject, any other law made has been held by the court to be "in operative" or "in abeyance" –in *A.G (Ogun State) v. A.G (Federation) (1982) NSCC I; INEC v. Balerabe Musa (2002) 3 NWLR (pt 806) 72 per Ayiola JSC (returned); Babajide Omoworare v. Iyola (2010) 3 NWLR pt (1180) 58; Inakoju v. Adeleke (2007) 4 NWLR (pt 1025) 423*.

3.4 QUALITIES OF A GOOD DRAFTSMAN

According to Imhanobe “the danger posed to the society by an incompetent draftsman is worse than the danger posed to the society by a fake medical doctor or builder”. To avoid this danger, a draftsman must possess certain qualities which include:

- (a) vast in law; should be qualified legal practitioner,
- (b) good knowledge of constitutional law and legal drafting,
- (c) good knowledge of linguistics,
- (d) possession of high mentality discipline,
- (e) high level concentration,
- (f) clear thought,
- (g) strong perception,
- (h) ability to work under pressure,
- (i) must be a team player; ability to work with others,
- (j) works under little or no supervision,
- (k) be a good listener,
- (l) must be a good planner,
- (m) good knowledge of sociology, politics and psychology of the society,
- (n) capable of handling confidential and classified information,
- (o) must be smart for his work,
- (p) regular and continuous practice (drafting).

According to Crabble “one can learn all the rules of swimming but that does not make one a swimmer; one has to get into water. That is where the text is”. Learning the rules are not enough because a lot is learnt by practicing the art of drafting.

4.0 CONCLUSION

Legislative drafting is art of drafting a bill while legislative process is the processes of passing a bill into law. The legislative power in Nigeria is vested in the legislature. The demand for legislative draftsman in a democratic setting is inevitable. A legislative draftsman must possess good qualities, learn the rules of legislative drafting and must

engage active practice of legislative drafting. Just like the swimmer, the test is in practice.

5.0 SUMMARY

At the end of this unit, you learnt

- The meaning of legislative drafting and legislative process.
- The legislative power in Nigeria.
- The qualities a good legislative draftsman must imbibe.

6.0 TUTOR MARKED ASSIGNMENT

Distinguish between legislative drafting and legislative process.

Highlights the qualities of good legislative draftsman

7.0 FURTHER READING

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult. .

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MODULE 3

UNIT 2 SOURCES OF MATERIAL FOR AND CHALLENGES OF DRAFTING A BILL

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main body
 - 3.1 Sources of materials for drafting a bill
 - 3.2 Challenges of drafting a bill in Nigeria

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 Further Reading

1.0 INTRODUCTION

The legislative drafter is not a policy maker but in he may assist the policy maker when drafting a bill to identify areas that require the intervention of the policy maker (legislature). To be able to do this the draftsman must have access to materials. In this unit we shall examine the sources of material for drafting a bill and the challenges draftsman face when drafting a bill in Nigeria.

2.0 OBJECTIVES

You are expected to learn the end of this unit

- Sources of material for legislative draftsman
- Challenges a legislative draftsman faces when drafting a bill in Nigeria.

3.0 MAIN BODY

3.1 SOURCES OF MATERIALS FOR DRAFTING BILLS.

The sources of materials for drafting bills are

- (1) The Constitution of Federal Republic of Nigeria, 1999 (as Amended). The provision of the Constitution is either "self executing" where it exclusively

covered the field of the subject matter or “non self executing” where it provides for general principle without covering the field of the subject matter but requires further legislative action by the legislature. E.g. Section 7 (1) of the 1999 Constitution which compels government of every state to legislate on the establishment, structure, finance, composition and functions of local government. A legislative draftsman must have understanding of the Constitution to be able to identify the provisions that are “non self executing”.

- (2) ELECTORAL PROMISES: promises are made to the electorate during election campaign and if the candidate emerges winner these promises if genuinely made require translation into law for implementation.
- (3) MANIFESTO: The party manifesto represents the party's intentions, motives, and opinion policies which is made to the public (electorates) during campaign for vote. If accepted by the electorates and they elect the party's candidate the manifesto form part of the contract between the government and the people. It requires also legislative intervention for implementation.
- (4) RESOLUTION OF THE LEGISLATURE: Resolutions are made pursuant to a motion moved by a member at the floor of the house on an important or urgent public issue or to correct this issue in the society. Resolution does not have the force of law. It may require enactment into law on the subject matter covered by the resolution to give it the force of law. The resolutions of the National Assembly on the removal of fuel subsidy could not be enforced on the President Jonathan.
- (5) LAW REFORM COMMISSION: Law Reform Commissions are often established by law. In Nigeria we have Nigeria Law Reform Commission established by the Nigeria Law Reform Commission Act, Cap N118, LFN, 2004. Its functions include
 - i. Review of law
 - ii. Codification of law
 - iii. Elimination of anomalies in the law
 - iv. Repeal of obsolete law.

Recommendation by the commission is a useful source of material for legislative draftsman.

(6) PROFESSIONAL BODIES AND CIVIL SOCIETY ORGANISATION (CSO) REPORTS.

The civil societies and professional bodies like Amnesty international, Nigeria Bar Association, etc conduct research and devote years on bugling issues in the society. Reports are issue at the end containing useful suggestion and recommendations. These reports are useful source of material for legislative draftsman. Some of these bodies initiate private bills. The fuel subsidy saga in Nigeria clearly shows that the CSO and various professional bodies in Nigeria are alive to their responsibility. Many of them are sending their reports and recommendations to the government and the House of Representative ad hoc committee on subsidy removal.

(7) JUDICIAL DECISION: Often the decision of court exposes the weakness of the law which can only be corrected by legislative intervention. The court can only interpret the law but can not make law. The judges often points out the weakness in the law in interpreting the law.

(8) EDITORIAL IN NEWSPAPER: This contains researched current issue carefully analysed and recommendations made. The recommendations are useful.

(9) PROPOSALS FROM MINISTRIES: They come in form of memo to the executive council for approval, when approved may acquired legislative action for implementation.

(10) GOVERNMENT WHITE PAPERS: Committees are set up by the government to look into and make recommendations on challenges facing the society. At the end of its work a report is submitted the government. E.g. Uwais report on the electoral reform. House of representative ad hoc committee on the removal of fuel subsidy headed by Hon. Farouk is expected to make a report to of it findings. At the end the government releases white paper accepting the recommendation in the report of the committee. The white paper is useful to the legislative draftsman.

3.2 CHALLENGES FACING LEGISLATIVE DRAFTSMAN IN NIGERIA

Legislative draftsman in Nigeria is faced with the following challenges;

- (a) They are usually unnoticed and unheard unlike their colleague (lawyers) in litigation and corporate practice as a result many lawyers do not take a career in legislative drafting.
- (b) The problem of “make it fast” syndrome in Nigeria. Grooming and proficiency in legislative drafting require long time commitment and practice. Many lawyers are eager to make it fast that they do not consider legislative drafting as a career.
- (c) Non recognition of draft bills for the award of Senior Advocate of Nigeria (SAN). Appearances in the court of Appeal and Supreme Court are counted for the award of SAN, the bills drafted by legislative draftsman is not counted. This discourage lawyers who are aiming at becoming SAN from paying serious attention to legislative drafting.
- (d) Hostilities from colleagues in government ministries. It requires maturity and patience to work with them.
- (e) Scarcity of research materials.
- (f) Scarcity of training programme for legislative draftsman
- (g) Lack of founding to properly go through the stages of legislative drafting as such there is always lack of consultation with the operators of the law.

4.0 CONCLUSION

We examine the sources of materials for legal draftsman. The various challenges encounter by legislative draftsman when drafting a bill were considered. The draftsman though not a policy maker must assist in identifying areas that require legislative intervention.

5.0 SUMMARY

In this unit, at the end you learnt:

- The sources of materials for legislative draftsman.
- Challenges facing legislative draftsman in Nigeria.

8.0 TUTOR MARKED ASSIGNMENT

What are the sources of material for legislative draftsman?

Highlight the challenges a draftsman faces in Nigeria.

9.0 FURTHER READING

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

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MODULE 3

UNIT 3 STAGES OF DRAFTING

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Stages of Drafting / Drafting process
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

In legislative drafting, drafting is not done half hazard but in a logical progressive manner from first to the last stage. The journey from stage one is not an easy one it involves going forward and backward. There are five stages of drafting process which we shall examine in detail in this unit.

2.0 OBJECTIVES

You are expected to learn the five stages of legislative drafting.

3.0 MAIN BODY

The five stages of legislative drafting are

- (1) Receiving and understanding instructions.

In receiving instruction from the sponsors of the Bill, the draftsman must fully understand the instruction he is being given in respect of the bill. To achieve this draftsman should focus his mind on making clear to the sponsors the kind of drafting instructions most helpful to him. The draftsman usually uses a guideline, drafting manual directions or notes on the instruction required to draft a bill. Also, the draftsman can consult the

sponsoring authority at the early stage after receiving the instruction. He should also attend the meeting of the sponsoring body when the bill is discussed. It is important that the draftsman bear in his mind and ensure the compliance of the following when taking instructions:

- (a) Sufficient background information of the bill: This will help the draftsman appreciate the perspective, the facts and the problem the proposal seeks to meet. The background of the bill are usually contained in the sources of materials, e.g. Constitution, judicial decision, manifesto, white paper etc.
- (b) The object of the law: The purpose which the law seeks to meet must be clearly stated. E.g. to cure a mischief. The object of a law will assist the draftsman in drafting long title, preamble and purpose clause of the bill.
- (c) Means of achieving the principal objects. The practical issues of enforceability of the proposed law are handled here. This may require the establishment of a body, stating the composition, power, function, qualification of member of such established body etc. This information assists the draftsman when drafting principal and miscellaneous provisions.
- (d) All known and anticipated challenges. These challenges may be legal, social or administrative.

(2) ANALYSIS

The draftsman after the receipts of legislative proposal (instruction) analysis the proposal in relation to

- (a) The existing law: This is to enable the draftsman avoid duplicity or repeal of existing law on the subject.
- (b) Potential danger area: Enable the draftsman to avoid conflict e.g. with the constitution (section 1 sub section 3). Ensure enforceability and to enable the draftsman advice the sponsor accordingly.

(c) Practicability: A law that cannot be implemented is no law. This occurs where (a) and (b) are not observed. Here requires knowledge of the culture of the people, social science and humanities.

(3) DESIGN

This is also known as the design stage. This is the structuring of information in such a way that enables readers to easily get the needed information. It covers the overall arrangement of the bill and the internal arrangement of sections. This aids the readers understanding of the bill. To also solve the challenge of leaving out vital points, the draftsman makes use of checklist and precedent at this stage. In dividing the bill into parts what is paramount is not necessarily the length of the bill but whether the proposed parts are independent. E.g. companies and allied matters Act 1990 has three parts: -

Part A – Companies

Part B – Business Name

Part C – Incorporated trustee.

See Reg v. Huntingdon D.C; Ex P Cowan (1984) 1 WLR 501 at 508

Alhaji Isikil Oladoyinbo v. Lord Edward Byron (2008) B. L.R (pt 1) 698

The different parts of CAMA were before 1990 covered by separate legislations. The advantage of arranging legislative in parts are:

- Ease of reference
- Clarity of presentation
- Easy comprehension by reader.

(4) COMPOSITION

This is the drafting of the bill. The draftsman uses precedent both local and foreign at this stage. A good draftsman should use provisions that are compatible with the purpose of the bill. The modern use of cut and paste must be used with care. The duty of the draftsman is to ensure that the bill is readable by using simple English language (the plain English). This

is because modern laws are not meant for the understanding of lawyer alone but the general public. This will also help reduced the level of ignorance of the law in the society. The draftsman must be precise and to achieve this, the draftsman must acquaint himself with the Interpretation Act, interpretation of words and phrases, read law reports and legal dictionaries. Draftsman must choose and use appropriate words.

(5) SCRUTINY

This is the stage of editing, proof reading to correct mistake and errors to ensure that the real intention is conveyed to the readers. If the other stages as followed, the work at this stage is made simple. Usually the bill is sent to editor after the draftsman has done self editing of the bill. The advantage of engaging independent eyes especially an experience draftsman is to help spot out errors or mistakes the draftsman may not notice and to tap from the editor's experience.

4.0 CONCLUSION:

There are stages a legislative draftsman must carefully follow if he is to produce a good bill. We carefully examined these stages distilling what should be done at every stage. The stages are rigorous but rewarding.

5.0 SUMMARY

At the end of this unit you learnt

- What to do in receiving legislature proposal
- How to analysis a proposal
- Design of a bill
- How to compose a bill
- Editing and scrutinizing of a bill

6.0 TUTOR MARKED ASSIGNMENT

Discuss the five stages of legislative drafting.

