SUPERVENCING IMPOSSIBILITY OF PERFORMANCE

IN THE

SOUTH AFRICAN LAW OF CONTRACT

by

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Submitted in partial fulfilment of the requirements for the degree of Master of Laws, University of the Witwatersrand, Johannesburg

1983

SUPERVISOR: PROFESSOR ELLISON KAHN B Com LL B (Witwatersrand) LL D (Natal) LL D (H o) (Cape Town)
AN ANALYSIS OF THE LAW RELATING TO SUPERVENING IMPOSSIBILITY OF PERFORMANCE OF CONTRACTS IN SOUTH AFRICA (WITH SOME EXAMINATION OF ITS HISTORICAL EVOLUTION) AGAINST THE BACKGROUND OF THE CORRESPONDING OR RELATED LEGAL PRINCIPLES IN OTHER MODERN LEGAL SYSTEMS, PARTICULARLY THE LAW OF SUPERVENING IMPOSSIBILITY OF PERFORMANCE, FRUSTRATION AND FAILURE OF CONSIDERATION UNDER ENGLISH LAW
I declare that "Supervening Impossibility of Performance in the South African Law of Contract" is my own work and that all sources used or quoted by me have been indicated and acknowledged by means of complete reference.

W A RAMSDEN

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W A RAMSDEN

1963
Cartum est quia impossibile est

Tertullian De Carne Christi, v.
# CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Summary</td>
<td></td>
<td>i1</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C H A P T E R 1 - INTRODUCTION</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Scope of the Inquiry</td>
<td>1</td>
</tr>
<tr>
<td>B.</td>
<td>Classification of Types of Impossibility</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C H A P T E R 2 - HISTORICAL SURVEY OF THE DEVELOPMENT OF</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>SUPERVENCING IMPOSSIBILITY OF PERFORMANCE</td>
<td>5</td>
</tr>
<tr>
<td>A.</td>
<td>Roman Law</td>
<td>5</td>
</tr>
<tr>
<td>B.</td>
<td>Roman-Dutch Law</td>
<td>34</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C H A P T E R 3 - THE APPLICABILITY OR RELEVANCE OF FOREIGN LAW</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>English-law Sources</td>
<td>41</td>
</tr>
<tr>
<td>(a)</td>
<td>Pusta sunt servanda</td>
<td>49</td>
</tr>
<tr>
<td>(b)</td>
<td>Loss lies where it falls</td>
<td>50</td>
</tr>
<tr>
<td>(c)</td>
<td>The doctrine of &quot;frustration&quot;</td>
<td>62</td>
</tr>
<tr>
<td>B.</td>
<td>Other foreign-law sources</td>
<td>81</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C H A P T E R 4 - VIS MAJOR AND CASUS FORTUITUS</td>
<td></td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>The Basic Rule</td>
<td>84</td>
</tr>
<tr>
<td>B.</td>
<td>Definitions</td>
<td>89</td>
</tr>
<tr>
<td>C.</td>
<td>Where the Basic Rule Does Not Apply</td>
<td>94</td>
</tr>
<tr>
<td>(a)</td>
<td>Assumption of <em>puriculum solutionis</em></td>
<td>98</td>
</tr>
<tr>
<td>(b)</td>
<td>Fault</td>
<td>102</td>
</tr>
<tr>
<td>(c)</td>
<td><em>Nora</em></td>
<td>105</td>
</tr>
</tbody>
</table>
B. Contract Extinguished
   Exceptions
C. Acquired Rights
   (a) Recovery of part performance
   (b) Part payment for work part done
   (c) Remission of amount payable
   (d) Position where no enrichment occurs
D. Effect of Specific Terms in the Contract

CHAPTER 9 - PLEADING AND ONUS OF PROOF
   A. Pleading
   B. Onus of Proof

TABLE OF CASES CITED
   A. South African
   B. Foreign

TABLE OF STATUTES CITED
   A. South African
   B. Foreign
BIBLIOGRAPHY

I. ROMAN LAW
   A. SOURCES
   B. SECONDARY SOURCES

II. MEDIEVAL LAW
   A. SOURCES
   B. SECONDARY SOURCES

III. ROMAN-DUTCH LAW
   A. SOURCES

IV. FOREIGN LAWS

V. SOUTH AFRICAN LAW
BIBLIOGRAPHY

I. ROMAN LAW
   A. SOURCES
   B. SECONDARY SOURCES

II. MEDIEVAL LAW
   A. SOURCES
   B. SECONDARY SOURCES

III. ROMAN-DUTCH LAW
    A. SOURCES

IV. FOREIGN LAWS

V. SOUTH AFRICAN LAW
P R E F A C E

At the outset I would like to express my profound thanks to Professor Ellison Kahn for consenting to be my supervisor and for the encouragement, assistance and advice he has given me, right from the commencement of my reading for this dissertation. Any mistakes that may have escaped his eagle eye, however, are entirely my own.

The contents of Chapter 2 have already been published by me in an article "Some Historical Aspects of Supervening Impossibility of Performance of Contract" (1975) 38 Tydskrif vir Hedendaagse Romeine-Hollandse Reg 153, 284, 370. This chapter is consequently very largely a repetition of material that has appeared in print before.

I resisted the temptation to repeat all the arguments already advanced in my article "Temporary Supervening Impossibility of Performance" (1977) 94 South African Law Journal 162 in Chapter 7 of this dissertation. For a full analysis and evaluation of Beretta v Rhodesia Railways Ltd 1947 (2) SA 1075 (SR) that chapter needs to be read in conjunction with the article mentioned.

I should also like to express my gratitude to the Attorneys Fidelity Guarantee Fund for financial assistance towards the payment of my registration fees.

Finally my thanks are also due to my wife Moreen, who typed a very large part of the first draft of this dissertation, in addition to her own heavy commitments. Her support and encouragement were invaluable.

A complete and authoritative exposition of supervening impossibility of performance is in itself an impossibility, but I have done my best and can only plead in mitigation the words of Aristotle:

"A plausible impossibility is always preferable to an unconvincing possibility."

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Postscript 24)
The dissertation at first examines the legal implications of supervening impossibility of performance in Roman law and very briefly traces the historical evolution of these principles in medieval times and in the Roman-Dutch law period, with a view to providing a background against which the modern South African law on the topic can be examined.

Thereafter a chapter follows in which the relevance of foreign law to an understanding of the South African law on the subject is examined. This is particularly necessary in view of the fact that

(a) English decisions have been referred to and even applied by our courts, particularly prior to 1919;

(b) certain judgments of our courts, beginning with the case of Peters, Plaumann & Co v Kokstad Municipality 1919 AD 427, contain statements on the applicability of English law which are not easy to understand or to reconcile;

(c) certain judgments of our courts, more particularly the judgment in African Realty Trust Ltd v Holmes 1922 AD 389, refer to Continental European writers, and in the light of their works make certain statements, albeit obiter, about our law.

In the remainder of the dissertation I examine and make a case for certain views on the present-day South African legal position concerning supervening impossibility of performance. In particular, the dissertation deals with

(a) the supervening event having to be one that falls into the category of a casus fortuitus or a vis major, and what exactly the scope of each of these concepts is, referring especially to the foreseeability of the event;

(b) the causal connection between the casus fortuitus or vis major and the inability of the debtor to perform, and particularly the effect of fault (whether dolus or culpa) or the more of either party or the operation of the maxim genus non passat in this regard; also the need for the impossibility to be
absolute; the effect of the surrounding circumstances and a correct appreciation of the contract in determining whether the situation is indeed one of absolute impossibility of performance; and whether there is any place in our law for a doctrine of "commercial impossibility";

(c) the question whether there is an obligation on the debtor to notify the creditor of the occurrence of the supervening event; the possible application of the principles of estoppel in these circumstances; and the possible consequences of a failure to notify;

(d) the effect of partial impossibility of performance, particularly whether substantial performance is sufficient, the severability of obligations to perform and the consequent rights of the parties;

(e) the distinction between partial and temporary impossibility of performance and the crucial nature of this distinction;

(f) the effect of temporary impossibility of performance, and a critical appraisal of Baretta v Rhodesia Railways 1947 (2) SA 1075 (SR);

