

https://dspace.org/

Supervening impossibility of performance in the South African law of contract

Ramsden, William Arthur

2015
http://hdl.handle.net/10539/18107

Downloaded from a DSpace repository. https://dspace.org/

SUPERVENING IMPOSSIBILITY OF PERFORMANCE

IN THE

SOUTH AFRICAN LAW OF CONTRACT

by

WILLIAM ARTHUR RAMSDEN QC BA LL B (Witwatersrand)

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 c*) (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 references.

W A RAMSDEN

1983

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 references.

W A RAMSDEN

1983

Certum est quia impossibile est -

Tertullian *De Carne Christi*, V.

CONTENTS

	Page
Preface	i
Summary	ii
CHAPTER 1 - INTRODUCTION	1
A. Scope of the Inquiry	1
B. Classification of Types of Impossibility	2
CHAPTER 2 - HISTORICAL SURVEY OF THE DEVELOPMENT OF SUPERVENING IMPOSSIBILITY OF PERFORMANCE	5
A. Roman Law	5
B. Roman-Dutch Law	34
CHAPTER 3 - THE APPLICABILITY OR RELEVANCE OF FOREIGN LAW	41
A. English-law Sources	41
(a) *Pacta sunt servanda*	49
(b) Loss lies where it falls	60
(c) The doctrine of "frustration"	62
B. Other foreign-law sources	81
CHAPTER 4 - *VIS MAJOR* AND *CASUS FORTUITUS*	84
A. The Basic Rule	84
B. Definitions	89
C. Where the Basic Rule Does Not Apply	94
(a) Assumption of *periculum solutionis*	98
(b) Fault	102
(c) *Mora*	105

CHAPTER 5 - ABSOLUTE IMPOSSIBILITY 108

A. Interpretation of the Contract 108

B. Performances Owed in the Alternative 116

C. Promise of a *Genus* 116

D. Difficulty or Inconvenience or Risk in Performing 117

E. The Doctrine of "Changed Circumstances" and "Commercial Frustration" 125

F. Where Performance Conditionally Possible, as with Licence or Permission 140

G. Contracts *Ad Faciendum* 143

H. Estoppel Operating to Preclude Reliance on Impossibility 144

CHAPTER 6 - PARTIAL IMPOSSIBILITY 150

A. Substantial Performance Possible 150

B. Performance Severable 152

C. Partial Destruction Resulting in Total Impossibility 159

D. Compensation for Reduced Performance 160

CHAPTER 7 - TEMPORARY IMPOSSIBILITY 163

A. Distinction between Partial and Temporary Impossibility 163

B. Analysis of Temporary Impossibility 168

CHAPTER 8 - THE EFFECT OF SUPERVENING IMPOSSIBILITY OF PERFORMANCE 176

A. Modification of the Contract 176

B. Contract Extinguished 178

Exceptions 179

C. Acquired Rights 182

(a) Recovery of part performance 182

(b) Part payment for work part done 183

(c) Remission of amount payable 183

(d) Position where no enrichment occurs 184

D. Effect of Specific Terms in the Contract 188

CHAPTER 9 - PLEADING AND ONUS OF PROOF 190

A. Pleading 190

B. Onus of Proof 190

TABLE OF CASES CITED 196

A. South African 196

B. Foreign 207

TABLE OF STATUTES CITED 212

A. South African 212

B. Foreign 212

BIBLIOGRAPHY 213

I. ROMAN LAW 213

A. SOURCES 213

B. SECONDARY SOURCES 213

II. MEDIEVAL LAW 215

A. SOURCES 215

B. SECONDARY SOURCES 216

III. ROMAN-DUTCH LAW 217

A. SOURCES 217

IV. FOREIGN LAWS 220

V. SOUTH AFRICAN LAW 222

BIBLIOGRAPHY 213

I. ROMAN LAW 213

A. SOURCES 213

B. SECONDARY SOURCES 213

II. MEDIEVAL LAW 215

A. SOURCES 215

B. SECONDARY SOURCES 216

III. ROMAN-DUTCH LAW 217

A. SOURCES 217

IV. FOREIGN LAWS 220

V. SOUTH AFRICAN LAW 222

PREFACE

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 Romeins-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 Noreen, 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."