7.0 FURTHER READING/REFERENCES

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MODULE 3

UNIT 4 COMPONENTS OF A BILL

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main body
 - 3.1 Components of a bill
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

A bill consists of different components with each part having peculiar nature and functions. The understanding of these different components and their functions is necessary and important in drafting a bill. These components will be examined in this unit

2.0 OBJECTIVES

The students is expected to learn

- The different components of a bill.
- The nature and functions of these components.
-

3.0 MAIN BODY

3.1 COMPONENTS OF A BILL

The various components of a bill in logical order are

- (a) **LONG TITLE:** This is part of an enactment is useful in determining the scope and in the interpretation of a legislation. However, where the word of the enactment is plain and unambiguous it cannot be used to modify such a word. The features are that it is

- usually drafted in bold

- drafted after the whole bill has been drafted.
- common in Act/Law made under democratic government but not common under the military regime. See *Osawaru v. Ezeiruka (1978) 6 & 7 S.C 135 149.*

AN ACT TO PROVIDE FOR THE ESTABLISHMENT OF FEDERAL MORTGAGE BANK, FUNCTIONS OF THE BANK AND FOR CONNECTED PUPOSES.

The phrase “for connected purposes” makes it applicable to all the business in the Act/Law. There are basically three parts of a long title – the introduction states whether it is an act or a law, the part stating the function(s) and the closing part. Where the law seeks to repeal or amend, it should be so stated.

E.g. Electoral (Amended) Act, 2011.

(5) PREAMBLE: This is not regarded as part of the legislation but can be resorted to in interpreting a legislation. See *Osawe v. Register of Trade Unions (1985) 1 NWLR (pt 4) 769.* The purpose and function of a preamble is to state the reason(s) for the legislation. Where there is explanatory note, preamble is not needed. The use is currently fading away. See *Ogbonna v. A.G. Imo State (1992) 2 SCNJ (Pt 1) 26; Opeola v. Opadiran (1994) 5 NWLR (pt 344) 368.* See also the preamble to the 1999 Constitution.

Presently, preambles are used in drafting

- The constitution
- International treaty
- Ceremonial legislation
- Legislation meant to solve exceptional local problem. e.g. take care of taking of hostage or bombing in Nigeria.

(6) COMMENCEMENT: This states when the legislation comes into effect. The commencement date is different from the date of passing of the Act. In some cases the date of passage is same as commencement but in numerous cases the

e.g.

“There shall be established a body to be known as Nigerian Interest Authority (hereinafter in this Act referred to as “the Authority)

Where the law is being repealed but the statutory body is to continue, it is recommended to draft in simple form. E.g.

“The Nigerian interest Authority is established”

(9) INTERPRETATION CLAUSE/SECTION

This is the section the meaning of frequently used words are assigned their meaning in line with the context in which they are used. It can be used to extend, delimit or narrow the meaning of any word. As earlier discussed, “means” when used as a connecting word, the word defined is exhaustive while “include” when used as a connecting word means the defined word is not exhaustive.

(10) SHORT TITLE

According to Lord Moulton in *Vacher v. London (1913) A.C 107 at 128*, the purpose of short title is to identify, describe and cite the law. It is called a “statutory nick name”. It removes the stress of referring to the legislation under its full title. It forms part of the statute.

(11) APPLICATION

This provision is necessary where the application of the law is not to every part of the country, person or subject matter. Where the legislation is of general application, it obviates the need for this provision. E.g.

Law of Property and Conveyancing 1959 provides in section 1 (2) thus:

“This law shall apply to land within the region which is not held under customary law”.

Another example is the Zafara state Sharia Penal Code Law 2000, which applies to only Muslim faithful in Zafara state.

(12) DURATION: This provides for the life span of the legislation. Generally, in the absence of contrary provisions legislation is of perpetual duration until amended or repealed. See *Ibidapo v. Lufthansa Airlines (1997) 4 NWLR (pt 498) 124*. The law may provide for the duration of itself, empowers some persons or authority to fix such a date or state the occurrence of an event upon which it expires.

E.g.

“This Act shall continue till 20th May 2012 and shall then expire”

(13) SAVINGS: This is used to preserve certain law referred to as existing laws. It is targeted at saving law, rights or privilege that would otherwise be repealed if not saved.

(14) REPEAL: Repeal is a way of bringing the life of legislation to an end. This can be done expressly or by implication. See *Sossa v. Fokpo (2000) FWLR (pt22) 1111*

(15) SCHEDULE: This is used to banish technical and detail matters from the main body to aid clarity and avoid distraction of the readers. This is part of the legislation. See *Egolum v. Obasanjo (1999) 5 SCNJ 71 at 129. A.G. v. Lamplough (1878) EXD 214, 229*.

(16) EXPLANATORY NOTES: This is not part of the law and is often excluded when passing the bill to law. The essence is to explain the legislation in an easy and simple form. See *A.G. Abia state v. A.G Federation (2003) 4 NWLR (pt 809) 124*.

4.0 CONCLUSION

We examined the different components of a bill and the sequences or order in which they are to appear in a bill. Their relevances in interpreting a statute were considered.

5.0 SUMMARY

At the end of this unit, you learnt.

- The various components of a bill
- The logical order of presenting the components of a bill
- The relevance of these components in interpreting a statute.
-

6.0 TUTOR MARKED ASSIGNMENT

Discuss the various components of a bill.

7.0 FURTHER READING/REFERENCES

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

Asprey, M., (1996) *Plain language for lawyers*, 2nd edn, Sidney: Federation Press

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MODULE 4

Unit 1 Interpretation of statutes and tools of interpretation

Unit 2 Rules of interpretation of statutes

UNIT 1 INTERPRETATION OF STATUTES AND TOOLS OF INTERPRETATION

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main body
 - 3.1 Interpretation of statutes
 - 3.2 Tools for interpretation
- 4.0 conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further reading.

1.0 INTRODUCTION

It is universally agreed that the law makers are not the interpreters of the law they make. A draftsman must bear this fact in mind when drafting a bill. A separate organ is set up to interpret laws and in interpreting the statute the judiciary uses certain tools which we shall examine in this unit.

2.0 OBJECTIVES

The Objectives of this unit is to expose the students to

- What interpretation of statute means
- The body or arm of government saddled with the duty of interpretation of statutes in Nigeria.
- The tools of interpretation of statutes.

3.0 MAIN BODY

3.1 Interpretation of statute simply means the art of seeking to unravel and discover the meaning of the statute. The duty of interpretation of statute is that of the judiciary. Section 6 of Constitution of Federal Republic of Nigeria places the duty of interpretation of statute in the courts. The judges in interpreting the statutes must seek to discover the intention of the law makers. The question then asked is whether judges make law. The answer is no but they seek to discover the intention of the law maker. In *Utih v. Omoyivwe (1991) 1 NWLR (pt 166) 166*, the supreme court held that when interpreting statute it is necessary for the court to discover the intention of the law maker which is deductible from the language used in the law. In performing this duty, the court is confronted with words that are unclear or ambiguous. The traditional view is that where the words of the statute is plain and unambiguous effect should be given to it without considering any injustice or hardship such interpretation may occasioned and it is immaterial if the interpretation represents the intention of the law makers. However, a shift is now towards a more purposive approach especially where the words used in the statute are ambiguous and do not represent the true intention of the law makers. One of the reason for the question whether judges make law is hinged on the doctrine of *stare decisis* where the judgment of a higher court is binding on a lower court no matter its correctness or wrongness. This makes the interpretation of any provision of the law by a higher court binding on lower court in Nigeria and other commonwealth countries. The decision of the Supreme Court as the apex court in Nigeria is brining on all courts in Nigeria.

The difficulty in construction/interpretation of statutes by the court has led to

- (a) Dissenting Judgment
- (b) Court over ruling its earlier decision and departing from it.

A draftsman must be careful in the use of words to ease the interpretation by the court. Plain simple English should be used.

3.2 TOOLS FOR INTERPRETATION OF STATUTES:

In interpreting statute the court calls in aid the following:

- (a) The interpretation Act: This contains definition of legal words or terms. It is relevant when there is no definition clause or section in the legislation or where the legislation especially refers to it after interpretation. See section 3 of the interpretation Act 1964.
- (b) Definition section/clause: This defines the words used in the legislation. It clearly states the context in which it is use in the statute. It forms part of the statute and is vital tool for interpretation of statute.
- (c) Punctuations: They are useful in ascertaining the meaning and understanding of a sentence used for clarifying the meaning of a sentence. If properly used, it clarifies absurdity and clumsiness.
- (d) Long title and preamble: The long title is useful in determining the scope of the law while the preamble shows reasons for the desirability of the legislation. Both are useful aid in construction of the statute.
- (e) Law dictionaries: Law dictionaries like the Black's law, Osborn law dictionaries etc. are for guidance especially when applying the literal rule of interpretation and in the absence of judicial guidance.
- (f) Legal texts: legal texts like Law of Contract by Sagay, Legal drafting and Conveyancing by Imhanobe are for consultation. They are of no binding effect on the court. However, where a court higher in hierarchy accepts opinion expressed in a legal text as correct and applies it in a case such decision or opinion expressed by an author in the text is binding on lower courts in hierarchy. In *International Textile Industries v. Aderemi* (1999-2000) All NLR, 156, the text by Barnsley on Conveyancing Law and Practice (1973 edition) page 4 where the court accepted and approved the author's distinction between the contract stage and the complete stage in conveyancing.
- (g) Decision of superior courts defining words. Where a superior court in hierarchy defines a controversial word

(h) The rules of interpretation. These rules were developed by the common law judges over a long period of time.

4.0 CONCLUSION

The business of interpreting the statute is that of the court. This function is statutory provided for by the constitution. Every workman requires tools for his work. The court in interpreting a statute makes use of certain tools to discover the true intention of the law makers.

5.0 SUMMARY

At the end of this unit you learnt

- What interpretation of statutes means
- The legal basis
- The necessary tools in interpretation a statute.

6.0 Tutor marked assignment

Discuss the tools of interpretation.

7.0 Further Reading/References

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Nigerian Lecture Note on Legal Drafting and Conveyance, 2006/2007

MODULE 4

UNIT 2 RULES OF INTERPRETATION

CONTENT

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Literal Rules
 - 3.2 Golden Rule
 - 3.3 Mischief Rules
 - 3.4 Purposive Approach
 - 3.5 Ejusden Generis Rule
 - 3.6 Ut res magis volet quam pereat
 - 3.7 Expressio unis est exclusio atterius
 - 3.8 Noscitur a sociis
 - 3.9 Contra proferentes
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

We observed in Unit I that rules of interpretation is a tool for interpretation of statutes. These rules were developed by the common law court and the courts have continued to evolve new rules of interpretation to meet the interest of justice. We shall examine both the traditional and newly evolved rules of interpretation of statutes.

2.0 OBJECTIVES

The students are expected to learn:

- The traditional rules of interpretation of statutes
- The newly evolved rules of interpretation of statutes.

3.0 MAIN BODY

3.1 LITERAL RULE

This is the primary or plain rule of interpretation. This rule requires that words used in the statutes should be given their plain and ordinary grammatical meaning especially where the words used are plain and unambiguous.

The argument is that legislatures means what they say and say what they mean. The development of this rule is traceable to the case of *Sussex Peerage case, 8 E.R 1034 of 1057*, where the court stated that:

If the words of the statutes are in themselves precise and unambiguous, then no more can be necessary than to expand those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver.

This rule was applied in Nigeria in the following cases. *Akintola v. Adegbenro (1979) 6-9 SC 51*, in this case section 33(10) of the Constitution of the Western Region fell for interpretation. The Judicial Council held that:

It is the end the wording of the Constitution itself that is to be interpreted and applied and this wording can never be overridden by the extraneous principles of other Constitution which are not explicitly incorporated.

In *Awolowo v. Shagari (1979) 6-9 SC 51*, where section 34A (1) (c) of the Electoral (Amendment) Decree No. 32 of 1979 fell for interpretation. The issue was what is two-third of 19 States? The Supreme Court applying literal rule said through Fatai Williams

CJN that "Considering the words used in the sub section again, we are satisfied they are plain and unambiguous".

The Supreme Court restated this principle in *Our Line Ltd v. S.C.C (Nig.) Ltd. (2009) 17 NWLR (Pt1170) 382, 409, 410.*

The problems of this rule are:

- Its application most times does not lead to same conclusion in the same case – *Awolowo v. Shagari (supra)* even when the justices applied this rule, different conclusions were reached.
- It fails to recognise that though statutes are generally perpetual in duration but its function and functioning changes.
- It fails to recognise that a word has not just core meaning but fringe meaning which is subject to manipulation. See *Ojukwu v. Obasanjo (2004) FWLR (Pt. 222) 1666. Ndoma Egba v. Chukwuogor (2004) FWLR (Pt 217) 735.*

3.2 GOLDEN RULE:

This rule is to the effect that where the strict application of literal rule will lead to absurdity, inconsistency, injustice and hardship the language (word) should be modified to discover the intention of the legislature. It recognises the application of literal rule but to be departed from where it will lead to absurdity or hardship.