(g) the effect of supervening impossibility of performance, particularly in relation to the question whether modification of the contract is possible, the termination of the obligations under the contract and the exceptional circumstances when this does not occur, both at common law and by statute, the effect on rights acquired under the contract and the remedies available to the parties, the effect of specific terms in the contract, such as a nonstatute clause and an exemption clause;

(h) the question of pleading and onus of proof in actions involving supervening impossibility of performance.
CHAPTER I

INTRODUCTION

A. Scope of the Inquiry

The object of this dissertation is an analysis of the law relating to supervening impossibility of performance of contract in South Africa and a statement of the principles applicable in as much detail and as accurately as possible. In order for this to be done reference will have to be made to legal sources, and this will pose the first major problem. In the past, our courts relied upon English cases as setting out rules and principles applicable in our own law or at least as providing guidance to us when confronted with difficult problems where little or no assistance is available from the traditional South African law sources. To some extent this recourse to English law takes place today. I shall, therefore, first have to establish whether a reliance upon English law sources is permissible and advisable, and if so, to what extent. The same question will also have to be asked of other foreign-law sources. Such an enquiry necessarily involves a reasonable working knowledge not only of the foreign legal system being examined but also of our own legal system, in order to ascertain whether and to what extent the principles of the two legal systems and the approach of the courts in each of them are comparable and consonant. This of necessity involves a prior knowledge of the very subject of the main enquiry - the South African law relating to supervening impossibility of performance of contract, which obviously makes it difficult to discuss the relevant topics in watertight compartments. Inevitably, then, there will be a good deal of cross-referencing, and, in particular, initial consideration of topics that are to be examined in more detail later.

This work is not, however, primarily a comparative-law study; the treatment of comparative aspects will be kept to a minimum, and, so far as is possible and practicable, confined
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to the particular legal principle of our law under examination.

B. Classification of Types of Impossibility

In conventional legal terminology, a contract may be unilateral, in the sense that an obligation to make performance (in the widest connotation) is imposed on one party only (for instance, a contract of donation); or it may be bilateral (or multilateral), in the sense that, from the time the contract comes into being, obligations are imposed on both parties (or if there are more than two parties, on all parties), each being both debtor (promisor) and creditor (promisee). The vast majority of contracts are bilateral (multilateral) (for instance, sale, letting and hiring of property, the various types of contracts of service). It is common in civil-law countries to draw a distinction between a synallagmatic bilateral (multilateral) contract - sometimes called a reciprocal contract - and a non-synallagmatic one. Where the contract is synallagmatic the obligations to make performance are undertaken each as an equivalent return for the other, as in sale and in letting and hiring, though the duty of each to perform is not necessarily at the same time. Where it is non-synallagmatic, for instance, where it is loan of money, this is not so. The distinction is significant because a synallagmatic contract may yield the defendant the so-called defence of *sequestration non adimpleri contractus.*

If, at the time the contract is entered into, it is impossible for one of the contracting parties to perform or to desist or abstain from doing the act he has contracted to do or not to do, then the contract may very well be regarded in law as initially impossible of performance. On the other hand, it

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2. The same would obviously hold good were this true of two or more or all of the contractual parties.
might not. For example, if I agree to pay you R20 000 within seven days for, say, goods sold and delivered, but, unknown to me, the stock-market has slumped and I am a ruined man, and even at the time I enter into the contract steps are being taken to sequestrate my estate so that I am totally unable to pay you the R20 000 as promised, nevertheless the contract will not be regarded in law as initially impossible of performance. This is because the law does not regard mere personal inability to perform as constituting impossibility.

Conversely, I may have agreed to sell and transfer a certain piece of land to you, but unknown to me you happen to be a disqualified person in terms of the Group Areas Act, so that, although I could physically transfer the property into your name, the law will not allow it. Here the law would regard the contract as initially impossible of performance, as logically it should also be if I agreed not to do something I was legally obliged to do, such as not to feed my infant child for a week, though such contracts are usually dealt with under the heading of illegal contracts. That they can also be regarded as initially impossible of performance can be illustrated by considering contracts to refrain from doing something which it is not physically or naturally possible to avoid, such as a promise not to die, which, besides being absurd, is also not possible to attain in the light of scientific knowledge up to the present time.

In the case of supervening impossibility of performance the question of impossibility is regarded in much the same way, except that here the obligation or obligations is or were possible of performance at the time the contract was entered into but subsequently, and before performance had been made, became impossible to fulfil. Here, again, physical impossibility per se is not enough, because on the one hand it may be personal to the one liable to perform (the debtor), which, as I shall show, later, may not excuse him from liability. On the other hand, performance may be prohibited by law or be
contra bonos mores, when it will be legally excused even though physically possible. The legal grounds of supervening impossibility of performance will be examined at greater length later in this dissertation.
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CHAPTER 2

HISTORICAL SURVEY OF THE DEVELOPMENT OF SUPERVENING IMPOSSIBILITY OF PERFORMANCE

A. Roman Law

When it becomes apparent that a party to a contract is unable to perform one or more of his obligations under that contract, the first question we as lawyers ask ourselves is whether the impossibility of performance existed at the time when the contract was entered into or whether it came into being subsequently, the former being termed initial impossibility of performance and the latter supervening impossibility of performance. This is the first major classification which our law makes, and it is one which is also made in other legal systems, being a traditional as well as a logical separation of the two kinds of impossibility handed down to us from Roman law.

Roman law employed the word \textit{impossibilitas} only in connection with initial impossibility.\textsuperscript{1} For supervening impossibility it used the word \textit{casus}\textsuperscript{2} (which in this context means an accident or chance occurrence).

Roman law divided contracts into those which were \textit{stricti juris} and those which were \textit{bona fidei}, according to the forms

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2. Buckland op cit 1281. As to the meaning of the word \textit{casus} as used in the sources, see Theodor Mommsen "About the Impossibility of Performance and its Influence on Contractual Relationships" (my translation), in \textit{Beiträge zum Obligationenrecht}. (Braunschweig, 1883) vol I pp 241-7. See also Bernhard Windscheid \textit{Lehrbuch des Pandektenrechts} 9th edition by Theodore Kipp, 1930 (Scientia Verlag, Aalen, 1963, reprint).
of action which, in terms of the rules of civil procedure, were available to parties seeking to enforce contractual rights. Some contracts, such as stipulatio, were stricti juris. They comprised the older system of contractual obligations, all the contracts in this class being unilateral. The later system of contractual obligations was bona fide, and the contracts in this class were generally bilateral. Stricti juris actions could lie for a certum or could be brought with the formula incerta. In both cases the judgment had to consist in the award of a definite sum of money (condemnatio pecuniaria), for until the introduction of the extraordinaria cognitio procedure the Roman courts had no power to order specific performance. They had to content themselves with attempting to compel specific performance indirectly by making the judicial assessment (litis aestimatio) payable in the case of non-performance so high that it was in the judgment debtor's interests to make the performance promised rather than to "buy it off" by paying the sum awarded (condemnatio pecuniaria).

The judgment, however, could be and was always satisfied by payment of the sum awarded. Hence, strictly speaking, it should have been irrelevant whether actual performance was possible, for the Romans, like us, never regarded mere inability to pay as amounting to impossibility of performance.

4. Whether certum pecuniæ, certum dare or certam rem reddere.
5. Max Kaser Roman Private Law 2 ed (Durban,1966) II § 34. (Translation by Rolf Dannenburg of the 3rd edition of Romisches Privatrecht.)
6. Kaser op cit 2 ed II § 34.
8. Ibid. See also Kaser op cit 2 ed II § 34.
whether in the sense of *impossibilitas* or of *casus*.\(^{10}\) It is therefore difficult to see why impossibility of performance, whether initial or supervening, came to be regarded as an excusing factor,\(^{11}\) particularly in actions with a formula *incerta*, where the judge was instructed to condemn the defendant in whatever he ought to perform to the plaintiff.\(^{12}\)

Ernst Rabe\(^{13}\) has pointed to certain factors which he feels have played a role in the development of initial impossibility of performance, viz the considerations of fraud, jest, donation, error, fault, public policy (i.e. the application of the *contra bonos mores* rule) and lack of pecuniary damage.\(^{14}\)

The last two could equally apply to supervening impossibility of performance. Dieter Medicus\(^{15}\) stresses a further factor, viz the practical difficulty of estimating in litigation the value of a non-existent *res* in early times, probably (as it was not always easy to get the defendant into court) a considerable time after it had ceased to exist. The performance had to be capable of evaluation in terms of money,\(^{16}\) and if no reliable estimate could be arrived at, no action could be given.

