FACTUM DEBITORIS AND CULPA DEBITORIS

by

GEOFFREY MACCORMACK (Aberdeen)

The texts which treat of the liability of the promisor under a stipulatio and the liability of the heir under a legatum per damnationem or fideicommissum sometimes speak of factum and sometimes of culpa. In some texts the promisor or heir is said to be liable if the loss has been brought about by his own act (factum); in others liability is said to turn on the presence of culpa. The loss in question is that brought about by the destruction, disappearance or change of legal condition of a certa res. In the literature it is commonly accepted that culpa and factum in these contexts have an equivalent force, that is, that culpa expresses an imputable fact. A statement that the promisor or the heir is liable if the object owed has perished through his culpa is held to mean that he is liable if the object has been destroyed by some positive act on his part.

On two points there is disagreement: the meaning of imputable, and the extent to which the liability of the heir under a legatum per damnationem or fideicommissum came to be determined on different principles from the liability of the promisor under a stipulatio. A factum has been considered to be imputable to the debitor only if it has been carried out carelessly or with the intention of harming the person to whom the object was owed. More often it is held that the debitor is liable if the act is voluntary and if it makes performance impossible, considerations of carelessness or intention being irrelevant.

Differences of opinion are most acute in the case of legatum per damnationem. Some hold that the liability of the heir was determined in the same way as the liability of the promisor. Others have made no reference to a factum and treated the heir in general as liable either for dolus alone or for culpa in the sense of negligence or for culpa (expressing careless acts) and diligentia (expressing careless omissions). Yet others have accepted that in the earlier law the liability of the heir was predicated upon a factum, but that before

1. The problem of liability for damage to an object owed under a stipulatio or legatum per damnationem is not discussed in this paper.
2. In general see Fornice, Labeo 2, 2, 1 (reprinted 1963), 107ff; Ferrini, Opere 4 (1930), 207ff; Arangio-Rúiz, Responsabilità contrattuale in diritto romano, 2nd ed. (reprinted 1958), 9ff; Sargenti, SDHI XX (1956), 162ff; Mayer-Maly, IVRA VII (1956), 6ff; Betti, Istituzioni di diritto romano 2, 1 (1962), 342ff; Cannata, SDHI XXXII (1966), 63ff. Further literature is cited in the succeeding notes.
5. Ferrini, Opere 4, 207f; Arangio-Rúiz, Resp. contr., 20ff; Sargenti, SDHI XX (1956), 162ff; Grosso, Legati, 395f; Cannata, SDHI XXXII (1966), 66.
8. Genzmer, ZSS XLIV (1924), 141ff.
the end of the classical period his liability was assessed in terms of dolus and culpa (intention and negligence).9

Fideicommissa are usually held to be subject to the same rules as legata per damnationem. Those who treat the heir as liable to the legatee only for loss brought about by his own factum assume that the heir's liability to the fideicommissary likewise depended upon the occurrence of a factum10.

The treatment of culpa as imputable fact generally implies acceptance of the following statements, that liability is only for a positive act11 and that culpa expresses the causal nexus between the act and the destruction, disappearance or legal change of the object owed.12 The latter statement might be more accurately expressed by saying that culpa expresses the causal nexus between the act bringing about the destruction, disappearance or legal change and the inability to convey the object to the person to whom it was owed. Culpa and factum are thought, in effect, to express different aspects of the same state of affairs. Factum designates the act which results in the loss, and culpa the liability incurred by that act. An apparent justification for this conclusion can be found in the parallelism between statements which hold the promisor or heir to be liable for the destruction, disappearance or legal change of the object owed brought about by his factum and those which hold him to be liable on the ground of his culpa.

The argument of this paper is that the sources do not support a treatment of culpa as imputable fact in the sense described. From the framing of statements about liability in terms either of culpa or of factum no conclusion can be drawn as to the meaning of culpa. All that is shown is that the jurists might frame decisions on liability in terms of factum as well as in terms of culpa.

The question which does arise is, why should factum have been used in the formulation of statements about liability? Sometimes the reason is apparent from the state of affairs considered. If a jurist had to consider the liability of a promisor who killed or manumitted a slave owed under a stipulatio he might naturally state that the latter was liable for his factum. Sometimes very general statements of liability framed in terms of factum occur. These should not be construed as meaning that the occurrence of a factum is a necessary condition of liability. They express liability from the point of view of an important element often present in the states of affairs which come up for decision. Often where there has been fault the failure to hand over the object owed derives from an act of the promisor or heir. Instead of expressing liability simply in terms of culpa a jurist might wish to emphasize the element of factum commonly found and state generally that the promisor or heir was liable for his factum.

There is some fluctuation in the meaning attributed to factum. Its primary meaning appears to be 'act which accomplishes or contributes to the destruction, disappearance or legal change of the object owed'. But it may also occur with the sense of mora.

9. Salkowski-Gluck, Pandecten XLIX (1889), 221ff (holding that the change had been accomplished by the classical period); Pernice, Labeo 2, 2, 1, 127ff (holding that the change is evidenced in the writings of Julian, though his account is not entirely consistent, cf. also 113ff); Betti, Ist., 349 (at the time of Sabinus the heir was held liable for the omission of acts by which the object bequeathed could have been kept safe).
10. Cf. esp. Salkowski-Gluck, Pandecten XLIX, 221ff; Arangio-Ruiz, Resp. contr., 23ff; Pernice, Labeo 2, 2, 1, 113ff; Genzmer, ZSS XLIV (1924), 153ff (holding that in the case of a fideicommissum the heir was liable only for "kommissiv culpa").
12. Some attribute to culpa the meaning of negligence (Pernice, cited n. 3) or positive carelessness (Genzmer, cited n. 3).