The Golden rule of interpretation evolved from *Grey v. Pearson 10 ER. 1216*, where the court held that:

the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency, the court should modify the language to discover the intention of the legislature.

This was supported by Lord Reid in *Luke v. IRE (1963) 1 All E.R. 655*, when he said:

...To achieve the obvious intention and to produce a reasonable result we must do violence to the words...

In Nigeria, golden rule has been applied in the cases of: *Bronik Motors v. Wema Bank (1983) NCCC 226*; *Adamolekun v. Council of University of Ibadan (1967) ALL NLR 40*; *Onyewu v. K. S. M. (2003) 10 NWLR (Pt 827) 40*.

3.3. MISCHIEF RULE

This is to the effect that in interpreting a statute, the court should seek to discover the mischief (error) or remedy by considering the following issues:

- (a) What was the common law before making the statute? That is the law before the making of the present one.
- (b) What was the disease of the commonwealth that gave rise to the statute? That is the defect or error in the previous law.
- (c) What remedy has parliament resolved and appointed to the mischief? That is the solution introduced in the new law to cure the defect.
- (d) The true reason of the remedy. That is the rational behind the remedy.

Where this mischief is identified and it is apparent that the legislature failed to deal with the mischief, the court in interpreting the statute is to interpret it to suppress the apparent mischief and make appropriate remedy. See *Smith v. Hughes (1960) 2 ALL E.R 859*.

The rule and the conditions for its application were developed in the case of *Heydon's (1584) 3.C. Rep 79*. The Nigeria courts had upheld and applied this principle in the following cases:

Savannah Bank v. Ajilo (1989) 1 NWLR (Pt97) 305

Abioye v. Yakubu (1991) 5 NWGR (Pt 190) 130

NEW Ltd. V. Denap Ltd. (1997) 10 NWLR (Pt 525) 481

S.P.P.C v. Isaiah (1997) 6 NWLR (Pt 508) 238

Omoijahe v. Umoru (1999) 8 NWLR (Pt 64) 178 at 186

National Assembly v. President (2003) 9 NWLR (Pt 324) 104

This rule is advantageous in the following ways:

- Recognises the changing function of law
- Avoid the hardship occasioned by literal rule.

The criticisms against mischief rule are that:

- It encourages judicial activism which leads to usurpation of power.
- It advances new policies especially where there exists no mischief.

In spite the criticism, it is useful for developing countries like Nigeria.

3.4 Purposive Approach

This is one of the newly evolved rules of interpretation. Just as the name connotes it requires an interpretation of statute to give effect to its general purpose.

It takes into consideration both the words used in their ordinary meaning and the context of its usage. The rule allows judge to make use of background materials (legislative history) that led to enactment of the legislation.

These background materials include proceedings of Committee stage, official report or materials used by the legislature before enacting the law. This is to enable the court discover the mischief and handle it appropriately. This rule removes the exclusionary rule which prohibits the admissibility of background legislative material in interpreting a statute.

According to Lord Denning in *Magor and St. Mellons RDC v. Newport Corp (1952) A.C. 189*, that what the legislature has not written the court must write. Though, Lord Simmonds in the same case regards Lord's Denning position as "usurpation of

legislative function under the thin guise of interpretation." In Nigeria the attitude of Nigeria Judges tends to follow the position of Lord Simmonds. See *Dapianlong v. Dariye* (2007) 8 NWLR (Pt 1036) 239,373 *Ladoja v INEC* (2007) 12 NWLR (PL1047) 119 at 189.

3.5 Ejusden Generis Rule:

The Black Law Dictionary (6th edition) comprehensively describes ejusden generis in the following words:

Under 'ejusden generis' canon of construction, where general words follow an enumeration of particular class of things, the general words will be construed as applying only to things of the same class as those enumerated

E.g. "goat, dog, sheep and other animals"

The general words "other animals will be construed from those enumerated from the enumeration, "goat, dog, sheep" are all domestic animals.

See *SS Knutsford Ltd. v. Tillman and Co;* (1908) 2K.B. 385 at 397; *Jammal Steel Structure Ltd. v. A.C.B* (1973) NSEC 619; *Bronik Motors (Supra)*. *Okuneye v. FBN* (1996) 6 NWLR (Pt 457) 749.

However, the application of ejusden generis rule is a matter of choice. The draftsmen can exclude its application by:

- (a) Adding "without prejudice of the following" or
- (b) Adding "including but not limited to..."

3.6 Ut Res Megis Valet Quam Pereat:

Means that where alternative constructions are open, that alternative is to be chosen which is consistent with the smooth working of the system which the statute purports to be regulating and that alternative is to be rejected which would introduce

uncertainty, friction or confusion into the working of the system. See Lord Shaw statement in *Shanon Realties Ltd. v. Villeda St. Michael (1924) AC 185 at 192, 193.*

This require the court to interpret legislation to give effect rather than to destroy the intention of the law makers. This can be done by the court departing from strict literal interpretation in order to given effect to the intention of the law makers and avoid confusion. This is common in interpreting the Constitution in Nigeria. See *Nafiu Rabi v. the State (1981) 2 NCLR, 293. Tukur v. Gongola State (1989) 4 NWLR (Pt 117), 517.*

3.7 Expressio Unis Est Excusio Alterius

This means that the express mention of a thing is the exclusion of another. See *A.G Bendel v. Aideyan (1989) 4 NWLR (Pt 188) 646 at 672; Osahon v. FRN (2003) 16 NWLR (Pt 845), 89.*

3.8 Noscitur a Sociis

It connotes that the meaning of a doubtful words phrases in a sentence may be derived from the meaning of accompanying words or phrases. This is deriving the meaning from the whole clause which is the context of usage. See *Garba v. FSC and Another (1988) NWLR (Pt 71) 449.*

3.9 Contra Proferentes:

This is used in construction of commercial documents. It means that if a word or a phrase in a document is capable of more than one interpretation it should be construed against the maker. The application has been extended to statute in Nigeria. See *A.G Bendel v. Aideyan (Supra).*

4.0 CONCLUSION.

The rules of construction though do not assert same force of law like legislations they are relevant and useful in giving effect to the true intention of the law makers. We discovered that no single rule is superior to the other. Their application depends on the circumstances or facts of each case. Some of these rules of interpretation have been

criticised e.g., mischief rule has been criticised on ground of judicial activism but we agreed that judicial activism is necessary requirement for developing states like Nigeria. Understanding these rules is useful to the members of the bar, the bench and the society at large.

5.0 SUMMARY

At the end of this unit, you learnt the various rules of interpretation from the traditional rules to the newly evolved rules.

6.0 TUTOR MARKED ASSIGNMENT

Judges make law, Discuss

7.0 FURTHER READING/REFERENCE

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

Cross, R., (1976) *Statutory Interpretations*, Butterworth

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MODULE 5

UNIT 1 WILL, APPLICABLE LAWS, ADVANTAGES, AGE OF TESTATOR AND POINT TO NOTE WHEN DRAFTING A WILL

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Content
 - 3.1 Definition of a will
 - 3.2 Applicable Laws
 - 3.3 Advantages of making a will
 - 3.4 Requisite Age for a testator
 - 3.5 Points to note when drafting a will
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor marked assignment
- 7.0 Further reading

1.0 Introduction:

There are various ways of disposing one's property during or after one's life time. The instrument of disposing a property during one's life time is different from the instrument to be used after one's life time. Will is an instrument of disposition of property after one's life time. It has special features and it is important as it helps to solve the fear and anxiety of what happens to one's estate, corpse and dependants after one's death.

2.0 Objectives

At the end of this unit student are expected to learn

- The meaning of a will
- The distinction between a will and codicil

- Applicable laws
- The features of a will
- Advantages of making a will
- Requisite age of the testator
- Important points to note when drafting a will.

3.0 Main Content

3.1 Meaning of will

According to Imhanobe “a will may be described as a testamentary document executed according to law and voluntarily made by a person with a sound disposing mind by which he gives direction to persons called executors concerning the disposition of his real and personal property after his death.”

According to Adubi “a will is the expression by a person of wishes he intends to take effect only at his death.” The distinction between a will and other modes of disposition is that a will is ambulatory. A codicil is a supplementary will by which the testator alters, add to or revokes his or her earlier will. A codicil is similar in nature with a will as regards both purpose and the formalities. The maker of the will is called “testator” while the person to whom the benefit of the will is made is called the “beneficiary.” The person given the power to administer the will is called the “executors”. The executor can also be appointed a trustee. A will is said to be ambulatory because it speaks from death. Until the death of the maker (testator) the will does not take effect. A will takes effect on or after the death of the testator. This is the mark of difference between will and other means of disposition. E.g. gift, lease, etc.

3.2 APPLICABLE LAWS

The laws applicable to will in English form are:

- (1) The wills Act 1837 amended in 1852 and became Wills Amendment Act, 1852.
- (2) The Wills Law of various states.
- (3) The High Court (Civil procedure) Rules of various states.
- (4) Case Law.

3.3 Advantages of making a will.

The advantages of making a will include:

- (1) It excludes the application of the Administration of Estate Law. This law provides and regulates the administration of estate of deceased person who died without a will (intestate). The law provides for the mode of distribution of the estate which may be contrary to the intention of the deceased. A valid will can be used to exclude the application of this law.
- (2) It enables a testator to decide who manages and administer his estate after his death by appointing executors. Where there is no will probate may be granted to administrators to administer the estate of the deceased. The dangers are that administrator may not be known to the testator during his life and the testator may not wish such a person appointed administrator to administer his property. A will gives the testator the freedom to choose the desired executors.
- (3) A will enables the testator to make preparation and provision for his burial. This is done by the testator notifying the executor in a separate document about his burial wishes so that it can be carried out before probate is granted.
- (4) Where there is a will, the executor's appointed law start carry into effect the wishes of the testator even before letter of probate is issued but where there is no will the administrator cannot until letter of administration is issued. The reason is that while the executors derived their power and authority from the will, the administrators derived theirs from the letter of administration.

- (5) It is cheaper where there is a will to administer the estate of the deceased than that of the deceased who died intestate. This is because a will helps to reduce the inheritance tax liability. See *Chief Registrar v. Shomefun (1936)* 13 N.L.R; 80
- (6) A will ensures continuity in the administration of the estate of the testator event of the executors' death. The reason is that by operation of law the executors of last surviving executor shall continue to administer the testator's estate but where there is no will the death of the last surviving administrator requires a fresh application for letters of administration.
- (7) The testator under a will can disinherit whoever he wishes and give his inheritance to who he wishes subject to the restriction on freedom of testamentary disposition.
- (8) A will enables the deceased make a gift to charity, person not related to him or her by blood or otherwise. This is not possible where there is no will as generally only those related to the deceased can benefit from the deceased estate.
- (9) A will enables a testator/deceased to appoint a guardian for his dependent who are infant
- (10) In a will, a testator can also appoint his executors trustees. This is impossible without a will.

3.4 AGE REQUISITE OF THE TESTATOR

The required age of majority to be capable of making a valid will is dependent on the relevant Wills Law applicable to the testator. The relevant wills law is the will law of the testator place of domicile. Under the Wills Act, 1837 the age of majority is 21 years but under the Wills Law of Lagos state, the age majority is 18 years. A person below these ages is regarded as a minor and cannot make a valid will. The relevant age is the age at the time of making the will. Where a minor makes a will, it is immaterial that he subsequently attained the requisite age. However, section 6 of Wills Law of Lagos state and 11 of Wills Act provide

for exception to this general rule. Soldier being in actual military service, a seamen or mariner or crew of commercial airline being at sea or in the air under the ages of 18 and 21 years can make a valid will, which is referred to as privileged will.

3.5 POINTS TO NOTE WHEN DRAFTING A WILL

A good draftsman in preparing a will should note the following practical points

- (a) Proper instruction must be taken. Ensure you take the instruction personally, cover the entire field, make use of Wills instruction form, take notes copiously where instruction is given orally, no information should be left out.
- (b) Must be diligent and careful. This is very important, any error detected after the death of the testator may mar the will and the solicitor may be liable for negligence.
- (c) Must have a good knowledge of the law. This is important to help determine the requisite age, testamentary capacity, use of Jurat.
- (d) Knowledge of the testator's property. Details should cover the title, location and value of such property. This to enable the draftsman advise the testator on tax liability and for equitable disposition. See *Taylor v. Taylor (1875) LR 20 Eq 155*. Also it will help know the property subject to customary law e.g. the *igigbe* custom in Benin kingdom of Edo state.
- (e) Knowledge of the composition of the testator's family.
- (f) Confirm the existence of any will.
- (g) The executors. Advise him on factors to consider in appointing executors and the necessity of also making executors trustees.
- (h) Note the testator's funeral wishes.