Whatever the reasons that led to the development of the rules,

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11. Medicus *op cit* 73.


13. *Grundzüge des römischen Privatrechts* (1915) 6 77, referred to by Medicus *op cit* at 80.

14. See also *Gai Institutiones* 3 97, 97c and 99.

15. *op cit* 80.

16. See Kaser *op cit* 2 ed I § 34.
The Romans recognised that impossibility of performance, whether initial or supervening, would absolve a promisor from his duty to perform, though the rule was applied differently to each of these two types of impossibility.

The releasing effect of supervening impossibility of performance appears to have been applied to stipulations at a fairly early date. Thus, if A promised to give B a specific res, which was accidentally destroyed before it was due to be handed over to B, A was released from his obligation to give it to B and did not have to pay B the value of the res.

Since business transactions are usually bilateral, in the older system of Roman law parties frequently gave reciprocal stipulations. The question now arises, what would the position be if only one of the stipulators found that, through no fault of his own but because of casus, it was impossible for him to fulfil his stipulated promise? In such cases whether the counter-stipulator had done anything in fulfilment of his own stipulation or not, the stipulator would be released from his obligation, provided that the impossibility was not due to his fault; but there is no clear answer in the early Roman law to the question whether the counter-stipulator was released from his reciprocal obligation if he had not performed, or, if he had performed, whether he could recover what he had already given. The only text which at first glance appears to be relevant is D 12.7.1, which reads:

"Whether the promise was made without consideration in the beginning or was made in consideration of a promise which has terminated, or failed, to take effect, a conditio will lie for the recovery of anything paid under it", but, as
Buckland points out, "that refers merely to non-performance and should not be confused with release by causa." It would seem that the other party would still be bound, and there is no indication that an equitable release, whether by exceptio doli or otherwise, was applicable. The release was only of the party whose obligation had become impossible of performance and nothing more.

The question whether release of one party by causa would absolve the other of his duty to perform his reciprocal obligation arose directly in the case of the condictiones, particularly the condictio ob rem dati, or condictio causa data causa non seonta as it was known to Justinian.

In classical Roman law only certain kinds of agreement were legally enforceable. A contract which did not fall into one of the recognised legal categories, such as a contract for mutual services, exchange or a similar transaction, was incapable of being enforced, and if one party had performed he had no means of compelling counter-performance by the other. To alleviate the injustice thus occasioned, the civil law provided the condictio ob rem dati to enable the party at least to recover what he had given under the unenforceable contract, thus creating a unilateral obligation to perform analogous to that under stipulatio. And, as Buckland points out, "we should thus expect here, as there, however unfair it may appear, causa would relieve the receiver of his obligation to perform what he had promised under the unenforceable contract, "and, since this was release and no more, the receiver would be under no obligation to restore what had been received. And so it is laid down in various:

22. Idem.
Thus in D 12.4.3, it is provided that if I agree to perform a certain obligation in your favour if you for your part will manumit a certain slave, and the slave dies through no fault of yours before I have performed, you may nevertheless bring an action to compel performance.

There are texts to the contrary (for example D 12.4.16) and even texts where disagreement on the point is adverted to (for example, that between Celsius par. and filius, between Aristo and Celsius and between Julius Maurician), but the contrary texts mostly relate to the promise of a doex where the marriage hasn't since become impossible (in which equitable solutions are common) or to _donatio sub modo_ (in which generally the transfer of the property donated is conditional). As Buckland points out: "The weight of the texts, at least in commercial cases, is heavily against

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25. Hans-Peter Benör "Das sogenannte Symallagma in den Konsensualkontrakten des klassischen römischen Rechts" (Hamburg 1965) 14.


27. For example D 12.4.16; 12.7.5; 27.6.4 (arg); 39.5.2.7f. The texts show that a buyer is able to defend himself with the aid of an _ексептио_ (for example, the _ексептио mercis non traditis_) if he has to pay for a res as the result of a stipulation and has not yet received the res (Benör "op cit 54"), but this does not refer to cases of impossibility at all.

28. Buckland "Casus and Frustration in Roman Law" op cit 1283. See also T Mayer-Maly "Perpetuatio obligationis: D 45.1.9.1" 1956 _Rura_ 6 at 12.

29. Idem.
recovery from the recipient of performance upon release by casus. It seems, then, that retention was the general rule in the field of stricti juris relations, including the condition ob rem data, and that equitable relief was only sporadically applied, and then generally in non-commercial cases.

The position was otherwise in the later bona fide judicata, although the same rule was applied with equal rigour. "Casus in Roman Law was essentially unilateral in its effect. If both parties are relieved by casus, it is only where the casus makes both performances impossible. That the other party is also released in most bona fide contracts rests not upon release by casus, but on the very different principle that ex fide bona a party ought not to be called upon to pay for a service he has not had[32] or, if he had already paid, that he ought to recover anything paid for the performance which had become impossible. [33] Bona fides in Roman law was not merely restricted to absence of fraud. It even went beyond requiring each party to do all that is necessary to fulfil the purpose of the contract and to refrain from doing anything which would defeat or nullify that purpose. Each is obliged to do what he can to fulfil the reasonable

30. It is not proposed to deal with the difficult texts, for example D 19.1.50, about which there is much controversy; see H A Benöhr op cit 82f; David Pugsley "D 19.1.60" (unpublished) and R Hoelink Peritiem est Emptoris (Haarlem 1928). It was probably, as Benöhr says, a "welfare law" (op cit 86).
31. Buckland "Casus and Frustration in Roman and Common Law" op cit 1287. See also generally on this topic C Hartmann 1884 Jahrbuch für Dogmatik 417.
32. Ibid.
33. Idem 1288.
expectations of the other contracting party. The development of the concept of *bona fides* seems to have been accompanied by and probably connected with a dawning realisation of the mutually interdependent nature of performance and counter-performance, certainly in some of the newer, consensual contracts that had come into being.

*Synallagma* is a useful modern term employed to describe this mutual interdependence of reciprocal obligations. It was originally a Greek word with a very wide and indefinite area of meaning, and although it was used by the Roman jurists Labeo and Aristo it was not used by them in the more restricted and specialised sense found here. Nevertheless the synallagmatic nature of certain contracts, notably *locatio conditio* and *emptio venditio*, came to be recognized and enforced by the Romans ever more as time went by, although retarded by the shortcomings of the procedural remedies available.

A modern writer has classified *synallagma* into three types — genetic *synallagma* (which is to the effect that if one obligation does not come into being then the counter-obligation will not be created), conditional *synallagma* (where one obligation expires, the counter-obligation will also disappear) and functional *synallagma* (if the fulfilment of one

34. Buckland *Casus and Frustration in Roman and Common Law* op cit 1286; Kaser op cit 9 36 III 1; Feenstra op cit 504; Benöhr op cit 26-7.

35. Indeed, it was not used in this sense until the sixteenth century (Benöhr op cit 118). For modern examples of its application in our law, see *Hawson v Hortig* 1914 AD 293 and *Koenig v Johnson & Co Ltd* 1935 AD 252.


37. *Idem* 8 n 16 and 19.

38. *Idem* 100.

obligation is demanded, then the counter-obligation has to be satisfied. Genetic synallagma would appear to relate exclusively to initial impossibility and cases where there has been an initial failure of contract, and so does not concern this work. It is principally into the field of conditional synallagma that cases on supervening impossibility of performance fall. The analysis, however, though interesting, is not of much importance to this work. It will be sufficient to say that as a result of the growing importance of the notion of bona fides there gradually developed a concept in classical times that performance and counter-performance were, subject to certain exceptions, interdependent.

This was particularly so in the newer, consensual contracts of locatio condicion and emptio venditio, where, however, a doctrine of risk (periculum) evolved. The relationship between the doctrine of risk and the rules relating to supervening impossibility of performance will be examined more fully later, but it may here be stated that it provided an exception to the notion of synallagma, whereas the doctrine of impossibility of performance falls within the concept of synallagma and, it is submitted, developed as a part of it.

