

Cambridge University Press

978-1-107-45589-4 - Impossibility of Performance: A Treatise on the Law of Supervening  
Impossibility of Performance of Contract, Failure of Consideration, and Frustration

Roy Granville Mcelroy

Excerpt

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Part One  
IMPOSSIBILITY OF  
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## CHAPTER I

## THE SANCTITY OF CONTRACT

IN the matter of supervening impossibility the common law started with a point of view which was quite different from the Roman.

In Roman law supervening impossibility of performance operated to extinguish an obligation. While the texts do not give other instances of this rule than destruction of subject-matter, Professor Buckland concludes that the principle does not appear to be confined to this one case.<sup>1</sup> The generic expressions used to denote the events which might be the cause of impossibility were *vis major* and *casus fortuitus*.

The French jurist Pothier, writing in the eighteenth century, stated the rule to be as follows:

The debtor *corporis certi* is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken upon himself the risk of the particular misfortune which has occurred.<sup>2</sup>

From this foundation has been developed the modern Continental law. Thus, in France, the Article of the Code Civil which expresses the general principle reads as follows:

There is no ground for damages when as a result of *force majeure* or *cas fortuit* the obligor has been prevented from giving or doing that which he was bound to do, or has done that which he was bound not to do.<sup>3</sup>

<sup>1</sup> *Text-Book of Roman Law*, 2nd ed. § cxcii, p. 562. See also Buckland in (1933) 46 Harvard Law Review 1281, and Buckland and McNair, *Roman Law and Common Law*, pp. 179-83.

<sup>2</sup> *Traité des Obligations*, Partie III, Ch. 6, art. 3, § 668. See generally on the relation of Pothier's treatment of impossibility to that in Roman law, Buckland in (1933) 46 H.L.R. 1281.

<sup>3</sup> Code Civil, Art. 1148. Some particular applications of this principle are contained in Arts. 1302, 1647, 1733, 1929 and 1954.

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The provisions of the French Code Civil relating to this topic have been largely copied in the Codes of other Continental countries and this is substantially the law to-day of all those countries whose systems are based on the Civil law.<sup>1</sup>

In England, on the other hand, the attitude with which the law commenced was that supervening impossibility did not excuse from performance of a contract, even though the promisor had exercised the utmost care. The first expression, in general terms, of this rule was made nearly three centuries ago in the well-known case of *Paradine v. Jane* (1647).<sup>2</sup> In that case the rule is reported as having been laid down as follows:

And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him, . . . but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, . . . because he might have provided against it by his contract.<sup>3</sup>

<sup>1</sup> Thus, provisions of the French Code Civil have been largely copied in the codes of the following countries: *Italy*, Arts. 1226, 1298, 1504, 1589, 1845, 1868; *Spain*, Arts. 1105, 1182 *et seq.*, 1487, 1488, 1563, 1766, 1784; *Portugal*, Arts. 705, 717, 1422, 1436; *Holland*, Arts. 1282, 1480, 1546, 1601, 1745, 1748.

The provisions of the German Civil Code and of the Swiss Code of Obligations are different in form, but are said to be based on the same general principle that impossibility is *prima facie* an excuse. See German Civil Code, Secs. 265, 275, 280 *et seq.*, 285, 287, 291, 323, 425, 815; Swiss Code of Obligations, Arts. 97, 119, 163, 378, 379, 392.

<sup>2</sup> Aleyn 26.

<sup>3</sup> The actual decision in *Paradine v. Jane* is relevant only to the law of failure of consideration (*post*, p. 107 *et seq.*), but this dictum in the judgment has frequently been approved as the general principle of English law in cases of impossibility. Mr H. W. R. Wade in (1940) 56 L.Q.R. at 525 contends that the words 'if he may' are a vital qualification, and mean that 'the duty to perform his undertaking rests always upon the promisor *while performance is still within the bounds of human possibility*'; in other words unexpected hardship is ruled out as a defence, but not utter impossibility. This interpretation, however, fails to give the pointed contrast between the two halves of the dictum that was evidently intended. The first part of the dictum, relating to a duty created by law, is expressed to apply to a case where 'the party is *disabled* to perform it'; hence when in the second part of the dictum the opposite rule is stated, by way of contrast, for a duty created by the parties, it must surely apply like the first to a case where 'the party is disabled to perform it'. Cp. Lord Wright in *Constantine S.S. Line v. Imperial Smelting Corp.*, [1941] 2 All E.R. at 185.—Ed.