4.0 CONCLUSION

A will is necessary to enable the testator decide after his death what happens to his estate and even decide how he is to be buried. A codicil is a mini will as it

supplements the will. A testator must be of full age at the time of making the will else the will is void. The relevant age depends on the applicable law. A draftsman must note certain practical points when drafting a will to ensure that the intention of the testator is fully covered.

5.0 SUMMARY

At the end you learnt

- The meaning of will
- The distinction between a will and a codicil
- The features of a will
- The advantages of making a will
- The applicable laws in Nigeria
- The requisite age of a testator
- The points to note when drafting a will

6.0 Tutor Marked Assignment

What are the features and advantages of a will?

7.0 Further Reading

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

Adubi, C.O., (1995) *Drafting, Conveyances and Will*, Lagos: Light House Publishing Co.

Abayomi, K, *Testamentary Capacity: The Importance of Sound Disposing Mind in Law and Practice Relating to Will.*, Nigeria and Practice Journal, Vol. 3 No 1.

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MODULE 5

UNIT 2 TESTAMENTARY CAPACITY

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Testamentary capacity
 - 3.2 Sound disposing mind
 - 3.3 Proof of sound disposing mind
 - 3.4 Insane delusion
 - 3.5 Undue influence and fraud
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Reading

1.0 Introduction

Apart from the age requirement, the testator requires further testamentary capacity. A testator must have testamentary capacity at the relevant time of making the will. A testator must be of sound disposing mind, free from insane delusion and not induced by fraud and undue influence. There must be no suspicious circumstances.

2.0 Objectives

The student is expected of the end of this unit to learn the meaning of and effect of

- Testamentary capacity
- Sound disposing mind
- Insane delusion

- Undue influence and fraud
- Suspicious circumstance

3.0 Main Body

3.1 Testamentary Capacity.

Testamentary capacity in this unit is used in the sense Imhanobe described it as a term used to refer to any incapacity that disentitles a person of a right to make a valid will. A will must be voluntarily made and any impediment to this freedom qualifies as incapacity.

3.2 Sound Disposing Mind:

Sound disposing mind means that the testator must have the requisite mental capacity to make a will. It has to do with the mental state of the testator. Some of the causes of mental disability include testator old age (senile), delusion, partial soundness of mind, habitual drunkenness etc. The relevant mental capacity of the testator is at the time of giving instruction and at the time of execution of the will. See *Kwentoh v. Kwentoh (2010) 5 NWLR (pt 1188) 543 at 566*.

The implication is that the supervening incapacity does affect the validity of a will. If the testator is of unsound mind before giving instruction but at the time of executing the will is certified to be of sound mind. The will is validly made. In *Banks v. Good fellow*, the court of Queens Bench provides a guide to assist in determining whether a testator has a sound disposing mind at the time of giving instruction to make and executing a will. According to the court where there exist sound disposing mind:

- (a) The testator shall understand the nature of the act of making a will and its effect, he must understand that he is by the will giving out and not perhaps selling his property;

- (b) The testator should understand the extent of his property of which he is disposing;
- (c) He shall be able to apprehend and appreciate the claims to which he ought to have effect, that is he must recollect the persons who are the objects of his bounty; and
- (d) The manner in which the property is to be distributed between them.

The term soundness of mind is different from the state of bodily health. A testator may be bodily weak yet possesses sound disposing mind. See *Federal Administrator General v. Johnson (1960) LL.R. 292*, where a testator after giving instruction but before executing the will his state of mind deteriorated, if he still understood that he is made to sign or is to be signed on his behalf, at his request is a document containing his instructions, the will is valid. See *Parker v. Felgate (1823) 8 P.D. 171*. Contrast with *Baltan Singh v. Amirchand (1948), ALL E.R. 152*, *Amu v. Amu (2000) 7 NWLR (Pt 663) 164*. However, a draftsman should be careful and exercise diligence particularly:

- (i) Where the instruction is not personally given to the solicitor but through intermediary
- (ii) In applying the rule in *Parker v. Felgate*.

The onus of proving sound disposing mind is on the propounder of the will, that is, the person claiming under the will. However, this burden is not static, it shifts. See *Okeola v. Boyle (Supra)*. In *Adebayo v. Adebayo (1973) 3 ECCLR 544*, the court held that

the onus of proof in probate action lies on the proponents of the will and in this case that onus was quite clearly defined and rightly laid on the defendant/respondent by the learned Chief Justice.

3.3 Proof of Sound Disposing Mind.

A testator must be of sound disposing mind both at the time of giving instruction for the making of the will and the execution of same. Oral or documentary

evidence is admissible in prove of sound disposing mind. See *Jenkins v. Morris (1880) 14. Ch. D. 674*. Generally, the two ways of proving sound disposing mind are to rely on the presumption of sound disposing mind and if necessary to adduce positive affirmative evidence.

PRESUMPTION OF SOUND DISPOSING MIND

The law is that, if a will is rational on its face, and it is duly executed, there is a rebuttable presumption that the testator was of sound disposing mind at the time of making and execution of the will. This presumption is justified by the principle of law which states that a state of things shown to exist continues to exist, unless the contrary is proved. Where it is established that the testator was insane immediately before the making of the will, the presumption albeit rebuttable is that the insanity continues (Imhanobe: Legal Drafting and Conveyance, p. 599). Conversely, where the testator is sane immediately before making of the will, the presumption is that the sanity continues except the contrary is proved. The rationale for this presumption is to avoid requiring the propounder of a will to always as a matter of course has to prove to court that the testator was of sound mind when he made the will. The requirement is that the will must be regular on its face without any suspicious attached. In *Okelola v. Boyle (1998) IS.C.N J. 63*, the court stated thus:

Where a document is *ex facie* duly executed, the court may pronounce for it in the maxim *omnia preasuntur rite esse acta*. The maxim only applies with force where the document is entirely regular in form and no suspicious attached to the will... or where the testator suffers from some disabilities such as deafness, blindness or illiteracy, the maxim does not apply with the same force.

It is the duty of the propounder of the will to establish sound disposing mind of the testator where challenged by showing that the will is rational and duly executed, and once established, the onus shifts to the challenger of the will to

establish that the testator lacked sound disposing mind at the time of making the will in spite of the fact that the will is rational on its face and duly executed. See *Johnson v. Maja (1950/51) 13 WACA 290*. In *Adebayo v. Adebayo (1973) 3 E.C.S.L.R 544*, in this case the plaintiffs challenged the validity of the will on the ground that the testator was at the material time of bad health thus not of sound mind. There was no evidence to show that the will was incoherent or not duly executed. The Court held thus:

Just as the contents of the will reveals a clear and coherent mind, so do the cogent pieces of evidence of the defense show the due execution of the will.

POSITIVE AFFIRMATIVE EVIDENCE

Generally, in civil case, it is the party who assert that must prove, but the rule operates in reverse in probate cases. In *Nsefik v. Muna (2007) 10 NWLR (Pt 1043) 502*. The Court of Appeal clearly stated the position of burden of proof on validity of a will as follows. "In civil cases the party who assert must prove, but the rule operates in reverse in probate cases, therefore, the person propounding a will has in addition to the onus of proving due execution as well as testamentary capacity. The onus always lies on the propounder of a will to satisfy the court that the document is the last will of a free and capable testator. This refers only to the first stage, for the burden of proof never remains static but shifts. Where the will is disputed, those who apply to the registrar of probate for grant of probate have initial evidential burden to establish prime facie that there has been due execution and that the testator had the mental capacity and was a free agent. Once the propounder of the will have prime facie satisfied the court as to the question of due execution and the testator being free and capable, the burden of leading evidence is cast on the people assailing the instrument. It devolves on them to show by admissible and credible evidence the

onslaught they have directed at the will in the nature of want of capacity, due execution and undue influence on the testator.

POSITIVE AFFIRMATIVE EVIDENCE

Another way of proving the testator's sound disposing mind is by adducing positive affirmative evidence. Positive affirmative evidence includes.

- Evidence that establishes that the testator wrote the will himself
- The evidence of attesting witnesses which must not be contradictory but corroborated
- Evidence of the testator's conduct before, during and after making the will.
- Evidence of the testator's general habits and course of life. See *Adebayo v. Adebayo (Supra)*
- Medical evidence of doctors who have treated the testator in the past or who conducted test on the testator before the making of the will.

Any of the above evidence can be adduced to prove that the testator has sound disposing mind at the time of making the will. See *Adebayo v. Adebajo (Supra)*, *Johnson v. Maja (Supra)*, *Okelola v. Boyle (supra)*.

3.4 INSANE DELUSION

This is a conception of a disordered mind that imagined the existence of things with no evidence. The imagined facts cannot be accounted for on any reasonable hypothesis. This state of mind often developed from religious or superstitious belief. The question is what extent of delusion can affect the validity of a will? A will made by a testator subject to any insane delusion is to be regarded with great distrust and obviate any presumption usually made in the first instance. However, where it is established that the delusion does not affect the general faculties of the testator's mind, it does not affect the validity of the will. In *Bank v. Good fellow (1870) L.L. R 7 H L 158*; the testator suffered two delusions, one

was that he was pursued by spirits and the other was that a man that was since dead came to molest him. The jury held that despite the delusion, the testator was in possession of his faculties at the time of executing the will. The will was pronounced valid.

Note:

- The fact that delusion is connected with the subject matter is not conclusive that the delusion affected the making of the will.
- A delusion that tends to quicken the testator's faculties will not destroy his testamentary capacity.
- Where part of the will is affected by delusion, the part unaffected will be admitted to probate while the affected part will be deleted. See the *Estate of Bohman (1938) 1 ALL E.R 271*.

3.5 UNDUE INFLUENCE AND FRAUD

Undue influence and fraud are not strictly matters that touch on testamentary capacity of the testator but they are qualify because they affect the testator's freedom of disposition. They affect the testator's exercise of free will or disposing of his property the way he wishes. Sound disposing mind deals with testator's state of mind. Undue influence and fraud deal with interference by a third party. What then is undue influence? This question was answered by Lord Chancellor in *Boyce v. Rossborough (10 E.R 1211)* thus:

I am prepared to say that influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence exercised either by coercion or fraud.

In *Johnson v. Maja* (supra), the widow of the testator challenged the will on the ground that one Jokotade Agnes mistress of the testator exercised undue influence on the testator in making of the will. Evidence was adduced of that the testator was estranged from his wife, refused to eat her food but insisted that

Jokotade Agnes prepares his meal. The trial court held that there was undue influence in making of the will but on appeal, the court held that the evidence was not sufficient to justify undue influence. The court stated:

For it must be remembered that something far stronger than reprehensive or even unnatural conducts in a husband or father is required in these cases. The immoral conduct of the testator, his preference for his mistress, his neglect of his wife and his failure to make adequate testamentary provision for her as far from been sufficient to show that the execution of the will was obtained by Jakade's undue influence. There is nothing that I can find to connect Jakade directly with it.

In *Hall v. Hall*, Sir J.P Wilde said:

Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of the testator, will constitute undue influence, though no force is either used or threatened.

The elements of undue influence are

- Coercion
- Pressure
- Motive and opportunity for exercising such influence.

The difference between persuasion and undue influence is whether or not the testator acted as "free agent" in making the will. If yes, that is persuasion but if no it is undue influence. There is no presumption of undue influence because of the existence of fiduciary relation e.g. relationship between doctor and patient.

4.0 CONCLUSION

The testator must possess sound disposing mind in making of a will for the will to be valid and to ensure that the will reflect the testator's true wishes. Where there exist delusion, undue influence and fraud the testator lacks sound disposing mind and the freedom to dispose his bounty as he wishes.

5.0 SUMMARY

At the end of this unit you learnt

- What sound disposing mind means
- How to prove, sound disposing mind
- Insane delusion and sound disposing mind.
- The meaning of undue influence and effect on the validity of a will

6.0 Tutor Marked Assignment

Discuss briefly sound disposing mind.

7.0 Further Reading/References

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MODULE 5

UNIT 3 FORMAL REQUIREMENTS

Contents

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Formal Requirement
 - 3.2 Requirement of writing
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 - 3.5 Acknowledgement of the signature
 - 3.6 Presence of witness
 - 3.7 Attestation
 - 3.8 Form of Attestation
 - 3.9 Incorporating other document
 - 3.10 Gift to witness, or his husband or wife
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Reading

1.0 Introduction

There are certain formal requirements for a will to be valid. These requirements are statutory provided for. We shall examine in this unit these formal requirements of a will.