D 12.4.16 illustrates the difference neatly. In this passage Celsus imagines a situation where I give you a sum of money if you will give me the slave Stichus. According to Celsus, this transaction is not a sale but a case where the condicio ob rem dati ex non sequita would apply. He then premises three possible events, the first of which constitutes supervening impossibility of performance, namely...

40. Idem 1.
41. Idem 34, 39, 45, 94, 114, 116 and 118; see also 100.
42. Idem 97 and 117.
that Stichus had died after the conclusion of the contract with you and before he has been handed over to me, and concludes that I would have the right to recover the money paid over to you. The express explanation that the transaction is not to be judged on the analogy of sale is important, for otherwise the rule periculum emptoris would apply and a buyer of Stichus in those circumstances would have no right to recover his purchase price. 43

In lease, also, the doctrine of risk (periculum) resulted in exceptions to the strict mutual interdependence between performance and counter-performance. For example, if a tenant farmer was unable to produce a crop because of vice major, such as floods, landslides, night frost, excessive heat, or devastation by Roman or alien soldiers or by robbers or pirates, he was excused from his obligation to pay rental. 44 There was, however, no release arising from disadvantages ex speci rei orientur, such as the "flipping over" of wine, the destruction of crops by insects or the choking of crops by weeds, because these causes of damage were regarded as falling more within the tenant's sphere of influence. 45

The synallagma was then forced into the background by the doctrine of risk in both emptio venditio and locatio conductio 46 wherever that doctrine applied. As Benöhr puts it: "Here a ruling is favoured which takes into account the financial factors in a better way than the strict principle

43. Idem 91.
44. Idem 106-17; see also Buckland "Casus and Frustration in Roman and Common Law" op cit 1285. Modern South African cases regard these as instances of supervening impossibility of performance; see pages 90-2 below.
45. Benöhr op cit 107, 118.
46. This included locatio conductio operarum and locatio conductio operis faciendi, see Buckland "Casus and Frustration in Roman and Common Law" op cit 1290, 1293.
Possibly, if I may hazard a guess, commercial practice had much to do with the development of the doctrine of risk (particularly in sale), much as it has in modern times with the emergence of the expedition theory of acceptance sent through the post, and this practice no doubt rested to a large extent upon commercial convenience and acceptable public policy.

But, quite possibly, it also had its roots in long-standing tradition, and Buckland has suggested that if sale was a simplification of two stipulations, as is sometimes contended, the fact that only the stipulator whose promise had subsequently become impossible of fulfilment was thereby excused from his obligations, whereas the counter-stipulator was not, might account for the exceptional rule that the risk in the massa passed to the buyer even though there had been no transfer of ownership in the massa to him; the rule of the old stricti juris reciprocal stipulations impressing itself by tradition and usage, as it were, on the later bonae fidei contract of sale.

Leaving out of account the rules of periculum, the general rule of Roman law, then, was that a bonae fidei contract which had subsequently become impossible of performance on one side in effect released both parties from their duties to perform under it, and, if one party had already performed before performance by the other became impossible, he could recover his performance, or at any rate, if that was no longer possible, the enrichment gained by the other.

47. op cit 108 (my translation); also 117-18.

48. See remarks idem 117-18; for example, in lease, as we have seen, the "sphere of influence" notion prevailed. Benöhr says that the reasons were probably largely social (op cit 108).

49. op cit 1281 n 5.
This general rule, however, was subject to certain qualifications - qualifications which, because they apply to \textit{causa} and not to the concept of \textit{bona fides}, also applied to contracts \textit{stricti juris}; namely -

(a) the impossibility of performance must not be due to the fault of the party whose performance has become impossible; and,

(b) performance must be objectively, and not merely subjectively,\footnote{50} impossible.

Let me briefly examine each of these in turn.

(a) \textit{Fault}

As has been seen, notwithstanding the fact that in all cases the award had to consist of a definite sum of money, super-
vening impossibility of performance released the debtor from his obligation to perform (except, of course, where the \textit{actio} was in respect of \textit{certa persona}). This was not the case where the impossibility was due to the debtor's own fault.\footnote{51}

Here a distinction was made between the \textit{formula incerta} and an action for a \textit{certum}. Where the action was brought with a \textit{formula incerta}, with or without the insertion of the phrase "\textit{ex fide bona}", the culpable destruction of the object primarily owed did not discharge the obligation.\footnote{52} If the

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\begin{itemize}
\item \textbf{50.} These terms are examined by Windscheid \textit{op cit} 264 n 1, who rejects Hartmann's objections to their use.
\item \textbf{51.} As Mayer-Maly says \textit{op cit} 93: "The absolution of the debtor is unreasonable if he has to account for the impossibility himself." As we shall see later, the principle that the debtor is released if he cannot be blamed for the impossibility is not an absolute rule (see Windscheid \textit{op cit} 264 2 (a)).
\item \textbf{52.} Kaser \textit{op cit} § 37 I 3a.
\end{itemize}
debtor failed to perform properly, owing to circumstances for which he was responsible according to the standard of liability applicable, he was held liable for the creditor's interest (interestes). Liability for damages in the case of part or defective performance was automatically included in these actions.

On the other hand, in strict obligations for dare or reddere of an individually ascertained aures ree the destruction of the thing should logically have released the debtor, because the dare aportare in the formula presupposed the continuous existence of the thing which was owed, notwithstanding the aestimatio pecuniaria. Nevertheless, when the impossibility was brought about as a result of the fault of the debtor, as early as the time of the jurists of the late Republic a legal fiction came into operation that had the effect of notionally continuing the existence of the res owed. This perpetuatio obligationis provided that if the debtor was, according to the standard of liability applicable, responsible for the

53. As to which, see below 25f.
54. Kaser op cit § 37 I 3a.
55. Idem § 37 I 3a.
56. Idem § 37 I 2. See also Medicus op cit 70. Mayer-Maly says op cit 81: "The unbearable consequences of a ruling impossibilium nulla est obligatio in the case of a performance hindrance set up by the defendant led as early as the time of the pre-Classical jurists to the acceptance of a 'perpetuation' of the liability in species debts which were stricti juris." This may not be quite accurate, because "perpetuation" only applied to cases of supervening impossibility (see below). Whereas, as we have seen, the concept of impossibilitas according to Buckland applied only to cases of initial impossibility, though the concept of cessus had a broadly analogous effect where the impossibility occurred after the conclusion of the contract.
58. As to which, see later at 25f.
18.

destruction of the thing, the creditor could proceed as if the res were still in existence at the time of little contestatio, so that the formulary dare oportere remained valid.\textsuperscript{59}

Even here, of course, the judgment against the debtor was to pay the assessed value of the res. There was no room in these actions for an award of damages. If the object owed was in fact given, but in a defective condition, from the time of Julian the reduction in value could be claimed by the strict action for dare, and the same held for an incomplete performance. Before Julian's time the creditor was restricted to the actio de dolo, the action for radiare being justified by the fiction res deterior reddita non est reddita.\textsuperscript{60}

Thus, for example, if I promise to give you the slave Stichus and then kill him before handing him over, you could still bring your action, and I would be obliged to pay you the value of Stichus, who was kept notionally alive for this purpose by the perpetuatio,\textsuperscript{61} which was an extension of the clausula doli.\textsuperscript{62}

Just how the Roman law came to develop this doctrine in this particular way is a bit of a mystery. The perpetuatio obligationis applied only to supervening impossibility of

\textsuperscript{59} Kaser op cit § 37 I 2.

\textsuperscript{60} Ibid and D 13.6.31; 16.3.1.16.

\textsuperscript{61} Medicus op cit 71.

\textsuperscript{62} Idem 72. The fault did not give rise to a new obligation even after the perpetuatio disappeared. The old obligation is preserved, the duty of performance remaining legally the same. The fact that a money equivalent of performance is exacted from the debtor is merely an expedient (Windscheid op cit 264 n 7). See also Huber Hedendaagse Rechtsgeschiedenis (translated by Percival Gane) 1.38.3.
performance. Initial impossibility of performance seems to have been recognised as a ground for release from as far back as our sources go, without any exception similar to the perpetuatio. Why, then, should I be free of all liability if I first kill Stichus and then, knowing you are unaware of that fact, promise him to you? Why was Stichus in this instance not to be kept notionally alive for the purpose of founding liability?