(*Poetics* 24)

W A R

PREFACE

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 Romeins-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 Noreen, 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."

(*Poetics* 24)

W A R

SUMMARY

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, Flamman & 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 forseeability 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 *mora* of either party or the operation of the maxim *genus non perit* 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 *voetstoots* clause and an exemption clause;

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

CHAPTER 1

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

CHAPTER 1

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

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 *exceptio non adimpleti contractus*.[1]

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.[2] On the other hand, it

---

1. See, generally, *Manual of German Law* 2 ed (1968) I § 215; J C de Wet and J P Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4 ed (1978) 6. And see below pp 11ff .

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.

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.

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 *impossibilitas* only in connection with initial impossibility.[1] For supervening impossibility it used the word *casus*[2] (which in this context means an accident or chance occurence).

Roman law divided contracts into those which were *stricti juris* and those which were *bona fidei*, according to the forms

---

1. See W W Buckland "*Casus* and Frustration in Roman and Common Law" (1933) 46 *Harvard Law Review* 1281; and R Feenstra "Verandering van Omstandigheden en Trouw aan het Gegeven Woord, Enkele Historische Kanttekeningen," *Rechtsgeleerd Magazijn Themis* 1972 (Amsterdam) 493 at 497.

2. Buckland *op cit* 1281. As to the meaning of the word *casus* as used in the sources, see Theodor Mommsen "About the Impossibility of Performance and its Influence on Contractual Relationships" (my translation), in *Beitrage zum Obligationenrecht*. (Braunschweig, 1853) vol I pp 241-7. See also Bernhard Windscheid *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 *bonae fidei*, and the contracts in this class were generally bilateral.[3]

Stricti juris actions could lie for a *certum*[4] or could be brought with the *formula incerta*.[5] In both cases the judgment had to consist in the award of a definite sum of money (*condemnatio pecuniaria*),[6] for until the introduction of the *extraordinaria cognitio* procedure the Roman courts had no power to order specific performance.[7] 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*).[8]

The judgment, however, could be and was always satisfied by payment of the sum awarded.[9] 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,

---

3. Buckland *op cit* 1281.

4. Whether *certa pecunia*, *certum dare* or *certam rem reddere*.

5. Max Kaser *Roman Private Law* 2 ed (Durban,1968) II § 34. (Translation by Rolf Dannenburg of the 3rd edition of *Romisches Privatrecht*.)

6. Kaser *op cit* 2 ed II § 34.

7. See J M Kelly *Roman Litigation* (Oxford 1966) 69f.

8. *Ibid.* See also Kaser *op cit* 2 ed II § 34.

9. Dieter Medicus "Zur Funktion der Leistungsunmöglichkeit im romischen Recht" 1969 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* LXXXVI *Band* (*Rom Abt*) 67 at 92, 102-3.

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 Rabel[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 (ie 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,

---

10. W W Buckland "The Nature of Contractual Obligation" (1944) *Cambridge LJ* 247 at 248; Medicus *op cit* 67.

11. Medicus *op cit* 73.

12. Kaser *op cit* 32 II 5.

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.[17] 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,[18] or failed, to take effect, a *condictio* will lie for the recovery of anything paid under it",[19] but, as

---

Buckland "*Cause* and Frustration in Roman and Common Law" *op cit* 1281.

Kunkel uses the word "exhausted".

My translation.

Buckland points out,[20] "that refers merely to non-performance and should not be confused with release by *casus*." 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 *casus* 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 secuta* 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,[21] 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*.[22] And, as Buckland points out, "we should thus expect here, as there, however unfair it may appear, *casus* 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

---

20. Buckland "*Casus* and Frustration in [illegible] *op cit* 1282.

21. *Idem* 1282.

22. *Idem*.

texts."[23]

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 *pat-* and *filius*,[24] between Aristo and Celsus[25] and between Juli : Maurician[26]), but the contrary texts[27] mostly relate to the promise of a *dos* where the marriage has 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).[28] As Buckland points out:[29] "The weight of the texts, at least in commercial cases, is heavily against

---

23. *Idem.*

24. *Idem* 1283 n12.

25. Hans-Peter Benöhr *Das sogenamte Synallagma in den Konsensualkontrakten des klassischen römischen Rechts* (Hamburg 1965) 14.