2.0 Objectives

The student is expected to learn

- Formal requirement of a valid will.

- The requirement of writing, signature or acknowledgement of signature
- The position of signature
- The acknowledgement of signature
- The number of witness required.
- Form of attestation
- Effect of a gift to witness or witness wife or husband
- Effect of incorporating other documents

3.0 Main Body

3.1 Formal Requirement of a valid will.

Section 9 of Wills Act and 4 of the Wills Law of Lagos provide for the requirements of formal validity of a will. These sections provide that no will shall be valid unless it is in writing, signed by the testator or signed on testator's behalf by his direction, the testator signs or acknowledge his signature in the presence of at least two witnesses both present at the same time and the witness must signed at least in the presence of the testator.

3.2 REQUIREMENT OF WRITING

This is one of the statutory requirements for a will to be valid. However, a will need not be in any particular form of words. It suffices if the intention of the testator can be ascertained from any kind of writing. Section 9 of Wills Act and section 4 of wills law (Lagos) provide that a will must be in writing. This implies that oral (nuncupative) will is forbidden. There is no form required. It can be hand written, typed or any visible form. See section 20 interpretation Act. A will on an eggshell was held to be valid in *Re Barnes Hodson v Barnes (1926) 43 T.L.R. 71*. Also, a photograph of a will written by the testator on the wall of his bed side was admitted to probate in *Re Slavinskyj's Estate (1989)53 S.A.S.R 221*

The exceptions to the requirement of writing are that it does not apply to

(a) privilege will

(b) will made under customary law. However, under the customary law for the will to be valid. It must satisfy these conditions:

- It must be made voluntarily by the testator.
- Testator must be of sound mind at the time of making the will.
- The beneficiary must be named.
- The will must be made in the presence of witnesses.
- The will must identify the property.

In *Okoh v. Ana (unreported) Native Court Suit No.43/61*, the testator called and invited responsible chief and entrusted her whole house and property into the hands of the defendant. The court held the deposition to be valid. According to the court "... this court cannot as such reverse the course of her wishes now that she is dead."

3.3 SIGNATURE

Section 9 of Wills Act and section 4 of Wills Law (Lagos) demand that the will must be signed by the testator and witnesses. Signing can take any of the following methods:

- (a) Testator may sign himself in the presence of at least two witnesses present at the same time to attest to the will.
- (b) Testator may authorize and direct another person to sign for him and he acknowledges the signature in the joint presence of witnesses who must attest to the will.
- (c) The testator may have signed the will and acknowledge the signature in the joint presence of at least two witnesses who must attest to the will.

3.4 TESTATOR'S SIGNATURE

The signature of the testator may take the form of thumbprint, a mark, initials or a stamp engraved with the testator's name. See the *State of Finn (1935) ALL E.R*

4.9. In *Wilson v. Beddard* 10 L.J Ch. 305, where the testator was ill and his hand was guided in making the mark, the will was held to be valid. Though the witnesses must sign in the presence of the testator, it is not required that the testator signs in the presence of the witnesses. The testator may resign or direct another to sign on his behalf. All that is required in these circumstances is to acknowledge the signature. The directive to another by the testator to sign on the testator's behalf need not be by words, it may be by gesture or implied from the testator's conduct and other circumstances.

Where the testator is illiterate or blind, the will should contain a jurat stating the language and name of the interpreter and his signature. See *Okeola v. Boyle* (*Supra*).

3.5 POSITION OF THE SIGNATURE

Generally by the provision of section 9 of Wills Act 1838, the signature shall be at the foot, or end of the will. The implication is that anything below the signature does not form part of the will and this was strictly followed. However, in 1952, Section 1 of the Wills (Amendment) Act extended the application of Section 9. The position of signature in a will is extended to under or beside, or opposite to the end of the Will. See

Re Goods of Unborne (1909) 25 T.L.R 519 (The signature was at the side margin)

Re Estate of Roberts (1934) ALL E.R. 62. (Signature was at the left hand margin)

Hunt v. Hunt (1886) ALL A & D 209 (On the top of the fourth page)

The court, in the above cases admitted the wills to probate in spite the position of the signature in conformity with the Wills (Amendment) Act 1852.

The application of the Wills (Amendment) Act must not be over stretched. See Harris, *Murry v. Everard* (1952) 2 ALL E.R 409, *Margay v. Robinson*, 57 L.T 281.

Where the will is contained in more than one page, it is not necessary to sign each page but the last page. In *Ewen v. Franklin* 164, E.R 485, the first four pages of the will were signed by the witnesses at the margin. The fifth page contained only the signature of the testator alone; the court held that the witnesses had not subscribed the will. The court further held that the signature at the margin were intended merely to guard against other pages been interpolated; the testator's signature at the end is that which the court must consider as intended to give validity to the whole instrument, and consequently that is the signature which ought to have been attested.

3.6 PRESENCE OF WITNESSES

The law is that a will must be signed by the testator in the presence of two or more witnesses present at the same time. There is no requirement of age. A minor capable of testifying on the due execution of a will can witness a will. Persons that are incompetent witness under the evidence Act can witness a will. Executors, beneficiaries, beneficiaries' husbands and wives can witness a will and their evidence admissible in prove of due execution.

In witnessing a will, physical mental and visual presence of the witnesses are required as a blind man cannot witness a will. See *Estate of Gibson (1949)* 2 ALL E.R 90. The witness must be present together at the time of the testator's signing or acknowledgement of his signature. The witnesses are to sign in the presence of the testator but need not sign in the presence of each other. They are to sign after not before the testator's signature. See *Wyatt v. Barry (1893)* p.5.

A witness cannot acknowledge his signature, a witness cannot sign for another, and a witness must personally sign the will. A testator must choose credible witness. In *Ita v. Dazie (2000)* 4 NWLR (Pt 652) 168 at 182, the court held inter alia that where the validity and due execution of a will is challenged there is a duty on the propounder of the will to call attesting witnesses.

3.7 ATTESTATION

The law requires the witness to attest and subscribe the will in the presence of the testator but not necessary in the presence of each other. The essence of attestation is to ensure that the will complies with the Law/Act and to ensure due execution.

3.8 FORM OF ATTESTATION

There is no form of attestation required. However, attestation clause is usually appended to show that the requirements of the Wills Act/Law are complied with. There are two forms of attestation the short or long form.

Example of Short form is:

“SIGNED by the testator in our presence and then by us in his”

The use of the word “then” is to ensure and show that the testator signed before the witnesses signed. See *Nelson v. Akofiranmi (1959) L.L.R 143*.

Example of the long form is:

“SIGNED by the said James Peter in the presence of Okoh John and Tofa Kure, present at the same time, who at his request and in his presence and in the presence of each other (where applicable) have subscribed their names attesting witnesses.

This long form is advantageous as probate may be granted without evidence of due execution of said will.

3.9 INCORPORATING OTHER DOCUMENTS

This is a process of incorporating into the will disposition in a document not executed as will. For incorporation of other documents to be valid the following conditions must exist:

- (a) The document to be incorporated must be clearly identified in the will.
- (b) The document must have been in existence and so referred as being in existence in the will.
- (c) The document must be in existence at the time of executing the will.

3.10 GIFT TO WITNESSES, HIS WIFE OR HER HUSBAND

Section 15 Wills Act and sections 8 of Wills Law (Lagos) provide that

If a person shall attest the execution of any will to whom or to whose wife or husband any beneficial legacy, estate, interest, gift or appointment of or affecting any property (other than and except charges and direction for payment of debt or debts) shall be thereby given or made such legacy, estate, interest, gift or appointment shall, so far as only concerns such persons attesting the execution of such will or the wife or husband of such person or any person claiming under such person or wife or husband, be utterly null and void, and such person attesting be admitted as witness to prove execution of such will or to prove the validity or invalidity therefore, not withstanding such legacy, estate, interest, or gift or appointment mentioned in the will.

Provided that the attestation of a will by a person to whom or whose spouse there is given or made any such disposition as it described in this section shall be disregarded if the will is duly executed without attestation and without that of any other such person.

The implication of the above section is that any person including beneficiary can witness a will but once a beneficiary, his wife or husband witness a will, any bequest to him is void subject to certain exceptions. This rule is applicable even where there are other two witnesses. See *Ross v. Counters (1980) Ch 297*.

The exception, to this rules are

- (a) It does not apply to marriage after the making of the will
- (b) It does not apply to privileged will
- (c) Where the beneficiary signed in other capacity not as a witness in the will.
- (d) Where the testator leaves the gift as secreta trustee

(e) Where the gift is subsequently confirmed by a codicil provided the witness did not witness the codicil.

(f) The application of the independent relative revocation may exclude the application of the rule.

4.0 CONCLUSION

There are certain requirements for the formal validity of a will. These requirements are statutory provided for and non compliances renders the will invalid.

5.0 SUMMARY

At the end of this unit, you learnt

- Formal requirement of will
- The mode of writing required
- The number of witnesses attestation
- Signature of a testator
- Gift to a witness, his wife or husband
- Exceptions to the rule on gift to witness his wife or husband.

6.0 TUTOR MARKED ASSIGNMENT

Discuss the formal requirement of a will.

7.0 FURTHER READING/REFERENCE

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

Adubi, C.O., (1995) *Drafting, Conveyances and Will*, Lagos: Light House Publishing Co.

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MODULE 5

UNIT 4: Alterations and Erasures in a Will, Revocation and Revival of a Will

CONTENTS

1.0 Introduction

2.0 Objectives

3.0 Main Body

3.1 Alterations and Erasures in a Will

3.2 Revocation of a will

3.3 Doctrine of Dependent Relative Revocation

3.4 Revival of a will

4.0 Conclusion

5.0 Summary

6.0 Tutor Marked Assignment

7.0 Further reading

1.0 Introduction

The only constant thing in life is change. Man is fallible, as such amendment, alteration of existing status quo is inevitable. A testator can alter a will or erase part of it. He can revoke a will as well revive already revoked will.

2.0 Objectives

The student is expected to learn

- What alteration and ways of alternating a will
- The meaning of revocation means of revoking a will
- What revival of a will means and how to revive a will.

3.0 Main Body

3.1 Alterations and Erasures in a will.

There are two ways of altering a will. They are

(a) By a codicil

(b) By re- execution

Section 21, Wills Act and section 14, Wills Law (Lagos) respectively are to the effect that no obliteration, interlineations, or other form of alteration in a will after execution is valid unless duly executed except the words or effect of the will before the alterations are apparent. The provision prohibits alteration or erasure after execution of the will. There are two exceptions, to wit:

- (a) Where it is proved that the alterations were made before execution of the will with the consent of the testator. In *the Goods of Handmarch 15 L.T 391*, evidence that without the alteration the will would be meaningless was admitted to discharge the burden.
- (b) If the alterations are attested as required under section 9 of the Wills Act and it should be opposite at the margin or near the alteration.

Where the alterations are unattested and the original words in the will is apparent, probate will be granted in favour in its original form and if the space is blank it will be granted in blank space.

Words are apparent if they are discernable on the face of the will probably with the aid of magnifying glasses while words are not apparent if it requires physical interference with the will to discover the words.

The presumption is that unattested alterations or erasures were made after execution of the will. This presumption is rebuttable by the party relying on the presumption.

See the *Goods of Bearon 163 ER 442*, where the testator who after making the will erased four and substituted it with five. The original word "four" was still apparent and the alteration was not attested. The court granted the probate in its original form. Example of attestation after alteration is

SIGNED by Okoh Peter as his last will in the presence of us present at the same time who at his request in his presence and in the presence of each other have subscribed our names as witnesses to the alteration in line 4 on page 2.

3.2 REVOCATION

Revocation is an act of bringing to an end the operation of a will. A will is naturally revocable at anytime during the lifetime of the testator. This is because a will is ambulatory and the testator's power of revocation is non delegable. Also the testator cannot by his own words make revocable that which by its own nature is revocable. However see the exception in *Re Green (1951) 1 Ch 148*. There are two classes of revocation:

(a) Voluntary revocation: This requires the intention of the testator.

(b) Involuntary revocation: This does not require the intention of the testator but occurs by the operation of law. A will may be revoked by the provisions of section 20 Wills Act and Section 13 Wills Law (Lagos) by the following ways:

(1) Latter will or Codicil: This form of revocation is voluntary. It may be express or implied and it applies to the whole or part of the will. For a latter will to revoke a previous will, the latter will must be validly made. To prove that the later will revokes the earlier the date of the latter will, its due execution and testamentary capacity of the testator must be proved. See *Henfrey v. Henfrey (13 E.R 221)*.