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For over two centuries this rule was more or less rigorously applied. The only modifications were that a contract might be discharged by:

- (1) Death of a party where the undertaking was personal;<sup>1</sup>
- (2) Destruction of a chattel the specific subject-matter of a contract of bailment;<sup>2</sup> and
- (3) Illegality owing to the operation of a subsequent Act of Parliament.<sup>3</sup>

Then, in the year 1863, Blackburn J. (afterwards Lord Blackburn), in his celebrated judgment in *Taylor v. Caldwell*,<sup>4</sup> expanded the second of these exceptions into the general rule that destruction of specific subject-matter would excuse performance even though the contract itself contained no provision to that effect. In reaching his decision in this case, Lord Blackburn called in aid the texts of Roman law,<sup>5</sup> while the passage from Pothier, cited above, was also founded upon.

In the period, now more than three-quarters of a century, since this case was decided, exceptions to the original rule of common law have grown, until it has come to be said that 'the exceptions allowed in modern times . . . have so eaten into it as almost to outgrow in importance the rule itself'.<sup>6</sup> That this, however, is a misconception, is clear from the following remark of Lord Buckmaster:

There is no phrase more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification such a statement is not accurate; and, indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule.<sup>7</sup>

As this passage shows, the original rule remains, and is still the *prima facie* rule of the common law. As Lord Justice Bowen

<sup>1</sup> *Hyde v. Dean of Windsor* (1597), Cro. Eliz. 552.

<sup>2</sup> *Williams v. Lloyd* (1629), W. Jones 179.

<sup>3</sup> *Abbot of Westminster v. Clerke* (1536/7), Dyer 27b, pl. 178, 28b, pls. 186–8.

<sup>4</sup> 3 B. & S. 826.

<sup>5</sup> For the treatment of Roman law in this case see Buckland in (1933) 46 Harvard Law Review at 1287–8.

<sup>6</sup> Anson, *Law of Contract*, 17th ed. p. 368. The passage is not repeated in the 18th edition.

<sup>7</sup> *Grant, Smith & Co. v. Seattle etc. Co.*, [1920] A.C. 162 at 169.

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put it, in a passage that has since received approval in the highest tribunal:<sup>1</sup>

One of the incidents which the English law attaches to a contract is that (except in certain excepted cases as that of common carriers and bailees, of which this is not one) a person who expressly contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*.

<sup>2</sup>At the same time, it must, of course, always be a matter of construction what the contractual obligation was. To say that 'a person who contracts absolutely to do a thing not naturally impossible, is not excused for non-performance because of being prevented by *vis major*', assumes that the contract was an absolute one. Frequently the only obligation under a contract is an obligation to use care to perform, and in that case impossibility of performance is clearly a defence to an action for breach of contract. Thus a servant does not normally contract to obey his master's commands in all events: his promise is to use due care in obeying, and if he is prevented from obeying through an event for which he is not responsible in fact, whether it be his death or his illness or (presumably) the failure of a train service, he is not liable for breach of contract. It is true that this is usually stated in the books as a special rule for death or illness, but it can hardly be doubted that the exemption is wider than this, and would cover, for instance, the servant's inability to perform his master's orders through the breakdown of a train service. There is no need here of any special doctrine of impossibility of performance, nor is the principle of sanctity of contract in peril: the servant is not liable in such cases for the simple reason that he has not broken his contract.

Another clear example of an undertaking that is no more than an undertaking to use due care and skill is the surgeon's undertaking to perform an operation: if the patient is incurable, the surgeon is obviously not liable in damages.

It has already been remarked<sup>3</sup> that in contracts like these,

<sup>1</sup> *Jacobs v. Crédit Lyonnais* (1884), 12 Q.B.D. at 603, approved by Lord Atkinson in *Matthey v. Curling*, [1922] 2 A.C. at 234.

<sup>2</sup> The succeeding pages, to p. 10, l. 2, have been added by the editor.

<sup>3</sup> *Ante*, p. xxviii.

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although the undertaking to perform when the promisor has arrived at the place of performance may be no more than an undertaking to use care, the undertaking to arrive at the place of performance may conceivably be 'absolute', i.e. qualified only by such special exceptions as those relating to death or illness. If this is so, a servant who fails to arrive at the place of employment owing to a failure of the train service is liable in damages, whereas one who arrives but is then unable (owing to the same cause) to travel farther in pursuance of his master's commands is not liable.