26. *Idem.*

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 *exceptio* (for example,the *exceptio meravis non traditias*) if he has to pay for a *res* as the result of a stipulation and has not yet received the *res* (Benöhr *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 *Iura* 6 at 12.

29. *Idem.*

recovery from the recipient of performance upon release by *casus*."[30] It seems, then, that retention was the general rule in the field of *stricti juris* relations, including the *condictio ob rem dati*, and that equitable relief was only sporadically applied, and then generally in non-commercial cases.[31]

The position was otherwise in the later *bonae fidei judicia*, 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 fidei* 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 R Benöhr *op cit* 82f; David Pugsley "*D* 19.1.50" (unpublished) and R Hoelink *Periculum est Emptoris* (Haarlem 1928). It was probably, as Benöhr says, a "welfare *lex*" (*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.[34] 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.[35] It was originally a Greek word with a very wide and indefinite area of meaning,[36] 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.[37] Nevertheless the synallagmatic nature of certain contracts, notably *locatio conductio* and *emptio venditio*,[38] 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[39] 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* § 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 *Hauman v Nortje* 1914 AD 293 and *Koenig v Johnson & Co Ltd* 1935 AD 262.

36. Benöhr *op cit* 8.

37. *Idem* 8 n 16 and 19.

38. *Idem* 100.

39. Benöhr *op cit*.

obligation is demanded, then the counter-obligation has to be satisfied).[40] 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[41] that performance and counter-performance were, subject to certain exceptions, interdependent.

This was particularly so in the newer, consensual contracts of *locatio conductio* 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*,[42] 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 *condictio ob rem dati re non secuta* 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 *vis 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 ipsa rei oriantur*, 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.

of the *synallagma*."[47] 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.[48]

But, quite possibly, it also had its roots in long-standing tradition, and Buckland[49] 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 *merx* passed to the buyer even though there had been no transfer of ownership in the *merx* to him; the rule of the old *stricti iuris* 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 *casus* and not to the concept of *bona fides*, also applied to contracts *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,[50] impossible.

Let me briefly examine each of these in turn.

(a) Fault

As has been seen, notwithstanding the fact that in all cases the award had to consist of a definite sum of money, supervening impossibility of performance released the debtor from his obligation to perform (except, of course, where the *actio* was in respect of *certa pecunia*). This was not the case where the impossibility was due to the debtor's own fault.[51]

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

---

50. These terms are examined by Windscheid *op cit* 264 n 1, who rejects Hartmann's objections to their use.

51. As Mayer-Maly says *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 *op cit* 264 2 (a)).

52. Kaser *op cit* § 37 I 3a.

debtor failed to perform properly, owing to circumstances for which he was responsible according to the standard of liability applicable,[53] he was held liable for the creditor's interest (*interesse*).[54] Liability for damages in the case of part or defective performance was automatically included in these actions.[55]

On the other hand, in strict obligations for *dare* or *reddere* of an individually ascertained *certa res* the destruction of the thing should logically have released the debtor, because the *dare oportere* in the *formula* presupposed the continuous existence of the thing which was owed, notwithstanding the *aestimatio pecuniaria*.[56] 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.[57] This *perpetuatio obligationis* provided that if the debtor was, according to the standard of liability applicable,[58] 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 *striati 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 *casus* had a broadly analogous effect where the impossibility occurred after the conclusion of the contract.

57. Kaser *op cit* § 37 I 2.

58. As to which, see later at 25f.

destruction of the thing, the creditor could proceed as if the *res* were still in existence at the time of *litis contestatio*, so that the formulary *dare oportere* remained valid.[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 *reddere* being justified by the fiction *res deterior reddita non est reddita*.[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*,[61] which was an extension of the *clausula doli*.[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

---

59. Kaser *op cit* § 37 I 2.

60. *Ibid* and *D* 13.6.31; 16.3.1.16.

61. Medicus *op cit* 71.

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 Rechtsgeleerdheyt* (translated by Percival Gane) 1.38.3.

performance.[63] 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*.[64] 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 *dolus* if the promisor had destroyed the *res* himself before he made the promise.[65] 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[66] - 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 rem* procedure the *res* or something (such as a part of it) symbolising the *res* had to be produced;[67] 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.