(2) By written Declaration of intention to revoke. This also falls within voluntary revocation of a will. This is a written declaration of the testator's intention to revoke the will and the requirement is that such written declaration (document) must be duly executed as a will to be effective.

(3) By burning, tearing or otherwise destroying the will with the intention to revoke the will. This method of revocation also falls within the voluntary means of revocation. Two conditions must be fulfilled before a will can be revoked under this method. They are: -

(a) Sufficient destruction: The destruction must be total, that is the tearing or burning must be beyond redemption. Partial destruction (e.g. squeezing,

tearing into two, cancellation) is not sufficient destruction. In *Cheese v. Lovejoy (1877) 2 P & D 2511*. The testator drew with a pen several lines on various part of his will and also wrote at the back " this is revoked" and threw it among heaps to waste paper but it was picked by servant and kept on the table in the kitchen. Eight years later after the death of the testator. The court held that the will was not revoked in line with section 20 which provides "...otherwise destroying".

(b) There must be an intention to destroy. The testator must possess at the time of destroying the will necessary intention known as *animo revocandi*. See *Perkes v. Perkes (106 E.R 740)* and *North v. North (1909) 25 T.L.R. 322*, where the testator is incapacitated at the time of destroying the will, the destruction will be insufficient.

4. Revocation by subsequent marriage: Section 18 of Wills Act and section 11 of Wills Law (Lagos) respectively provides that every will made by man or women, shall be revoked by his or her marriage except

(a) Marriage in accordance with customary Law or

(b) Will made in contemplation of the celebration of marriage provided the names parties contemplated clearly stated. In *Re Langston (1953) 1 ALL E.R 928*, where a will made in contemplation of marriage was held to be valid because the parties were clearly stated in the will. See the altitude of Nigeria court in *Jadesimi v. Okolie – Eboh (1996) 2 NWLR (Pt 429) 128*.

3.3 DOCTRINE OF RELATIVE REVOCATION

The need to study in each case the act of destroying or mutilating a will in the light of the circumstances under which it occurred has given rise to the doctrine of relative revocation. As noted before any revocation without *animo revocandi* is no revocation. E.g. where testator sole intention of destroying the present will was to make another, in such situation the *animo revocandi* is dependent on

making of the new will. The *amino revocandi* has conditional existence. Such a will is not totally revoked until the condition is revoked

3.4 REVIVAL OF A WILL

The revival of a will is provided under Section 22 of Wills Act and section 15 of the Wills Law (Lagos) respectively. They provide that:

No will or codicils, or any part therefore, which shall be in any manner revoked shall be revived, otherwise than by the re execution thereof, or by a codicil executed in a manner herein before required, and showing an intention to revive the same and when any will or codicil when shall partly revoked and afterward wholly revoked shall be revived, such revival shall not extend so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary be shown.

There are two ways of reviving a will or codicil. They are:

- (a) Re execution
- (b) By a codicil duly executed with clear intention to revival the will.

Also where a will partly revoked is afterward wholly revoked is to be revived; the revival will not extend to the part partly revoked except a contrary intention is shown.

4.0 CONCLUSION

A will may be amended, revoked or revived by one testator during his life time at any time. There are basically four ways of revoking a will. However a revoked will can be revived by the testator by re-execution or codicil with an intention to revive.

5.0 SUMMARY

At the end of this unit, you learnt.

- Ways of revoking a will
- How to revive a will

- Alterations and erasures in a will and their effect.
- What doctrine independent relative revocation means.

6.0 Tutor Marked Assignment

Discuss revocation and revival of a will

7.0 Further Reading/References

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

Adubi, C.O., (1995) *Drafting, Conveyances and Will*, Lagos: Light House Publishing Co.

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MODULE 5

UNIT 5 DOCTRINE OF ADEPTION AND LAPSE, LEGACY AND DEVICE

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Doctrine of lapse
 - 3.2 Exceptions to the Doctrine of lapse
 - 3.3 Doctrine of ademption
 - 3.4 Legacies and Device
 - 3.5 Types of Legacies
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment

1.0 Introduction

A gift by the testator may fail because of the death of the beneficiary in which case the gift is said to have lapsed. In other case, the gift may not be in existence at the death of the testator in which case the gift is said to have adeemed. The gift to the beneficiary may be a legacy or a device.

2.0 Objectives

The students are expected to learn

- Doctrine of lapse
- Exception to the doctrine of lapse
- Doctrine of ademption
- Meaning of legacy
- Types of legacy
- The meaning of device

3.0 Main body

3.1 Doctrine of Lapse

A situation where the beneficiary of a will dies before the testator, the gift to such beneficiary fails and falls into the residual. This occurrence is what is referred to doctrine of lapse. The law is that no one takes under a will who does not survive the testators and it immaterial that there exists a codicil confirming the gift to the deceased person. See *Roper v Williams (1990) 1 Ch. 329*.

3.2 EXCEPTION TO THE DOCTRINE OF LAPSE

The application of doctrine of lapse is not absolute; there are five exceptions to its application. They are:

(a) Substitutional gifts.

A substitutional gift is a gift to an alternative beneficiary where the first beneficiary is not capable of taking on the gift contemplated. Where there is a provision for substitutional gift and the first beneficiary predecease the testator but the alternative beneficiary survives the testator. E.g. "I give my house at No 2 Abdu Bello Way to Ade or Kunle". The gift shall be given to Kunle if Ade predeceases the testator. Where both predeceased the testator the gift falls into the residual.

(b) Declaration Against Lapse

This is where the testator provides in his will a declaration that a gift in his will shall not lapse. However for such declaration to be valid and effective it must be accompanied by a valid substitutional gift. See *Re Lad. Henderson v. Porter (1932) 2 Ch. 219*.

(c) Statutory Exception

The provision of section 33 of Wills Act and section 24 of the Wills Law (Lagos) provide that a gift to children or other issue living at the testator's death shall not lapse. By this section, surviving issue of the beneficiary saves

the will. This is what is referred to as fictional survivorship by which the beneficiary is deemed to have died immediately after the testator unless a contrary intention appears in the will.

(d) Class Gift

A class gift is a gift to a class of persons having a common tie. E.g. Elections of the testator like "to all my children". The law is that where there is a gift to a class; the members of the class capable of taking the gift take the whole. This is because it is assumed that the intention of the testator is that the class shall take to the extent that the law will allow. See *Lee v. Pain* 14 L.J Ch. 34.

(e) Gift made in Discharge of Moral Obligation.

The doctrine of lapse does not apply where the testator makes a gift in discharge of moral obligation. It is immaterial whether or not the obligation is legally binding. See *Re Leach* (1948) Ch. 232, *Steven v. King* (1904) 2 Ch. 30.

3.3 DOCTRINE OF ADEPTION

A situation where the gift to a beneficiary ceases to exist at the death of the testator and the gift by operation of law fails, ademption is said to have occurred.

Ademption may occur:

- (a) By subsequent disposition of the subject matter of the gift by the testator.
- (b) Where there is change in the ownership or nature of the subject matter of the gift.
- (c) By the presumption that the testator does not intend to provide double portion for his children or those he stands in loco parentis.

Ademption can be prevented or avoided by the testator by stating in his will thus:

"I give my Lorry with Reg. No, XL 22 TX and if the lorry shall not be found at my death, my executors shall from money taken from my estate

purchase and deliver to John a lorry of same capacity as my Lorry with Reg. No XL22 TK."

3.4 LEGACY AND DEVICE

Traditionally, Legacies are testamentary gifts of personal estate. They are gift of identifiable assets that can be handed over without doubt as to its identity. A device on the other hand is a testamentary gift of land. Also, the traditional style of drafting uses the word "device" for immovable and the word "bequeath" for movable gifts. This style is no longer necessary as all disposition of gift in a will can now be made by using "I give..."

3.5 TYPES OF LEGACIES

Legacies are classified into the following:

(a) Specific legacy

This is a gift of an identifiable property that can be distinguished from the other property of the testator. E.g. I give my Toyota Camry with Reg. No TY 440 XL to Ade". This gift can be distinguished from the testator other car. What makes a gift specific is the sufficient description provided by the testator in the will to mark the gift out from others. The challenge of specific gift is that it is subject to ademption. This can be cured by incorporating substitutional clause.

(b) General Legacy

Where a gift is to be satisfied from the testator general estate, the gift is said to be general legacy. There is no distinction or separation of such gift from the others. E. g.

"I give a three bed room flat to Ade". It is immaterial whether the testator has a three bedroom flat or not the gift is to be satisfied from the testator general estate. The advantage is that it is not subject to ademption the way it applies to specific legacy.

(c) Demonstrative Legacy

It is Demonstrative because it is a gift by the testator with a direction that it shall be satisfied from a particular fund. It is said to be general in the phrase but specific in the fund. It does not abate with the general legacies until the fund is exhausted. It does not adeemed the way specific legacy does where recourse can not be made to the general estate. But under the demonstrative legacy if the particular fund is insufficient to satisfy the legacy recourse can be made to the testator's general estate.

(d) Pecuniary Legacy

Pecuniary legacy simply is a gift of money. The testator may give where direction of where to satisfy the gift. Where direction is given, it is demonstrative. Money includes notes of hand, money immediately payable or of the bank. It does not extend to shares. See *Re White (1982) 7 P.D 65*.

(e) Residuary Legacy: This is remainder after satisfying all the gifts and payment of debts. Residuary legacy may arise from

- (a) Property acquired after making will
- (b) Property acquired by the testator after his death.
- (c) Gifts that lapse
- (d) Failed gifts e.g. as a result of the beneficiary attesting to the will.

Every will should provide for an evidence clause and give direction on how to share the residuary legacy. The danger of not providing for residuary legacy is that it creates partial intestate.

4.0 CONCLUSION

A gift or even the beneficiary of the will may not been in existence at the death of the testator. In such situations the gift is said to have adeened or lapsed. There are however safeguards or exceptions to the doctrines of lapse and ademption. These gifts to beneficiary traditionally were classified as devices or legacies but this classification is irrelevant this days. A gift (legacy) may be specific, demonstrative, pecuniary or general.

5.0 SUMMARY

At the end of this unit you learnt:

- The doctrine of lapse
- Exceptions to the doctrine of lapse
- What doctrine of ademption means
- What legacies and devise are all about
- Types of legacy.

6.0 Tutor Marked Assignment

Discuss the doctrine of lapse and ademption.

Explain different types of legacies.

7.0 Further Reading/References

Imhanobe, S.O., (2010), *Legal Drafting and conveyancing*, Abuja: Temple Legal Consult.

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MODULE 5

UNIT 6 EXECUTOR, RESTRICTIONS TO THE TESTATOR'S FREEDOM OF DISPOSITION, CODICIL AND CUSTODY OF A WILL

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Executor
 - 3.2 Factors to be considered when appointing Executor
 - 3.3 Restrictions to the testator's freedom of disposition
 - 3.4 Codicil
 - 3.5 When is a new will needed
 - 3.6 Custody of a will/codicil
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor Marked Assignment
- 7.0 Further Reading

1.0 Introduction

An important point in preparing a will is the appointment of executors. The executors are saddled with the duties of carrying into effect the will. Hence in choosing them care must certain factors are considered. A will is generally voluntary but there certain restrictions to testator's freedom of disposition. The may be need to alter, amend, revoke or revive a will, an instrument that is handy is codicil. Will and codicil are special documents and should be kept in safe place.

2.0 Objectives

At the end of this unit, students are expected to learn

- Who an executor is

- The number of executor required
- Factors to consider in choosing executor
- Restriction to the testator's freedom of disposition
- What codicil is and when is it necessary to use it
- Where to keep a will.

3.0 Main Body

3.1 Executor

Who is an executor? An executor is a person appointed and vested with the power by the testator to carry out the wishes of the testator in accordance with the will.

The appointment may be made by –

- Express provision in the will.
- Implication from the testator's will.
- By statutory provisions.
- By exercise of power of nomination conferred by the testator in the will.

Failure to appoint an executor does not invalidate the will. An executor may be appointed for specific or general purpose. The appointment may be conditional. The determination and substitution of executor may be upon occurrence of certain event. An executor may also be given the power of trustee in a will. The difference between a trustee and executor are:

- a. An executor cannot appoint another executor but a trustee can
- b. A trustee must strictly comply with the terms of the will but an executor may deviate.
- c. A sole trustee cannot give a valid receipt subject to power of trust corporation but a sole executor can.

There is no minimum number of executors required by law but in practice it is better to appoint minimum of two and maximum of four. The advantages of having at least two executors are:

- a. Sole executor may predecease the testator.
- b. It guarantees continuity at the death of one executor.

Note that the maximum number of executor allowed by law is four.