As has been seen, the perpetuatio obligationis was an extension of the clausula doli, and, according to Medicus, the clausula doli would not only in its future tense refer to the subsequent destruction of the res but in its present tense also to its destruction before the promise, as the promise itself would constitute doli if the promisor had destroyed the res himself before he made the promise. In theory, then, the perpetuatio obligationis should have applied to initial impossibility of performance too, unless, of course, the slave Stichus was a figment of my imagination and had never existed at all in fact - but this was not the case.

It has been suggested that the reason for the distinction may very well lie in the fact that it is supposed that under the old legis actio per sacramentum in re procedure the res or something (such as a part of it) symbolising the res had to be produced, but that cannot be so, for it would have applied equally in cases of supervening and initial impossibility.

63. Idem 74.
64. Idem 71.
65. Idem 72.
66. Idem 73.
as has been shown, was not the case. It would also have applied to cases of subjective and objective impossibility and to a promise to deliver a res in possession of another, 68 which, as will be seen, was also not the law. As indicated earlier, Medicus submits that the real reason lies in the practical difficulty in fixing the res esti materia in early times. As he puts it: “To express it in positive terms, the stipulation obligatioris restricts itself to those cases in which the performance res existed in a performance-fit state at least some time previously and therefore also had a real market price. 69 It is true that in cases of impossibility one cannot assess the monetary value of the res if one takes it in its actual condition, but why draw a line at the moment the contract is formed? If Stichus had been killed moments before the stipulation was given and you found out this fact moments after I had stipulated, how could it be more difficult to arrive at a res esti materia than in the case of a cargo lost at sea after it is promised, where months lapses before the fact becomes known? 70

The reason for the distinction is obscure, but it may lie in the different lines along which the notions of impossibilitas and casus developed, in considerations of policy such as the idea that a contract of sale must have a certain and definite subject-matter upon which to operate, and in Roman ideas of responsibility which I need not examine here.

The borderline between fault and accident does not appear to have been very clearly defined in Roman law. In the strictest sense, for instance the contione ex stipulatu, and in

68 Ulpian 18-18.5.

69 Ibid.

70 Medicus explains this, apparently, by saying it is a "rather rough and ready classification...not too unusual in the early Roman Law" (op cit 79 - my translation).
conditions, the debtor was, according to the Code, only in the case of dolus.

According to the examples given in the Code, the classical jurists seem to have assumed a liability if the debtor had made performance impossible by his intentional act (facere) or if he had knowingly delayed the possible performance. But it was liability for dolus in an objective sense, in that conduct was construed as intended if, for example, the debtor had acted in ignorance of his obligation, and even if he could not have acted otherwise under the circumstances.

In isolated cases liability was extended to culpa, but this was probably classical, because in earlier times only liability for dolus and liability for custodia existed in the field of contractual and quasi-contractual responsibility.

Liability for custodia was imposed on borrowers "and, furthermore, on those who, like the launderer (pulito) and the mender of garments (sorator), received things to be worked upon, the ship-master, innkeeper and stable-keeper (nauta, ouopo et stabularius), the lessor of a warehouse, the inspector who, in his own interest, received things for examination, presumably also the vendor before delivery, the lessee of a thing, the partner who had to work upon things belonging to other partners, and perhaps also the pledge-creditor."
condictiones, the debtor was, according to Kaser, liable only in the case of dolus.

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Liability for autodita was imposed on borrowers "and, furthermore, on those who, like the launderer (fullo) and the mender of garments (sartor), received things to be worked upon, the ship-master, innkeeper and stable-keeper (navic, caupo at stabularius), the lessor of a warehouse, the inspector who, in his own interest, received things for examination, presumably also the vendor before delivery, the lessee of a thing, the partner who had to work upon things belonging to other partners, and perhaps also the pledge-creditor."

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71. op cit § III 4.
72. Ibid. See also D 12.1.5.
73. Ibid § 36 III 4. See also König v Johnson & Co Ltd 1935 AD 262, explaining Innes Co in MacDuff Co (Liquidator of) v Johannesburg Consolidated Investments Co., 1924 AD 573 and Pothier Traité des Obligations 3 6 3 para 625.
75. Ibid § 36 III 5.
76. Ibid § 36 III 3. See also Benöhr op cit 89-90.
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According to the examples given in the Code, the classical jurists seem to have assumed a liability if the debtor had made performance impossible by his intentional act (facere) or if he had knowingly delayed the possible performance.72 But it was liability for dolus in an objective sense, in that conduct was construed as intended if, for example, the debtor had acted in ignorance of his obligation, and even if he could not have acted otherwise under the circumstances.73 In isolated cases liability was extended to aulpa, but this was probably classical,74 because in earlier times only liability for dolus and liability for ausetoda existed in the field of contractual and quasi-contractual responsibility.75

Liability for ausetoda was imposed on borrowers "and, furthermore, on those who, like the launderer (fullo) and the mender of garments (saracinator), received things to be worked upon, the ship-master, innkeeper and stable-keeper (nauta, aapa et stabularius), the lessor of a warehouse, the inspector who, in his own interest, received things for examination, presumably also the vendor before delivery, the lessee of a thing, the partner who had to work upon things belonging to other partners, and perhaps also the pledge-creditor."76

71. op cit § III 4.

72. Ibid. See also D 12.1.5.

73. Ibid § 36 III 4. See also Koenig v Johnson & Co. Ltd 1935 AD 262, explaining Innes CJ in MacDuff Co (liquidator of) v Johannesburg Consolidated Investment Co., 1924 AD 573 and Pothier Traite des Obligations 3 § 3 para 625.


75. Ibid § 36 III 5.

76. Ibid § 36 III 3. See also Benohr op cit 89-90.
Originally liability for custodia was absolute, because, in practice, damage was occasioned generally as the result of defective care in guarding the thing, and thus of negligence. "Only certain typical situations of innocence were excluded; the following have been transmitted to us: fire, shipwreck, inundation, collapse of a building, earthquake, riot, pillage by the enemy and gangs of robbers, also the natural death of a slave or animal." As Kaser points out, the classical jurists may have found justification for the liability in the express or tacit assumption of a warranty to care for or guard the thing effectively. "Liability for damage occasioned by animals . . . and for the escape of slaves who had to be guarded . . . was included in custodia-liability." It was a controversial point among the classical jurists whether liability also lay in the case where damage was occasioned to the res by a third party. "Where a debtor had to expose a thing to perils under a contract (e.g. in carriage of goods by sea . . . ), this kind of liability was excluded."

77. Kaser op cit § 36 III 3. See also Benohr op cit 89 and Windscheid op cit 264 n 9.
78. Kaser loc cit.
79. Ibid. See also Windscheid op cit 264 n 9, where he points out that the custodian was liable except in cases of damnum fatale, vis major or casus cui resisti non potest.
80. Kaser loc cit.
81. Ibid. Naturally the debtor had to cede to the creditor all claims which he had against third parties responsible for the loss (Pothier op cit 3 6 4 para 635) including all insurance claims (Windscheid op cit 264 n 6 rule 5).
82. Ibid. And even where the damage or loss was deliberately occasioned by the carrier in such circumstances he could be excused, e.g. where he was forced to jettison cargo to save the ship and remaining cargo. Benohr op cit 99 and 116.
There were certain other instances of warranty where liability arose irrespective of fault; for example, where a contractor or a partner was assumed to have warranted that he had the necessary professional skill and, therefore, was held to be liable for imperitia. 83

The early liability for dolus hardened and extended into a liability for culpa in the bona fide judicia. 84 "After an early post-classical tradition one attempted to make up a clumsy and incomplete scheme of the standards of liability by assuming that the party who was not interested in the legal relationship, was liable for dolus only, whereas the party who was so interested was to be liable for culpa as well (so-called 'principle of utility' . . . )", except in the case of the mandatarius, the tutor and the negotiorum gestor, who were also liable for culpa. 85 The question arises whether the fault of which the promisor was guilty and which brought about the impossibility of performance could lie in an act of omission as well as one of commission.