Another important illustration of the contract to use care is the carriage of goods by land and the carriage of passengers: for loss or delay that is not caused by his fault the carrier is not liable.<sup>1</sup> (An exception is of course the common-law strict liability of common carriers in respect of loss of goods.) And, speaking generally, whenever an obligation is not expressly assumed but is implied in fact or in law, the obligation is simply to use care.<sup>2</sup>

The contracts, then, that really raise the question of impossibility of performance are the so-called 'absolute' contracts—they might better be termed contracts of strict liability—where according to their true construction the duty is not simply a duty to use care but an 'absolute' assurance that a thing shall be done or an event occur. The tendency of English courts has hitherto been to put most contracts into this category. Thus a contract to

<sup>1</sup> See, e.g., *Sims & Co. v. Midland Rly. Co.*, [1913] 1 K.B. 103. Many other authorities are collected in Halsbury, *Laws of England*, 2nd ed. Vol. IV, pp. 10–11, 60–71.

<sup>2</sup> See, e.g., *Anglo-Russian Merchant Traders and John Batt & Co.'s Arbitration* (1917), *post*, p. 37, and, as to the obligation to load or discharge a cargo, *Ford v. Cotesworth* (1870), L.R. 4 Q.B. at 137; 5 Q.B. 544; *Hick v. Raymond*, [1893] A.C. 22; *post*, pp. 14–15. *Porter v. Tottenham U.C.*, [1915] 1 K.B. 776, *per* Buckley L.J. at 789. Consider also the duty of a bailee to take care of the chattel bailed, which is not an absolute duty either in tort or in contract. Exceptions to the general rule are (among others) the well-known strict duty of a dealer who lets or sells goods to supply goods that are reasonably fit (*Randall v. Newson* (1877), 2 Q.B.D. 102; *Frost v. Aylesbury Dairy Co.*, [1905] 1 K.B. 608), the implied undertaking of seaworthiness (*Scrutton, Charterparties*, 14th ed. p. 101), and the duty towards those who come upon premises in pursuance of contract (*Winfield, Text-Book of the Law of Tort*, pp. 584–5).

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pay money is always presumed to be absolute. The same presumption seems to apply to any express promise to do a definite act. At all events, contracts of sale of goods, contracts to repair and to build, and contracts involving action on the part of third parties, are all usually read with strictness. So is a contract of carriage of goods by sea; here the existence in the charterparty of specific exceptions to the shipowner's liability reinforces the court's attitude that apart from these exceptions his liability is absolute.<sup>1</sup> But the adjustment of the rights of the parties under contracts of these kinds is frequently very complicated, and it is proposed to conclude the chapter by examining each of them in greater detail. A reader who wishes only to follow the general thesis of this book may pass at once to Chapter II.

CONTRACTS TO PAY MONEY. *King v. Michael Faraday and Partners Ltd.* (1939)<sup>2</sup> is an exceptional decision on exceptional facts. The facts, partially stated, were that a debtor assigned a sum certain out of his salary for a period of ten years in satisfaction of the debt. Later his salary was so reduced that if the assignment stood the assignor would have no salary left. Atkinson J. held that the assignment failed for a number of reasons, one of which was that 'it had become an obligation wholly impossible of performance in practice'. Whatever the practical justice of this decision, it is difficult to see how the law can logically take account of this type of impossibility unless it is ready to give similar relief to every poor debtor who is sued for the debt.

SALE OF GOODS. We shall see in the next two Chapters that the obligation of the seller is generally strict, but that there is an exception to his liability where the goods are specific and perish without his fault.

COVENANTS TO REPAIR. If a tenant covenants to repair or to keep and leave in repair the demised premises he is bound to reinstate them although they have been injured or destroyed by

<sup>1</sup> Thus in *Spence v. Chodwick* (1847), 10 Q.B. 517 at 529-30, Wightman and Erle JJ. declared that a charterparty is 'in effect, a contract of insurance against all but certain specified risks'. (This case, however, is no longer law on the point of foreign illegality that was decided in it.) But cp. *Jackson v. Union Marine Insurance Co.* (1874), L.R. 10 C.P. 125 at 144, where the question was left open.

<sup>2</sup> [1939] 2 All E.R. 478 at 484-5.



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accidental circumstances.<sup>1</sup> The explanation of this rule is partly historical and partly a matter of construction of the covenant. 'Where a man covenants in absolute terms to do an act, it may be his duty to provide a necessary subject-matter upon which the covenant may operate. If he has covenanted to repair, he must, if necessary, rebuild.'<sup>2</sup> This being the construction of the covenant, it is evident that so far from being discharged by the destruction of the premises, this is the very thing that brings it into operation. The mere fact that the obligation turns out to be more onerous than was thought is, as always,<sup>3</sup> immaterial.

