Roman Law: some observations on its relevance to the common law

David Johnston

1. Civil law and common law: the contemporary context

2. Influence or parallel? A note on trusts
(i) PS 4.1.15: *Rem fideicommissam si heres vendiderit eamque sciens compararit, nihilo minus in possessionem eius fideicommissarius mitti iure desiderat*.

(ii) D. 42.4.15 (Ulpian 6 fideicommissorum): *Is qui rem permutatam accepit emptori similis est: item is qui rem in solutum accepit vel qui lite aestimata retinuit vel ex causa stipulationis non ob liberalitatem est consecutus*.

3. Roman law in the common law
(i) *Taylor v Caldwell* (1863) 3 B & S 826: extracts from the judgment of Blackburn J:

'…there are authorities which ... establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.

Accordingly, in the Civil law, such an exception is implied in every obligation of the class which they call obligatio de certo corpore. The rule is laid down in the Digest, lib. XLV., tit. 1, *de verborum obligationibus*, 1. 33. "*Si Stichus certo die dari promissus, ante diem moriatur: non tenetur promissor*." The principle is more fully developed in 1. 23.

"*Si ex legati causa, aut ex stipulatu hominem certum mihi debeas: non aliter post mortem ejus tenearis mihi, quam si per te steterit, quominus vivo eo eum mihi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum*." The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and no doubt the propriety, one might almost say necessity, of the implied condition is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as in the present case a theatre) the existence of which is not so obviously precarious as that of the live animal, but **the principle is adopted in the Civil law as applicable to every obligation of which the subject is a certain thing**. The general subject is treated of by Pothier, who in his *Traité des Obligations*, partie 3, chap. 6, art. 3, § 668 states the result to be that 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 on himself the risk of the particular misfortune which has occurred.

Although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law.
...
These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused from performing his contract to deliver, which has thus become impossible.
That this is the rule of the English law is established by the case of *Rugg* v. *Minett* (11 East, 210) …

The great case of *Coggs* v. *Bernard* (1 Smith's L. C. 171, 5th ed.; 2 L. Raym. 909) is now the leading case on the law of bailments, and **Lord Holt, in that case, referred so much to the Civil law that it might perhaps be thought that this principle was there derived direct from the civilians**, and was not generally applicable in English law except in the case of bailments; **but the case of *Williams* v. *Lloyd* (W. Jones, 179), above cited, shews that the same law had been already adopted by the English law** as early as The Book of Assizes. The principle seems to us to be that, in

contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance. We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things.'

(ii) *Krell v Henry* [1903] 2 KB 740: extracts from the judgment of Vaughan Williams LJ:

'**The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor v. Caldwell***. That case at least makes it clear that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." **Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with *obligationes de certo corpore*. Whatever may have been the limits of the Roman law**, the case of *Nickoll v. Ashton* makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of

things, going to the root of the contract, and essential to its performance. … **I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing** which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. … In my judgment the use of the rooms was let and taken for the purpose of seeing the Royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a licence to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred. … Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and, secondly, I think that the non-happening of the procession, to use the words of Sir James Hannen in *Baily v. De Crespigny*, was an event "of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting

parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against. …'

4. Roman law and the structures of private law
(i) Jorge Luis Borges: extract from 'a certain Chinese encyclopaedia': 'animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) suckling pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable), (k) drawn with a very fine camelhair brush, (l) et cetera, (m) having just broken the water pitcher, (n) that from a long way off look like flies.'

(ii) Sir William Jones: two extracts from the *Law of Bailments* (1781): 'I propose to begin with treating the subject analytically, and, having traced every part of it up to the first principles of natural reason, shall proceed historically to show with what perfect harmony these principles are recognised and established by other nations, especially the Romans, as well by the English courts, when the decisions are properly understood and clearly distinguished.'

'If law be a science and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason; but if it be merely an unconnected series of decrees and ordinances, its use may remain, though its dignity be lessened, and He will become the greatest lawyer who has the strongest habitual, or artificial, memory.'

(iii) *Moore v Regents of the University of California* (1988) 249 Cal Rep 494 (Cal. CA); (1990) 793 Pacific Rep 2d 479 (Cal. Supreme Court)

Cells removed from a patient's body were used to develop a cell-line of great value biotechnologically. The university patented the cell-line, and the profits to be derived from it were estimated in billions of dollars. The patient, however, had consented only to surgery but not to any use of his cells for purposes of research, let alone profit. He sued the university for conversion of his property. The university argued that Moore did not own his own body, that he therefore did not own the cells removed from it, and that the university itself had become proprietor of the cells and the cell-line developed from them. How to resolve these rights and obligations? How would Roman law deal with it?