Any adult of full capacity may be appointed executor. Individual of full age corporation sole, trust corporation, professionals, banks, and insurance company can be appointed. So both natural and artificial person can be appointed. A debtor may be appointed. However, where a debtor is appointed it means that the debtor is released from his debt because the debtor/executor cannot sue himself. Infant, lunatic and drunkard are not eligible.

Acceptance to act as executor may be made expressly or impliedly. It is implied where he performs certain acts with regards to the estate of the testator. Acceptance must be whole not part. Executor who has not accepted office may renounce but where he has accepted and has applied for probate to be granted he cannot renounce.

A professional executor maybe paid for his professional work if the will contain a charging clause.

3.2 FACTORS TO CONSIDER IN APPOINTING EXECUTOR

A testator should consider the following factor when choosing executor.

- a. Availability of the executor
- b. Willingness and capability of the executor
- c. Existence of any conflict of interest with that of the testator
- d. Executors should consist of person that can work together harmoniously.

- e. Integrity and good standing in the society.
- f. Logistics of the executor performing their duties. E.g. obtaining entry visa where the testator's property is situated abroad.
- g. Understanding the nature of the business of the testator especially if the testator is into complicated business.

3.3 RESTRICTION TO TESTATOR'S FREEDOM OF DISPOSITION

Statutorily, there are two restrictions to testator's freedom of disposition. They are-

1. Native law and custom
2. Provision for family and dependants.

NATIVE LAW AND CUSTOM

A testator has no power to dispose of by will a property which the testator has no power to dispose of under customary. The proviso to section 1(1) of the Wills law (Lagos) provides that:

Provided that the provision of the law shall not apply to any property which the testator had no power to dispose of by will or otherwise under customary law which he was subject.

Similar provision is contained in the Wills Laws of Edo and Delta states. This was applied in *Osula v. Osula (1995) 3 NWLR (Pt328) p.128*, the testator wished to exclude the application of the Bini native law and custom and was rejected by the Supreme Court.

There is no such provision under the Wills Act. That means that states where the Wills Act applies do not have such restrictions. In *Adesubekun v. Yenusu (1973) 3U.I.L.R (pt 1) p.22*, the plaintiff brought an action to set aside the probate granted on the ground that the testator being a moslem is incapable of making a will under the Wills Act as it is against moslem law. The court rejected the plaintiff's argument and held that section 3 of the Wills Act does not contain such restriction.

PROVISION FOR FAMILY AND DEPENDANTS

The Wills Law (Lagos), section 2(1) provides that

Notwithstanding the provisions of section 1 of the law where a person dies and is survived by any of the following person:

- a. The wife or wives or husband of the deceased
- b. A child or children of the deceased

That person or those person may apply to the court for a order on the ground that disposition by the deceased estate affected by the will is not such to make reasonable financial provision for the applicant.

The question is what amount to reasonable financial provision? It is relative and depends on the applicant's lifestyle. The application is to be brought within six (6) months of the date of probate.

The aim of the provision is to ensure where the testator does not make reasonable provision for the maintenance of surviving spouse or child or children the court may order payment for that purpose out of the testator's estate.

However, in spite of this provision the testator can still disentitle any of the family members by stating the reason for not providing for such member. The reason must be reasonable and cogent to displace the application of this section.

3.4 CODICIL

A codicil is popularly referred to as a miniature will because its existence is dependent on a will and requires all the formal requirements of a will to be valid. A codicil is used to

- a. Amend a will
- b. Alter a will

- c. Revoke and
- d. Revive a will
- e. Republish a will. This is to confirm an unrevoked will or will. The aim is to make the will operate from the date of republication. Where there are more than one codicil to a will it should be numbered and where there are many codicil it is better to execute a fresh will.

WHEN IS IT NECESSARY TO EXECUTE A NEW WILL

- a. When there are many codicil
- b. When the testator has just married under the Act.
- c. Where testator divorced. Note that divorce does not revoke a will.
- d. Testator changes place of domicile. The applicable law may differ.
- e. Where the testator has acquired more properties.

3.6 CUSTODY OF A WILL/CODICIL

A will or codicil is executed in several copies and kept in any of the following places for safety

- a. Testator's personal safe
- b. With testator's solicitor
- c. With a relative
- d. With an associate
- e. Club or association the testator is a member
- f. In the bank
- g. In the court with the seal of the court.

It is important that the testator informs his executors and family about the custody of his will.

4.0 CONCLUSION

The office of the executor is a prestigious one as such demand a consideration of certain factors and the appointment of men of proven integrity. An executor must ensure that the testator is carried out. Though there are statutory restrictions on the freedom of disposition in jurisdictions that do not apply the Wills Act yet a testator may successfully disentitle any family member by give reasonable reason. A testator may amend, alter, revoke, revive or republish his will any time during his life time. This he does by using a codicil. However, it is not in all circumstances that a codicil, a fresh will may be preferred under some condition. A will is a special document that must be properly and safely kept.

5.0 SUMMARY.

At the end of this unit you learnt

- Who an executor is
- Appointment of an executor
- Factors to consider in appointing executor
- Restriction to the testator's freedom of disposition
- Codicil
- When a fresh will is necessary
- Custody of a will.

6.0 TUTOR MARKED ASSIGNMENT

A testator is at liberty to dispose of his estate. Discuss.

7.0 FURTHER READING/REFERENCES

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MODULE 6

Unit 1 Customary modes of transfer of property

Unit 2 Customary tenancy

UNIT 1 CUSTOMARY MODES OF TRANSFER OF PROPERTY

CONTENTS

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Customary Conveyance
 - 3.2 Gift of land under customary law
 - 3.3 Sale of land under customary law
 - 3.4 Pawn under customary law
 - 3.5 Pledge under customary law
 - 3.6 Tenancy under customary law
 - 3.7 Partitioning under customary
 - 3.8 Allocation under customary law
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

Prior to the advent of the English system of conveyancing in Nigeria, lands were held and subject to the incident of native law and custom. The introduction of English system of conveyance has led to dual systems operating simultaneously. The doctrine of *memo dat quod non habet* is applicable to customary conveyancing and English conveyancing. Nigeria, being agrarian country like most countries in Africa, land is regarded as the most valuable assets in the community. Under the customary law there are certain ways of transferring land

from one person to another. We shall examine these customary ways of transfer of land.

2.0 OBJECTIVES

You are expected to learn at the end of this unit, the following:

- What customary conveyancing means
- Modes of transfer land under the customary law
- Gift of land under customary law
- Pawn under customary law
- Pledge of land under customary law
- Tenancy under customary law
- Partitioning and allocation under customary law

3.0 MAIN BODY

3.1 Customary Conveyancing

Conveyancing is the process of transfer of interest in land. Customs are set of rules generally accepted by the people as binding on them. Customary conveyancing therefore, is the process of transferring interest in land under the native law and custom. When we speak of duality of conveyancing, it implies that certain land has now been converted from customary to English tenure. This conversion is effected in two ways, namely:

- a. Making of transaction on land in ways unknown to customary law. E.g. Deed of Conveyance, Deed of Grant, leases or will. In fact in recent times land transactions under native law and custom are often reduced into writing. The mere fact that a customary form of conveyance is accompanied by writing does not change it from customary to English form of conveyancing under English law. In *Ogunbambi v. Abowaba (1951) 13 WACA 222 at 225*, the court held that under customary law no written evidence of the transaction is

required nor is writing alone sufficient to transfer possession. The attitude of the court has change considerable from the above decisions. In *Muonweokwu v. Egbunike (1959) E. N. L. R.*, the court held that customary sale reduced into writings (documents) are registrable document within the definition of instruments in the Instrument Registration Law and if not registered is inadmissible. Where the documents are admitted in evidence, it removes the requirement of witnesses as a major element of customary conveyance.

In *Rotibi v. Savage (1944) 17 NLR 77*, Waddington J. warned against the overzealous tendency to hold that mere use of writing displaces customary law in favour of English law.

The underlining consideration therefore would be the intention of the parties as may be gathered from the instrument in question and the surrounding circumstances. See *Nelson v. Nelson (1951) 13 WACA 248 at 250*

- b. The duality may also arise from direct imposition by statute. E.g. acquisition of community's land for interest known only to English law e.g. Section 37 the Public Lands Acquisition Act, 1958 and the Land Use Act 1979.

Land can be transfer under customary law by gift, sale, pawn, pledge, tenancy and order of the court.

3.2 Gift of Land under Customary Law

According to Oluyede in his book "*Nigeria Law of Conveyancing*", (1978), *Ibadan: Ibadan University Press, p 41*, a gift is an out-and-out transfer of property by the grantor to the grantee. The grantor is the giver of the property while the grantee is the recipient of the property. Under the Nigerian native law and custom gift is used to exclude the application of the rule of intestate succession. Where a father gives away a plot of land to his son during his lifetime, at his demises the land given to that his son cannot be part of his estate. The gift of land is of two forms:

- a. Out-and-out gift
- b. A revocable gift

An out-and-out gift is non revocable. A revocable gift of land is valid until it is revoke by the grantor. The grantee may hold the land in perpetuity if he does not misbehaves. What amount to misbehaviours depends on the facts and circumstance of each case. *Igedegudu v. Ajenifuja (1961) FSC 431*. In *Molade v. Molade (1958) 3 FSC 72*, a father conveyed a house via a deed of gift in 1943, the house was earlier mortgaged in 1937. Also in 1945, the father also mortgaged the same house. It was held that the gift was valid and that the son's descendants were entitled to the property. According to Oluyede, where an out-and-out grant has been made to a member by the family, the family's right over such a portion is destroyed for ever and the family cannot thereafter claim the land. The court held that the member under such circumstance acquired a "customary fee simple" in *Lagundeye v. Adesogba (1961) suit no 011/61, Ondo State "B" Customary Court*.

One problem of gift of land under customary law is that in some areas, a gift of land does not mean the grantee has the right of reaping the economic trees on it. In Awori area of Lagos, only the native are entitled to reap such economic trees. So, a gift of land to a stranger does not carry with it the right to reap economic trees by the stranger. In Nupe, a gift of land to stranger or even indigene does not carry the right to reap the palm trees as they are usually held by the chief and the family head. In Ika area of Delta State, such palm trees are reaped by those who clear the farm road. This is exception to the doctrine of *nemo dat quod non habet*.

3.3. Sale Under Customary Law

Sale of land under customary law is of recent development. The earliest approval was in the case of *Sheft v. Ladipo (unreported Ibadan Case)*, where the district officer held the sale of family property is against customary rule, sale would be permitted in this case for the purpose of equity so that debt can be discharged. The interest which passes to

the purchaser is dependent on the applicable custom. In some areas of Yoruba land sale of land to non natives (strangers) does not convey to such non native purchaser the right to reap the palm tree growing on the land.

See *Kubuyi V. Odunjo (1926) 7 NLR 51*, the court held that in accordance with the Awori custom the right to reap palm trees was confined to natives of Awori and therefore the right of the purchaser was subject to the right of a previous tenant to remain on the land as tenant under the local customary law. The tenants continued to plant crops, reap and collect palm nut was allowed by the court. However, in *Sule v. Aromire (1951), 20 NLR 146*, the court held that the plaintiff is entitled to rescission of a purported sale of a house because the vendor deliberately misled the plaintiff by fraudulent misrepresentation.

3.4 Pawn under Customary Law

A pawn is the grant by the pawner of the possession and use of land under customary tenure to the pawnee who usually occupies the land. The purpose of this system is to use the income or use of the land as settlement of the loan taken by the pawnor and is to be regularly collected by the pawnee until the debt is discharged. Where the land/property is a family land, the improvement by pawnor can be pawned only with the consent of the family. Any thing pawned must yield annual income. The pawning of human beings has been abolished and is now a criminal offence.

The pawnee is to be in possession of the land pawned. The general maxim is that once a pawn is always a pawn." The pawnee cannot transfer the legal right of occupation without first asking for repayment of the loan and must clearly inform the pawnor that failure to pay within given period, someone else may go into possession. The pawnee can only transfer what he has which is legal right of possession not ownership.

3.5 Pledge under Customary Law

A pledge under customary law has a recent history. It is different from pawn, it does not start with possession, no regular interest is paid and possession remains with the

owner. It is a form of security for a loan. At the early stage, it was a form of personal bond of a wealthy cousin or neighbour. In which case if the debtor failed to pay, the wealthy cousin or neighbour paid while the debtor paid the wealthy cousin or neighbour either by personal service or in cash. However, the modern practice, the debtor uses his property as security for the loan. The principle is as expressed in the maxim that once a pledge is always a pledge. See *Orisharinu v. Mefun* 91940) 15 NLR 111.

Where a pledge family land is redeemed by a member of the family, the land is still a family land – see *Akirefie v. Breman – Esiam* (1951) 13 WACA 311.