The answer given by Mayer-Maly is "yes". "Only an obligation directed at factum (however) can be continued in existence through omissive culpa" (in addition to commissive culpa). 86 It appears that an opinion which regarded omissive culpa as founding liability in a wider field did not prevail. 87 Following Kreller, Mayer-Maly is also of the opinion that culpa was regarded objectively as being "an offence against that which is necessary in concretosc for fulfilment

83. Ibid.
84. Idem § 36 III 5.
85. Idem § 36 III 5.
86. op cit 9.
87. Ibid. See also supra.
of the obligation",88 thus indicating the influence of the concept of *bona fides* on the development of the notion of *culpa*.

In the *bona fides judicio* the creditor was, in addition to an award for his *interesse*, "indemnified for all other losses which resulted from the debtor's breach of his duty under the concrete obligation to show good faith and care".89

In the Eastern Roman Empire the concept of *culpa* was still further developed under the influence of Greek philosophy and Christianity into a tendency to base all liability on fault (although it must be admitted that the first glimmerings of the notion appear in classical times).90 The general norm then was that a debtor was liable for *dolus* and *culpa*, both of which acquired a new meaning in that they were taken to imply an element of moral blameworthiness, which did not permit too rigid a classification, but required an individual assessment in each particular case.91

"In *dolus* (*fraus*) the element of malice came to the fore. *Culpa* now comprised any blameworthy behaviour, especially the unintentional fault, negligence, irrespective of whether it manifested itself in positive acting or in an omission. This purely subjective *culpa* included a dereliction of duty; a general duty of care (*diligentia*) was on the debtor, the culpable disregard of which constituted carelessness (*negligentia*)."92 This latter was tantamount to *culpa* and

89. Kaser *op cit* § 37 1 3 b.
90. Idem § 36 IV 1.
91. Windscheid *op cit* 264 n 9.
92. Kaser *op cit* § 36 IV 1.
the very opposite of diligentia. Despite the fact that a rigid classification was not possible, there remained a gradation of standards, frequently based on traditional distinctions, which briefly were:

(a) Utmost care (exactissima diligentia), mainly imposed on those who in classical law had been liable for custodia; they bore the strictest liability and were responsible for even the slightest degree of negligence.

(b) The ordinary principle of liability for both dolus and culpa applied, the latter being measured by the well-known standard of the diligentia patrifamilias, a criterion obviously derived from Greek philosophy.

(c) A lower standard, which was often imposed, viz diligenz quam suis rebus adhibere solet (the so-called liability for culpa in concreto); sometimes Justinian construed this standard as a duty of the utmost care, but that is not particularly relevant for my purposes here.

(d) The lowest contractual responsibility was liability for culpa lata (nima negligentia) or gross negligence; although it was said culpa lata dolo aequiparatur, dolus was retained only for delict.

But even if there was culpa so that the obligation was perpetuated, the promisor could be freed of his liability if a larger overlapping accidental damage had been occasioned to

93. Ibid.
94. Idem § 36 IV 2.
95. Idem § 36 IV 2a.
96. Idem § 36 IV 2b.
97. Idem § 36 IV 2c.
98. Idem § 36 IV 2d, 2e. See also, generally, Windscheid op cit 264 n 9.
the res, provided that at that time the promisor was not in
mora. 99 This even applied to wilful damage. 100 Thus
Mayer-Maly points out that if a slave has been sold, and
subsequently the seller sells the slave again and delivers
him to a third party, even this second dolosale will not be
sufficient to "annul the freeing effect of the death of the
slave". 101 He points out, however, that neither Plautius
nor Paulus "nor the formulation of the consti tutio by the
veteris laid claim to the correctness of all the logical
consequences" of the rule, "but concentrated instead only on
the general rule". 102

Perpetuation also applied where the impossibility of performance
arose after the debtor was in mora. The rule provided that
if per debitorum statit, quo minus daret (ie if the destruction
of the thing was due to the debtor's fault or if it took
place after the debtor was in mora), the performance res was
notionally kept alive until litis contestatio.

Pernice 103 emphatically states that culpable destruction of
the obligation and mora had nothing in common, though clearly
they would appear to be logically related, for were it not
for the debtor's neglect to perform ... obligation timeously
the subject-matter of the contract might not have been
destroyed. Furthermore, both found a place in the perpetuation,
though it is impossible to decide which occurred first. 104
Mayer-Maly points out that the culpable destruction of an

99. Mayer-Maly op cit 17 and see below p 26 for the effect
of mora.
100. Ibid.
101. Ibid (my translation).
103. Labeo 22 133, referred to by Mayer-Maly op cit 18.
104. Mayer-Maly op cit 18.
obligation is non-remediable, whereas mora, on the other hand, is considered by some to be remediable; he goes on to say that mora came to be regarded as a failure in performance because of the "indisputable, logical, legal realization that late performance is only a substitute for the performance owed".¹⁰⁵

The perpetuatio obligationis was also used to exclude mere temporary suspension of the duty to perform.¹⁰⁶ In this way Roman law recognised something analogous to our present-day notion of temporary impossibility of performance.¹⁰⁷ As Pasquale Voci¹⁰⁸ points out, the problem of temporary impossibility of performance of a stipulation had received close study by Paulus and Celsus. Paulus postulates two hypothetical cases:

(1) Where A promises B a ship, which is later destroyed.

The obligation starts off by being valid, but is later extinguished. The destruction, however, may not be final; for example, it may be possible to repair the ship. Paulus says if it is reconstructed of the same materials of which it was previously made, it reacquires its original identity. The impossibility is terminated and the obligation of the stipulatio revives; the obligation was temporarily impossible of performance and the stipulatio merely temporarily invalid. But if the ship is reconstructed according to a different design (or, presumably, even if it is reconstructed to the same

¹⁰⁵. Following K Wolff Grundzüge des Österreiches Bürgerliches Rechts (1948); see Mayer-Maly op cit 18.
¹⁰⁷. Idem 87.
¹⁰⁸. Le obbligazioni Romani (corso di Pauletta) il contenuto dell'obbligatio I I (Milan 1969) (Prestazioni possibili) 130.
design but of different materials\textsuperscript{109}) it becomes a
different ship, and the obligation will not revive
but will be regarded as having been finally extinguished,
just as it would if the ship cannot be reconstructed.

(ii) Where a promised slave was captured by the enemy or
escaped from his master before delivery. The obli-
gation was not nullified, but action to compel delivery
of him could be taken only when the slave had been
recaptured.\textsuperscript{110} (It must be admitted, however, that
the words \textit{valere aperationem at stipulatorem} can also
mean that before repossession of the slave it was
possible to sue successfully for his value.\textsuperscript{111})

Celsius posed two further hypothetical cases:

(i) Where a thing is promised which later becomes \textit{extra
commeriun}, or a slave is promised who later becomes a
freeman, in each case the promisor not being
responsible for the change in status. In both these
cases the obligation was extinguished but reappeared
if the thing later became negotiable or the freeman
once more became a slave. No mention is made of the
length of the period of impossibility; hence, pre-
sumably, the Romans, unlike ourselves,\textsuperscript{112} did not
regard a period of temporary impossibility as
permanently invalidating the contract after a reasonable
period had elapsed, even if the inhibiting factors
were subsequently removed.

\textsuperscript{109} See the interesting parallel case referred to in
Schorer's note to Brotius' \textit{Inleiding tot de Hollandsche
Rechtsgeleerdheid} 1.3.47.1 (Maasdorp's translation 2d
ed Cape Town 1888).

\textsuperscript{110} See also Medicus \textit{op cit} 87-90. Temporary impossibility
also applied to cases of \textit{occausius causarium}. See
Medicus \textit{op cit} 77. See also Benohr \textit{op cit} 72-3.

\textsuperscript{111} Medicus \textit{op cit} 89.