The rule has recently been reaffirmed by a decision of the House of Lords<sup>4</sup> which makes it clear that the rule in *Paradine v. Jane* applies, and that in no circumstances does the doctrine of *Taylor v. Caldwell* apply to contracts of this class.

In order to escape the operation of the general rule it is not unusual in covenants to repair to make express exception of casualties by fire, tempest, and the like.<sup>5</sup> In the absence of such an express exception it is clear that the tenant is not excused at common law. But by the Landlord and Tenant (War Damage) Act, 1939,<sup>6</sup> it is enacted that an obligation to repair is not to extend to war damage. There are various supplementary provisions, which it is not necessary here to specify in detail.

It is to be presumed that similar principles apply to contracts to repair chattels. But by the Liability for War Damage (Miscellaneous Provisions) Act, 1939,<sup>7</sup> war damage is excluded (in certain cases) from the operation of any liability to repair

<sup>1</sup> *Anon.* (1537), 1 Dyer 33 a; *Walton v. Waterhouse* (1672), 2 Wms. Saund. 420; *Bullock v. Domitt* (1796), 6 T.R. 650; *Pym v. Blackburn* (1796), 3 Ves. 34; cp. *Lurcott v. Wakely*, [1911] 1 K.B. 905.

<sup>2</sup> (1923) 39 L.Q.R. 4, citing *Clark v. Glasgow Ass. Co.* (1854), 1 Macq. H.L. 668; *Howe v. Botwood*, [1913] 2 K.B. 387.

<sup>3</sup> See *Restatement*, § 467.

<sup>4</sup> *Matthey v. Curling*, [1922] 2 A.C. 180. See also *Redmond v. Dainton*, [1920] 2 K.B. 256.

<sup>5</sup> *Bullock v. Domitt* (cit. sup.); *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C.P.D. 507.

<sup>6</sup> 2 & 3 Geo. VI, c. 72, Part I. The rationale of this statute, as explained by the Committee that proposed it, is that a tenant who covenants to make good extraordinary damage does so on the assumption that facilities for insuring against it will be available to him, and it is now impossible to insure against war damage (Cmd. 5934 of 1939, pp. 2-3).

<sup>7</sup> 2 & 3 Geo. VI, c. 102.

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bailed goods, or to insure them against loss or damage, etc. The detailed provisions of the Act should be consulted.

The law of Scotland and of Continental countries whose systems are founded on the Civil law differs from the common law on this question of repairs.<sup>1</sup> In the United States the common-law rules are applied.<sup>2</sup>

**BUILDING CONTRACTS.** In considering the principles of law applicable to building contracts it is necessary to distinguish between contracts by which a builder or other contractor has undertaken to erect a building, bridge, or other structure, and contracts by which he merely undertakes to do work upon a building that is already in existence.

(a) *Contracts to erect a building or other structure*

With respect to contracts to erect a building or other structure, English law applies the rule in *Paradine v. Jane*, and, in the absence of an express exception, the builder or contractor is not excused from liability, even though the building is destroyed without fault of either party while in process of erection. Since the time when Lord Kenyon C.J. applied the rule in *Paradine v. Jane* to a contract of this kind in the case of *Brecknock v. Pritchard* (1796)<sup>3</sup> this rule has been the established rule of English law. In that case certain contractors were sued upon their covenant to build a bridge in a substantial manner and keep it in repair for a certain time. The bridge, after erection, was broken down by an extraordinary flood. The plaintiffs relied on the analogy of the leasehold cases and urged that upon such a contract as was then before the court, loss by flood was akin to loss by fire in the case of a contract to repair a house, the loss in each case being a loss of such a kind as the parties must have contemplated and ought to have provided against by their con-

<sup>1</sup> French law: Code Civil, Arts. 1719, 1720, 1722. German law: Civil Code, Secs. 536, 537; Schuster, *The Principles of German Civil Law*, pp. 237–45. Scots law: Bell, *Principles*, § 1208; Gloag, *Contract*, 2nd ed. pp. 315, 348.

<sup>2</sup> See Williston on *Contracts*, 2nd ed. Vol. VI, § 1967, p. 5519.

<sup>3</sup> 6 T.R. 750. Cp. *Bass v. Miller* (1847), 10 L.T.O.S. 190; *Jackson v. Eastbourne Local Board* (1886), 2 Hudson's *Building Contracts*, 4th ed. p. 81; *Bottoms v. York Corporation* (1892), 2 Hudson, *op. cit.* p. 208; *McDonald v. Workington Corporation* (1893), 9 T.L.R. 230, 2 Hudson, *op. cit.* p. 228.