67. Kaser *Das Römische Zivilprozessrecht* (München 1966) 69, referred to by Medicus *op cit* 74.

was, 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 *litis aestimatio* in early times. As he puts it: "To express it in positive terms, the *perpetuatio obligationis* restricts itself to those cases in which the performance *res* existed in a performance-fit state at a point 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 *litis aestimatio* than in the case of a cargo lost at sea after it is promised, where months elapse before the loss 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 actions, for instance the *actiones ex stipulatu*, and in

---

Medicus *op cit* 74-5.

Idem.

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).

condictiones, the debtor was, according to Kaser,[71] liable 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.[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 *culpa*, but this was probably classical,[74] 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 (*fullo*) and the mender of garments (*sarcinator*), received things to be worked upon, the ship-master, innkeeper and stable-keeper (*nauta, caupo 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 6 3 para 625.

74. Kaser *op cit* § 36 III 4.

75. *Ibid* § 36 III 5.

76. *Ibid* § 36 III 3. See also Bendor [illegible]

condictiones, the debtor was, according to Kaser,[71] liable 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.[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 *culpa*, but this was probably classical,[74] because in earlier times only liability for *dolus* and liability for *custodia* existed in the field of contractual and quasi-contractual responsibility.[75]

Liability for *custodia* was imposed on borrowers "and, furthermore, on those who, like the launderer (*fullo*) and the mender of garments (*sarcinator*), received things to be worked upon, the ship-master, innkeeper and stable-keeper (*nauta, caupo 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 6 3 para 625.

74. Kaser *op cit* § 36 III 4.

75. *Ibid* § 36 III 5.

76. *Ibid* § 36 III 3. See also Benöhr *op cit* 89-90.

condictiones, the debtor was, according to K ,er,[71] liable 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.[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 *culpa*, but this was probably classical,[74] because in earlier times only liability for *dolus* and liability for *custodia* existed in the field of contractual and quasi-contractual responsibility.[75]

Liability for *custodia* was imposed on borrowers "and, furthermore, on those who, like the launderer (*fullo*) and the mender of garments (*sarcinator*), received things to be worked upon, the ship-master, innkeeper and stable-keeper (*nauta, caupo 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 6 3 para 625.

74. Kaser *op cit* § 36 III 4.

75. *Ibid* § 36 III 5.

76. *Ibid* § 36 III 3. See also Benöhr *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.[77] "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."[78] 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.[79] "Liability for damage occasioned by animals . . . and for the escape of slaves who had to be guarded . . . was included in *custodia*-liability."[80]

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.[81] "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."[82]

---

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, eg 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 *bonae fidei 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 *facere* [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 concreto* 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 *bonae fidei judicia* 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

---

88. *Ibid* 13.

89. Kaser *op cit* § 37 I 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*.[93] Despite the fact that a rigid classification was not possible, there remained a gradation of standards, frequently based on traditional distinctions,[94] 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.[95]

(b) The ordinary principle of liability for both *dolus* and *culpa* applied, the latter being measured by the well-known standard of the *diligens paterfamilias*, a criterion obviously derived from Greek philosophy.[96]

(c) A lower standard, which was often imposed, viz *diligentia 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.[97]

(d) The lowest contractual responsibility was liability for *culpa lata* (*nimia negligentia*) or gross negligence; although it was said *culpa lata dolo aequiparatur*, *dolus* was retained only for delict.[98]

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 *dolo* sale 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 *constitutio* 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]

Perpetuatio also applied where the impossibility of performance arose *after* the debtor was *in mora*. The rule provided that if *per debitorem stetit, 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 his obligation timeously the subject-matter of the contract might not have been destroyed. Furthermore, both found a place in the *perpetuatio*, 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).

102. *Idem* 17-18 (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 Voci[108] 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:

(i) 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 *Grundriss des Österreiches Bürgerliches Rechts* (1948); see Mayer-Maly *op cit* 18.

106. Medicus *op cit* 86-7.

107. *Idem* 87.