It is important as a customary rule that on the death of the pledgee, a reminder should be given to his successor if not the transition may be alleged to be a sale. See the interesting case of *Agada Okoiko and Ors v. Ozo Esedalue*

3.6 Tenancy Under Customary Law

According to Onwuamaegbu tenancy arises where a person who has a right to possession of land grants (or is deemed to have granted) this right to another who is not legally entitled to use the land, the grant not being incidental to any other existing relationship for a purpose which may be definite or general with the intention that the use of the land shall revert to the grantor at the end of the period or when the purpose has been fulfilled. Tenancy confers right of possession on the tenant to the exclusion of all persons including the overlord.

See *Nwavwaro v. Ogegedo* (1971) 1 NWLR 413, where the court held that a customary tenant can maintain an action for trespass against his overlord who commits a breach of a customary grant.

3.7 Partitioning

This is permanent physical delineation of land. It is use where there is joint ownership of land. See *Olurunfemi v. Asho* (2000) 74 LRCN, 45, where the court held that partitioning is one of the methods family property can be determined. Partitioning may

be by the consent of the all the family members or by the order of court. The court will order partition where

there is persistent denial of members right over family land,

gross abuse by the head of the family,

partitioning is the only way of doing justice in this case,

that will ensure no break down of law and order, or

there is a unanimous agreement by the family member.

In all, the court will consider the best interest of the family. See *Bajulaiye v. Akapo (1938) 14 NLR 10*, *Ajabadi v. Jura (1948) 19 NLR 27*.

The implication of partitioning is that it confers absolute title on each member in respect of his portioned portion. In *Abike v. Adebokun (1986) 3 NWLR pt 30 548*, the court held that once a previous family land is partitioned and the recipients of the partitioning go into exclusive possession, the ceases to be family land.

3.8 ALLOCATION

It is another form of transfer of land under customary law. It is often used for transferring family or community land to individual members of the family or community. In most community in Nigeria, attainment of certain age as male member qualifies such a person to allocation of land for building or farming purpose. It shares same legal implication with partitioning.

It is pertinent to point out that apart from the different modes of transfer above, the courts can order sale of land under customary law in appropriate cases. E.g., on application by judgment creditor or sale under execution process to satisfy a judgment against a family.

4.0 CONCLUSION

Customary conveyancing is the foremost form of transfer of land in Nigeria. The advent of the colonial master led to dual system of land ownership/tenure and conveyancing operating simultaneously. Customary conveyancing is still practice till date and is a valid form of transfer of interest in land.

5.0 SUMMARY

At the end of this unit, you learnt

- What customary conveyancing means
- The various forms of customary transfer of land from one person to another
- About gift under customary law
- Pawn, pledge sale and tenancy under customary law

6.0 TUTOR MARKED ASSIGNMENT

Discuss the various customary ways of conveyancing in Nigeria

7.0 FURTHER READING/REFERENCE

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MODULE 6

UNIT 2 CUSTOMARY TENANCY

CONTENT

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Body
 - 3.1 Customary Tenancy
 - 3.2 Nature of customary tenancy
 - 3.3 Types of tenancy
 - Fixed tenancy
 - Periodic tenancy
 - Tenancy in perpetuity
 - Kola tenancy
 - Gratuitous tenancy
 - Service tenancy
 - Share tenancy
 - Cash tenancy
 - 3.4 Determination of customary tenancy
 - Abandonment
 - Extinction
 - Accomplishment of purpose
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 Further Reading

1.0 INTRODUCTION

In Unit I, we examine briefly customary tenancy as a way of transferring interest in land. In this unit because of its peculiarity of customary tenancy special attention is to be given to it. There are different classifications of tenancy under customary law. We shall examine the different types of tenancy and how tenancy can be determined.

2.0 OBJECTIVES

At the end of this unit, you are expected to learn:

- What customary tenancy means
- Different classifications of tenancy
- How customary tenancy can be determined

3.0 MAIN BODY

3.1 Customary Tenancy

Customary tenancy arises where a land owner individual or group (called the overlord) grants to another person or group called the tenant a right of occupation of land to farm on or live in return the grantee (tenant) acknowledges the grantor's (overlord) title by payment of customary tribute or rent either in cash or in kind. However, a customary tenancy may exist without payment of tribute as was held in *Lawani v. Adeniyi (1964) NSCC 231*.

The tenant pays what is called rent and the rent payable is dependent upon the agreement of the parties and is meant to serve as an acknowledgement of the grantor's title. E.g. bringing tubers of yam to thank the grantor. It does not bear any economic relation to the value of the land. See *ARE V. IPAYE (1990) 2 NWLR pt 132, 298* where Nnaemeka observed this:

...ishakole on the other hand depend on the agreement upon grant of the land, although it cannot be equated to consideration in the sence qui pro quo at common law...

The rent/tribute could be a single or annual payment.

3.2 Nature of Customary Tenancy

The basic feature of customary tenancy is that it confers on the tenant the right of possession and use of the land to exclusion of all persons including the overlord. See *Nyavwaro v. Ogegedo (Supra)*.

Customary tenant enjoys complete power of exploitation of the land as to amount to ownership of land. A customary tenant cannot transfer his interest i.e possession and use of the land without the consent of his overlord. Any such alienation is void and in the absence of laches and acquiescence the purchaser gets nothings. On the otherhand, the overlord cannot also sell the land without the consent of the tenant where the overlord does the purchaser takes the land subject to the interest of the tenant because the purchaser is seen as stepping into the shoe of the overlord. See *Lasisi v. Tubi (1974) 1 ALL NLR 438*.

3.3. Types of Customary Tenancy

In classifying tenancy, it may be classified either according to the length of the term or according to the nature of the consideration paid by the tenant. When classified according to the length of term we have indefinite long term tenancy, tenancy for a definite term of year and periodic tenancy.

When classified accroding to consideration paid by the tenant we have rent free tenancy or gratuitous tenancy, kola tenancy, share tenancy and service tenancy.

CLASSIFICATION ACCORDING TO DURATION

1. Fixed Customary Tenancy:

This is a system where the overlord sells the anticipated yield of his economic trees e.g. cola nut tree, oil palm for a fixed period to the purchaser who reaps the produce for that period only; at the end of the period the purchaser must give up his right over the economic tree. The rule is that the purchaser is under obligation to give up the possession whether or not the purchaser has reaped enough crops to repay the money he advanced the vendor or not. Also the vendor is not entitled to any excess if the yield exceeds the sum advanced. This is different from pawn system because in fixed customary tenancy the period depends on when rents and profit could repay both the principal and interest but in pawn system the rents and profits are for discharge of interest only.

PERIODIC TENANCY: This is granted for a definite period usually for a season to grow crops but in practice this tenancy could go on from season to season for as long as the tenant continues in possession and the grantor does not eject him.

TENANCY IN PERPETUITY OR INDEFINITE LONG TERM TENANCY: Under this type no definite term is agreed upon at the beginning of the tenancy, so it can go on for generation. The tenant enjoys substantial rights in the land and is often referred to as the "owner" because of the long stay on the land. He can plant permanent crops unless expressly forbidden from so doing at the time of the grant. The tenant passes interest to successors and heirs who take under same condition of grant. The rule is that no matter how long the tenancy has been in existence and no matter that the tenant has come to regard himself as the owner of the land with or without the acquiescence of the overlord the reversion of the overlord cannot be extinguished even if he has publicly pronounced ownership in the presence of overlord, except when a third party came in that it will affect the owner but does not change the transaction from tenancy. In *Achibong & or v. Ita (2004) 117 LRCN 3803*, the supreme court held that long

possession by a customary tenant cannot ripen to ownership. See *Longe v. Ajakaiye* (1962) 2 NSCC 389.

CLASSIFICATION ACCORDING TO CONSIDERATION PAID BY TENANT

KOLA TENANCY

This is a grant of land to another on customary payment of kolanut or kolanut and drink. It creates possessory right in favour of the tenant and the tenant enjoys almost complete control of the land except absolute alienation. The tenant could sublet with the consent of the overlord. The tenant could only be evicted for fundamental breach of the term of the tenancy payment of cash could be taken as kola when it is so intended by the parties in *Ochonma v. Onosi* (1960) 4 enlr 107, the plaintiffs paid a total sum of E28 as kola, after a period of 20 years the tenant claim that it was a sale. The court held that the intention was to create a kola tenancy.

Kola tenancy just like any other customary tenancy confers on the tenant possessory right and nothing more. See *Mojekwu V. Iwuchukwu* (2004) ALL FWLR PT 211, 1406.

Kola tenancy is common in the Onitsha area of Anambra State. Because of the substantial powers enjoy by the tenant particularly power to sublet, it happens that tenant derived benefit over and above what he was paying the overlord under the original grant. This is not unconnected to commercialisation and enhanced value of land. This led to agitation by overlords who sought to share from the enhanced value of the land. This came before the court in *Mgbelekele Family v. Madam Iyayi Family* (1931) (unreported), the plaintiff sued the successors in title of their kola tenant who had leased that holding to a company (SCOA) at a rental value of E200 per year. They asked for declaration of title and that one half of rent be paid to them. The supreme court granted the declaration and refused the prayer for proportionate share of the yearly rent.

In 1935 because of the controversy, the government of Eastern Nigeria promulgated the Kola Tenancy Law to address the problem associated with kola tenancy. Section 2

defines kola tenancy to extend to situation where no payment of kola or any token is made by the native. Section 3 address the issue of the tenant or his successor receiving a more substantial benefit than the grantor might have reasonable anticipated as likely to accrue to the tenant, the overlord is entitled to apply for extinction of the tenancy provided the tenant is compensated for improvement on the land.

GRATITUOUS TENANCY

Under this type of tenancy the tenant pays no rent either in the form of personal service or cash. It is usually for a short term. Though the grantee may occassionally give gift to the grantor, he is not obligated to do so. Section 2 of kola tenancy law recognises gratuitous tenancy.

SERVICE TENANCY

This is where the grantor grants the land to the tenant in return for rendering of labour by the tenant to the grantor.

CASH TENANCY

This is the payment of cash as consideration by the tenant for the grant. This is a new development and has become popular because of modern economic condition. The danger is that it is often mistake for a sale.

SHARE TENANCY

This is a grant with the understanding between the grantor and grantee that the produce from the land will be shared between them. It is usually granted in respect to farm land and for farming season but with the evolution of cash crop it may extend beyond farming season.

3.4 DETERMINATION OF CUSTOMARY TENANCY

Customary tenancy may be brought to end by:

- a. Abandonment: This is where the tenant vacates the land without the intention of returning to it. This must be proved e.g. by showing that the tenant left with his family from the community
- b. Extinction: This applies to kola tenancy by section 3 of the kola tenancy law 1935, where the grantee receives more substantial benefit than the grantor might have reasonably anticipated as likely to accrue to the tenant, the grantor is entitled to apply for extinction of the tenancy.
- c. Accomplishment of purpose: where a tenancy is granted for a specific purpose or specific period of time, it will be terminated at the accomplishment of the purpose or at the effluxion of the time. See *Kele V. Nwerebere (1998) 3 NWLR pt 543 p. 5*, where it was granted for farming season. In *Uchonma V. Onosi (supra)*, it was granted for 20 years and the court held that the tenancy was determined at the effluxion of 20 years.
- d. **Forfeiture**: This is the determination of customary tenancy by order of court upon a proven allegation of an act or acts of misconduct on the part of the tenant amounting to a denial of the overlord's title. The misconduct may take any of the following:
 - i. Alienation without consent of overlord
 - ii. Refusal to pay tribute
 - iii. Going beyond the area granted
 - iv. Using the land for purpose other than the purpose for which it is granted
 - v. Direct denial of overlord's title
 - vi. Wanton destruction of overlord's property

In *Onisiwo v. Bamgboye (1941) 7 WACA 69* the court ordered forfeiture of the tenant interest for an attempted alienation by way of 30 years lease without the overlord's consent. In *Salami v. Oke (1987) 4 NWLR pt 64 p1*, the court ordered forfeiture for refusal to pay customary tribute to the overlord. See *Fashonu v. Fawehinmi (1992) 3 NWLR pt 492 p. 182*.

4.0 CONCLUSION

Customary tenancy is a customary way of transferring possession and right of use of land to the tenant on payment or even without payment of rent or tribute. Any alienation of the land without the consent of the overlord is void. In tenancy arrangement the overlord retains the reversionary interest of the land. The customary tenancy may be determined by abandonment, extinction, accomplishment of purpose or by forfeiture.

5.0 SUMMARY

At the end of this unit, you learnt

- What customary tenancy is
- The nature of customary tenancy
- The various types or classification of customary tenancy
- How customary tenancy can be determined

6.0 TUTOR MARKED ASSIGNMENT

Discuss customary tenancy and its various types

7.0 FURTHER READING/ REFERENCES

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