\textsuperscript{112} See eg \textit{Beretta v Rhodesia Railways Ltd} 1947 2 \textit{SA}
1075 (SR) 1082 and see Chap 7 (pp 153ff) below.
Where a piece of land is promised on which later and before transfer to the promisee a building is erected. Celsus says that in such circumstances the obligation is extinguished, but that if the building is destroyed the obligation would revive. As might be expected, Paulus disagrees with this conclusion, but maintains there is relative impossibility of performance in this case.113

A similar sort of suspension, but not extinction, of the obligation arose in the case of vadimorium, a kind of recognisance entered into by a litigant to secure his due appearance at the hearing of the case. If the promisor was absent owing to his wife's pregnancy or to his presence at a relative's funeral, his promised payment was not exacted but was held in suspense against his appearance in due course.114

(b) Performance must be objectively impossible

First, performance had to be substantially impossible. As Medicus115 says, "nullity does not apply if the disturbed transaction remains performable with reasonable changes".

Secondly, the obligation had to be wholly impossible of performance. If it was merely partially impossible, the obligation was not extinguished, and the promisor had to perform what he could of the obligation and compel the promisee for what he could not perform.116 The obligation

113. See Voci op cit 130. A reference to the texts, viz D 32.79.2.3 and D 46.3.98.8, does not seem to support the conclusion in its entirety.
114. Kaser op cit § 36 IV 2d.
115. op cit 92.
116. Pothier op cit 362 para 623 and 364 para 634; but see Windscheid op cit 264 n 2 rules 6 and 8. See also below p 150f, where the matter raised here is dealt with in more detail.
could not be wholly impossible or performance, however, where

(i) the obligation related to a genus or an indeterminate res, i.e., a res not particularly specified; 117

(ii) the obligation consisted of alternative performances, only one of which had become impossible of fulfilment, as the remaining alternative simply became the promise due; 118 or

(iii) in consequence of the circumstances which made the performance impossible, the promisor received compensation or at least a right to compensation for loss of the thing due, for here the promisee could demand the compensation received by him or cession of the right to demand it. 119

Thirdly, mere difficulty of performance or personal incapability of the debtor 120 was insufficient. 121 In favo re obligations the distinction between impossibility and mere personal incapability was lost in cases where the person of the debtor was important, that is, in modern legal terms, in cases which require the performance of highly personal duties, 122 and the promisor was absolved, for example, where a portrait painter had been accidentally blinded. On the other hand, performance was considered impossible if it could be done only by exceptional effort or by the employment of very extraordinary resources or if it was within the power of only a

117. Pothier op cit 3 6 2 para 622; Windscheid op cit 264 n 2 rule 7.
118. Pothier op cit 3 6 2 para 621.
119. Ibid 3 6 4 para 635; Windscheid op cit 264 n 2 rule 5.
120. Which cannot always be clearly separated, see Medicus op cit 85.
121. Idem 100; Windscheid op cit 264 n 1.
122. Medicus op cit 84.
would not be wholly impossible of performance, however, where

(i) the obligation related to a genus or an indeterminate res, i.e. a res not particularly specified; 117

(ii) the obligation consisted of alternative performances, only one of which had become impossible of fulfilment, as the remaining alternative simply became the promise due; 118 or

(iii) in consequence of the circumstances which made the performance impossible, the promisor received compensation or at least a right to compensation for loss of the thing due, for here the promisee could demand the compensation received by him or cession of the right to demand it. 119

...thirdly, mere difficulty of performance or personal incapability of the debtor 120 was insufficient. 121 In facere obligations the distinction between impossibility and mere personal incapability was lost in cases where the person of the debtor was important, that is, in modern legal terms, in cases which require the performance of highly personal duties, 122 and the promisor was absolved, for example, where a portrait painter had been accidentally blinded. On the other hand, performance was considered impossible if it could be done only by exceptional effort or by the employment of very extraordinary resources or if it was within the power of only a

117. Pothier op cit 362 para 622; Windscheid op cit 264 n 4 rule 7.
118. Pothier op cit 362 para 621.
119. Ibid 364 para 635; Windscheid op cit 264 n 1.
120. Which cannot always be clearly separated, see Medicus op cit 85.
121. Idem 100; Windscheid op cit 264 n 1.
122. Medicus op cit 84.
While in general a promise was effective despite the incapacity of the debtor, there were exceptional cases. One such exceptional case was that of the promise of a fideicommissum of a foreign res. Here, it seems, an implied condition may have applied that the promise is effective only if the foreign res can be procured. The reason advanced by Medicus for the exception is that the fideicommissum was actionable in the extraordinaria cognitio for which a condemnatio in ipsam rem had to be given. It is clear, therefore, that Rabel's opinion that the Romans took account only of objective impossibility of performance is subject to some qualification.

It has been shown that if the res were carried away by the enemy, performance would be regarded as impossible, for it seems that the Romans were realistic enough to disregard the possibility of performance by the hostes themselves. On

123. D 40.7.41. See J E Goudsmit Rondakten-system 1.5.3.62 (translated by R de Tracy Gould (London 1873) 166) and F C von Savigny System des heutigen römischen Rechts III 165. See also Windscheid op cit 254 26 4.
124. Medicus op cit 84.
125. Ibid.
126. See below p 34. Medicus op cit 85.
127. Medicus op cit 91-2, particularly if we take into account those cases where the duty to perform was temporarily suspended; see above at 27ff.
128. op cit 89. R G McElroy "Frustration and Force Majeure: The Common Law and the Common Market" 1963 New Zealand Law Journal 185 says: "In Roman Law supervening impossibility of performance operated to extinguish an obligation . . . . The texts do not give other instances of this rule than destruction of subject matter . . . ", but this clearly appears to be incorrect.
the other hand, it afforded no excuse to the promisor, for example, that the promised res was owned by another who refused to part with it, or that it had been lost to him by theft, for strictly speaking these circumstances were not regarded as constituting impossibility, as performance could objectively be achieved, though probably not by him.

As has been seen, however, temporary impossibility would excuse a delay in performance, and it is probable also that under the Roman law difficulty in performance might also in certain circumstances excuse delay. Certainly from the days of the post-glossators the maxim "difficultas non tollet obligationem sed excusat a mora" was enunciated, and after the Middle Ages applied even to money debts. This maxim developed out of the Accursian Gloss on D 45.1.137.4, where impossibility is clearly contrasted with mere difficulty of performance. This clear distinction, however, did not correctly reflect the true position in Roman law, as has been shown, and came to have a less precise meaning and significance in medieval times.

130. Medicus op cit 101.
131. op cit 100.
132. op cit 101.
133. Feenstra op cit 501.
134. Idem 498; M Meijsers Etudes d'histoire du droit Vol IX, 27.
135. Feenstra op cit 498 and Windscheid op cit 264 n 1: "It is not so important whether the impossibility is an objective or a subjective one but whether the debtor is to blame for it"; and at 254 n 2, 1: "The debtor is freed of the duty of performance if he cannot perform or is incapable of performing through circumstances for which he is not responsible after the liability relationship has come into being"; see also R W Lee An Introduction to Roman-Dutch Law 5 ed (1953) 261 n 1 Voci op cit 125f and D 45.1.137.5.
136. See below re the clausula rebus sic stantibus, at pp 54 and 86.
There was another case of impossibility that failed to excuse the promisor and which must be mentioned here. This occurred where the promised *res* perished as a result of latent defects existing within it at the date the contract was entered into, unless the contract excluded liability for latent defects, as in the case of a *voestboote* sale.

The post-classical jurists, including Justinian, did not directly add anything to the rules relating to impossibility. Although, as we have seen, they developed the concept of *bona fides* and the rules relating to *diligentia*, it is surprising that the changes in legal procedure, more particularly the enforcement of specific performance, had no effect whatever on *impossibilitas* or *casus*. The Romans did not work out any rules providing for an unsuccessful claim for primary performance to be supplemented by a successful secondary claim.

Likewise, although *perpetuatio obligationis* fell into disuse the old rules of *casus* applied to the *bona fides* contracts in much the same way as they had in the *stricti juris judicis*, subject only to the growing sense of *synallagma*, of *bona fides* and of *diligentia*. As Riccobono points out:

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137. Benôhr *op cit* 90. See also Pothier *op cit* 361 para 613 n.

138. Medicus *op cit* 104.


140. Kaser *op cit* § 37 I 2.

"Frequently the compilers adapted passages, which originally referred to stipulation, so as to apply them to *emptio* and *locatio*, substituted the word 'obligatio' for 'stipulatio' and treated the stipulation as a written agreement. That the Byzantine emperors understood the form and substance of the stipulation in the latter sense is apparent from C 4.30.13. . . . With this as its meaning the term *stipulatio* passed into modern language."