108. *Le obbligazioni Romani (corso di Paulette) il contenuto dell' obligatio* I 1 (Milan 1969) (*Prestazione possibile*) 130.

design but of different materials[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 obligation was not nullified, but action to compel delivery of him could be taken only when the slave had been recaptured.[110] (It must be admitted, however, that the words *valere emptionem et stipulatiorem* can also mean that before repossession of the slave it was possible to sue successfully for his value.[111])

Celsus posed two further hypothetical cases:

(i) Where a thing is promised which later becomes *extra commercium*, 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, presumably, the Romans, unlike ourselves,[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.

---

109. See the interesting parallel case referred to in Schorer's note to Grotius' *Inleiding tot de Hollandsche Rechtsgeleerdheyd* 1.3.47.1 (Maasdorp's translation 2d ed Cape Town 1888).

110. See also Medicus *op cit* 87-90. Temporary impossibility also applied to cases of *concursus causarum*. See Medicus *op cit* 77. See also Benöhr *op cit* 72-3.

111. Medicus *op cit* 89.

112. See eg *Beretta v Rhodesia Railways Ltd* 1947 2 SA 1075 (SR) 1082 and see Chap 7 (pp 163ff) below.

(ii) 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 *vadimonium*, 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 Medicus[115] 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 compensate 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* 3 6 2 para 623 and 3 6 4 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.

would not be wholly impossible of performance, however, where

(i) the obligation related to a *genus* or an indeterminate *res*, ie 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* 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*, ie 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* 3 6 2 para 622; Windscheid *op cit* 264 n 3 rule 7.

118. Pothier *op cit* 3 6 2 para 621.

119. *Ibid* 3 6 4 para 635; Windscheid *op cit* 264 n 3 rule 7.

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.

few exceptional persons.[123]

While in general a promise was effective despite the incapacity of the debtor,[124] there were exceptional cases. One such exceptional case was that of the promise of a *fideicommissum* of a foreign *res*.[125] Here, it seems, an implied condition may have applied[126] 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.[127] It is clear, therefore, that Rabel's opinion that the Romans took account only of objective impossibility of performance is subject to some qualification.[128]

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.[129] On

---

123. *D* 40.7.41. See J E Goudsmit *Pandekten-systeem* 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* 264 2b 4.

124. Medicus *op cit* 84.

125. *Ibid*.

126. See below p 34.

127. Medicus *op cit* 85.

128. Medicus *op cit* 91-2, particularly if we take into account those cases where the duty to perform was temporarily suspended; see above at 27f.

129. *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,[130] or that it had been lost to him by theft,[131] for strictly speaking these circumstances were not regarded as constituting impossibility,[132] 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 tollit obligationem sed excusat a mora*" was enunciated, and after the Middle Ages applied even to money debts.[133] This maxim developed out of the Accursian Gloss on *D* 45.1.137.4, where impossibility is clearly contrasted with mere difficulty of performance.[134] This clear distinction, however, did not correctly reflect the true position in Roman law,[135] as has been shown, and came to have a less precise meaning and significance in medieval times.[136]

---

130. Medicus *op cit* 101.

131. *c it* 100.

132. *op cit* 101.

133. Feenstra *op cit* 501.

134. *Idem* 498; M Meijers *Etudes d'histoire du droit* Voi 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 264 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,[137] unless the contract excluded liability for latent defects, as in the case of a *voetstoots* sale.

The post-classical jurists, including Justinian, did not directly add anything to the rules relating to impossibility.[138] 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.[139]

Likewise, although *perpetuatio obligationis* fell into disuse[140] the old rules of *casus* applied to the *bonae fidei* contracts in much the same way as they had in the *stricti juris judicia*, subject only to the growing sense of *synallagma*, of *bona fides* and of *diligentia*. As Riccobono points out:[141]

---

137. Benöhr *op cit* 90. See also Pothier *op cit* 3 6 1 para 613 n.

138. Medicus *op cit* 104.

139. *Ibid*. The Roman-Dutch jurists, however, took it into account: see Van Leeuwen *Het Roomsch Hollandsche Recht* 12 ed revised and with notes by C W Decker 1780-3) (translation by J G Kotze sub nom *Commentaries on the Roman-Dutch Law* (London 1882-6)) 243.

140. Kaser *op cit* § 37 I 2.

141. Salvatore Riccobono *Stipulation and the Theory of Contract* (translation by J Kerr Wylie (1957) (Amsterdam and Cape Town) 174.

"Frequently the compilers adapted passages, which originally referred to stipulation, so as to apply them to *emptio* and *locatio*,[142] substituted the word '*obligatio*' for '*stipulatio*'[143] 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 *Pandektenrecht*, for example, "contains what is substantially only one system of contract . . . *Bonae fidei* notions have practically ousted those of *strictum jus*"[144] and the "system of contract laid down by Pothier was unitary and fused the notion of release by *casus* with respect to *stricti juris* obligations with the law of sale . . . ."[145] 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."[146] The same is generally true of the other institutional writers and even of the classical treatises on Scots law.[147]

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

---

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,[148] spoilt[149] or lost,[150] or became *extra commercium*[151] or was expropriated;[152]

(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;[153]

(c) *duae lucrativae causae* obtained;[154] this applied only where

(i) both contracts were lucrative;[155] 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;[156]

(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 *Hedendaagse Rechtsgeleerdheyt* (translated by Percival Gane) 3.42.7 and Grotius *Inleiding tot de Hollandsche Rechtsgeleerdheyt* (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 *loc cit*.

153. *Idem* 3.6.1. para 615.

154. *Idem* 3.6.1. para 616.

155. *Idem* 3.6.1. paras 618-19.

156. *Idem* 3.6.1. para 617.

made,

(a) the subject-matter of the contract was destroyed,[148] spoilt[149] or lost,[150] or became *extra commercium*[151] or was expropriated;[152]

(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;[153]

(c) *duae lucrativae causae* obtained;[154] this applied only where

(i) both contracts were lucrative;[155] 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;[156]

(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 *Hedendaagse Rechtsgeleerdheyt* (translated by Percival Gane) 3.42.7 and Grotius *Inleiding tot de Hollandsche Rechtsgeleerdheyt* (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 *loc cit*.

153. *Idem* 3.6.1. para 615.

154. *Idem* 3.6.1. para 616.

155. *Idem* 3.6.1. paras 618-19.

156. *Idem* 3.6.1. para 617.

example, a portrait painter became blind.[157]

As regards (a):

(i) Destruction was subjected to very much the same test as in Roman law.[158] The *Hollandsche 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.[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,[160] and if he was responsible for the damage, to compensate the creditor for the deficiency in performance;[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.[162]

---

157. *Supra*. All the cases were very much in accord with Roman law.

158. *Supra*.

159. Schorer's note to Grotius *op cit* 3.47.1.

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 *res*.

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).

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;[163] 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,[164] even if at the time he was unaware of the obligation,[165] or by negligence,[166] the determination of which varied according to the different nature of contracts.[167]

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.[168]

If the debtor was *in mora* at the time the subject-matter was destroyed or damaged, he was generally not released,[169] unless the *mora* had been purged, by tender, waiver or release,[170] 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,[171] unless the creditor would have resold it and so passed on the risk.[172] 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.[173]

In all such cases where the debtor was not released by the supervening impossibility, he was obliged to pay the creditor damages and interest,[174] 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,[175] though often in such circumstances the extreme difficulty of performance releases the debtor.[176]

Where the liability existed, it was transmissible to the debtor's heirs,[177] and sureties for the original obligation were liable for the substituted obligation.[178]

---

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.§629.

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 *mora*, see Pothier *op cit* 3.6.1 para 630, 1 & 2 respectively.

Author Ramsden W A
Name of thesis Supervening impossibility of performance in the South African Law of contract 1983

PUBLISHER:
University of the Witwatersrand, Johannesburg
©2013

LEGAL NOTICES:

Copyright Notice: All materials on the University of the Witwatersrand, Johannesburg Library website are protected by South African copyright law and may not be distributed, transmitted, displayed, or otherwise published in any format, without the prior written permission of the copyright owner.

Disclaimer and Terms of Use: Provided that you maintain all copyright and other notices contained therein, you may download material (one machine readable copy and one print copy per page) for your personal and/or educational non-commercial use only.

The University of the Witwatersrand, Johannesburg, is not responsible for any errors or omissions and excludes any and all liability for any errors in or omissions from the information on the Library website.