B. **Roman-Dutch Law**

This process was completed by the institutional writers on the civil law. The *Pandectenrecht*, for example, "contains what is substantially only one system of contract . . . *Bona fide* notions have practically ousted those of *strictum jus*" and the "system of contract laid down by Pothier was unitary and fused the notion of release by *oasus* with respect to *stricti juris* obligations with the law of sale . . . ." He took the rules he preferred from both systems to create what seemed to him to be a more ideal exposition of the law of sale. The same is generally true of the other institutional writers and even of the classical treatises on Scots law.

The position in Roman-Dutch law, then, seems to have been very similar to that which obtained in the developed Roman law. Supervening impossibility of performance arose if, after the contract had been entered into but before performance had been

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142. See D 45.1.35.2; 44.7.48.
143. See D 45.4.14; 45.1.137.5.
144. Buckland "Casus and Frustration in Roman and Common Law" op cit 1283, 1286.
145. Idem 1288.
146. Idem 1293.
147. Idem 1284.
made,

(a) the subject-matter of the contract was destroyed, spoil or lost, or was expropriated;

(b) the object of the performance ceased to be capable of accepting performance, for example, A promised to procure B a right of way to B's land over an adjoining field, but B sells his land without transferring the benefit of the contract;

(c) due to sequellae causae obtained; this applied only where

(i) both contracts were lucrative; and

(ii) the rights actually acquired under one lucrative contract were at least as extensive as those promised under the other, otherwise the obligation remained under the latter contract to make up the deficit;

(d) death or disability incapacitated a promisor from performing his obligations under the contract, for

148. Pothier op cit 3.6.1. para 613; Van der Linden Koopmans Handboek (translated by George T Morice (Cape Town 1914)) 1.18.6; Huber Betredenges Rechtsgeschiedenis (translated by Percival Gane) 3.42.7 and Grotius Inleiding tot de Hollandse Rechtsgeschiedenis (translated by R W Lee (Oxford 1926)) 3.47.1.

149. Van der Linden op cit 1.18.6.

150. Ibid and Huber op cit 3.42.7.

151. Pothier op cit 3.6.1. para 614 and Grotius op cit 3.47.1, 4.

152. Pothier loco cit.


156. Idem 3.6.1. para 617.
made, 

(a) the subject-matter of the contract was destroyed, made, or lost or became extra commoditatem or was expropriated; 

(b) the object of the performance ceased to be capable of accepting performance, for example, A promised to procure B a right of way to B's land over an adjoining field, but B sells his land without transferring the benefit of the contract; 

(c) causa lucrativa causa obtained; this applied only where 

(1) both contracts were lucrative; 

(2) the rights actually acquired under one lucrative contract were at least as extensive as those promised under the other, otherwise the obligation remained under the latter contract to make up the deficit; 

(d) death or disability incapacitated a promisor from performing his obligations under the contract, for 

148. Pothier op cit 3.6.1.para 613; Van der Linden Koperzins Handboek (translated by George T Morice (Cape Town 1914)) 1.18.6; Huber Hedendaagse Rechtsgesnerchayt (translated by Percival Gane) 3.42.7 and Grothus Inisiting tot de Hollandsche Rechtsgesnerchayt (translated by R W Lee (Oxford 1926)) 3.47.1. 

149. Van der Linden op cit 1.18.6. 

150. Ibid and Huber op cit 3.42.7. 


152. Pothier loco cit. 


156. Idem 3.6.1. para 617.
example, a portrait painter became blind.\textsuperscript{157}

As regards (a):

(i) Destruction was subjected to very much the same test as in Roman law.\textsuperscript{158} The \textit{Hollandseke Consultatien} 1.66 contains a reference to a case at Amsterdam where it was held that a surviving spouse could not claim under an antenuptial contract a mill which had been blown down by the wind and reconstructed, in part out of the old materials, on the grounds that it had ceased to exist and something quite different had been substituted in its place.\textsuperscript{159}

(ii) If the subject-matter of the contract was spoilt, the general rule appears to have been that the debtor was not released, but had to perform what remained,\textsuperscript{160} and if he was responsible for the damage, to compensate the creditor for the deficiency in performance;\textsuperscript{161} but if the deficient performance could be shown to be of no value to him, the creditor could reject it and, where the debtor was responsible, demand full compensation from him.\textsuperscript{162}

\textsuperscript{157} Supra. All the cases were very much in accord with Roman law.

\textsuperscript{158} Supra.

\textsuperscript{159} Scherer's note to Grotius op cit 3.47.1.

\textsuperscript{160} Pothier op cit 3.6.1 paras 624, 634. The examples given relate to sale, where the doctrine of risk would require this anyway. See also Van der Linden op cit 1.18.6; Windscheid op cit 264 n 2: "If the debtor is not to blame, he is free and only has to perform what remains possible of the obligation originally contracted for", including any proceeds (such as insurance) received from the destroyed ree.

\textsuperscript{161} Windscheid op cit 264 n 2, 6, 8, provided the right has already vested at the time of the partial destruction (Pothier op cit 3.6.1 para 634).

\textsuperscript{162} Windscheid op cit 264 n 2, 6, 8.
(iii) A distinction was drawn between destruction and loss, for a thing destroyed cannot be renewed, whilst if it is merely lost, for instance taken by robbers, it may be recovered and the debtor is only released whilst the loss continues; hence temporary impossibility was also recognised, apparently still without time limit.

Again, impossibility did not release the debtor if he was responsible for it, whether by a deliberate act, even if at the time he was unaware of the obligation, or by negligence, the determination of which varied according to the different nature of contracts.

The onus rested on the debtor to show that the subject-matter of the contract had not perished or been damaged as a result of his fault.

If the debtor was in mora at the time the subject-matter was destroyed or damaged, he was generally not released, unless the mora had been purged, by tender, waiver or release, or he could show that it would have been destroyed or damaged.

163. Pothier op cit 3.6.1 para 620.
164. Ibid 3.6.1 para 625; Windscheid 264 n 2, 3 & 4; Grotius op cit 3.47.1, & 2; Van Leeuwen op cit 2.4.14.3; Huber op cit 3.42.7.
165. Pothier op cit 3.6.1.625.
166. Ibid 3.6.1.626; Windscheid op cit 264 n 2, 3 & 9; Van der Linden op cit 1.18.6; Van Leeuwen op cit 2.4.14.3.
167. Pothier op cit 3.6.1.626.
168. op cit 3.6.1.620.
169. op cit 3.6.1.627; Grotius op cit 3.47.1, 3; Huber op cit 3.42.7.
170. Pothier op cit 3.6.1.627.
anyway, even if delivered in time, unless the creditor would have resold it and so passed on the risk. These rules do not appear to be restricted to the doctrine of risk, but to be generally applicable to supervening impossibility of performance, though the institutional writers make no attempt to distinguish between the two doctrines. If the debtor's liability arose from fraud or violence, for example, he had forcefully dispossessed the creditor of the res, it did not avail him to show that it would equally have perished in the creditor's possession; he was held absolutely liable. In all such cases where the debtor was not released by the supervening impossibility, he was obliged to pay the creditor damages and interest. Windscheid, however, says that if the performance is possible but only with disproportionate sacrifices, the debtor would be liable only for the true value of the res, but not interest, though often in such circumstances the extreme difficulty of performance releases the debtor.

Where the liability existed, it was transmissible to the debtor's heirs, and sureties for the original obligation were liable for the substituted obligation.

171. *Ibid* and Huber *op cit* 3.42.7.
172. Pothier *op cit* 3.6.1.627.
173. *Ibid* and Huber *op cit* 3.42.7.
174. Van der Linden *op cit* 1.18.6.
175. *op cit* § 264 n 2 (b).
176. *op cit* § 264.2.4. and see above pp 30-1.
177. Pothier *op cit* 3.6.1.6629.
178. *Ibid* and Van der Linden *op cit* 1.18.6; for the position where the surety, a co-debtor or a co-heir was guilty of fault or *morae*, see Pothier *op cit* 3.6.1 para 630, 1 & 2 respectively.
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