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in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 33

Limitation and Prescription

A Comparative Legal History

Edited by

Harry Dondorp
David Ibbetson
Eltjo J. H. Schrage

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Herausgegeben von

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und Reinhard Zimmermann

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Knut Wolfgang Nörr, dem Freund und Kollegen
zum Gedächtnis

Preface

Those of us who were involved in the discussions at Bad Homburg in 1982 which led to the inauguration of this series have been more than gratified by the enormous quantity of scholarship which it has generated. The main object has been comparison across jurisdictions and legal systems, but this requires some clarity about the details to be compared. The method of achieving this preliminary clarity has been to commission restatements of current thinking on the history of each topic within the different jurisdictions to be compared. That in itself has proved a valuable exercise. But it is preparatory to the second and more difficult stage, which is to rise above the terminology and technicality of each system of law and seek out the points of real similarity and difference. Such an enterprise requires leadership, scholarship, patience and diplomacy, not to mention a keen awareness of linguistic and cultural differences. Few of us have attempted it more than once. Eltjo Schrage has been responsible for no less than four projects: volumes 15 (unjust enrichment and restitution), 22 (negligence in tort), 26 (ius quaesitum tertio) and the present one (prescription and limitation). Since he has indicated that he intends this to be his last, it is fitting that his remarkable contribution should be recorded. Not only has he exhibited all the requisite editorial qualities in abundance, but he has made participation a pleasure rather than a chore for all who were involved with him, not least through the generous and memorable hospitality bestowed on them in Amsterdam. This achievement should surely rank highly alongside his many scholarly contributions to legal history. We thank him, and congratulate him warmly on bringing these important volumes together.

This volume is dedicated to the memory of Knut Wolfgang Nörr, who died on 15 January 2018 aged 83. Together with Helmut Coing, he was one of the founding fathers of the project which began at Bad Homburg, and indeed he wrote the first introductory essay in the first volume. He, more than anyone, deserves the credit for keeping the series alive through the generous auspices of the Gerda Henkel Stiftung, on whose board he served, and he attended many of the preparatory conferences for the individual volumes. This is, indeed, the first volume in the series which has not been moderated by him as co-editor. His obituary on the Law Faculty website of the University of Tübingen said that he mastered to perfection the balance between duty and inclination, the latter being (of course) his affection for legal history. By combining that inclination with practical energy he helped to create, as an

augmentation to his considerable personal scholarship, an institution of lasting importance to legal historians.

The editors have desired me to add their personal thanks also to Andrew Simpson for his assistance in perfecting the translation into English of the pieces which were originally written in other languages.

John Baker

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Introduction

By *Harry Dondorp, Eltjo Schrage, David Ibbetson*

I. Lapse of Time

Within both the Civil law and the Common law (as well as in mixed legal systems) we find means of acquiring and losing rights, or freeing ourselves from obligations by the passage of time. The ratio thereof is at least twofold: On one side, for a claimant or creditor prescription and limitation imply stimuli to actually bringing the action, if they choose to have one. If a creditor is negligent in protecting his assets, the law does at a certain stage no longer protect him. As Oliver Wendell Holmes, Jr. said aptly some 100 years ago: "Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example".[1] As Martin Schermaier (p. 302), Harry Dondorp (p. 98) and Jan Hallebeek (p. 235) show, Holmes thus stepped in the footsteps left by medieval civilians[2], canonists and theologians. David Ibbetson (p. 213) observes the same notion in the medieval common-law concept of laches.

On the other hand, for the possessor and debtor prescription and limitation imply a certain protection against claims which have been at rest for too long, i. e. claims against which defences might have been lost. In the common-law tradition this is a cornerstone of one of the oldest pieces of legislation in the field of limitation of remedies, the Limitation Act of 1624. Lord Hatherley expressed that thought as follows in 1879: "[The] legislature thought it right … by enacting the Statute of Limitations to presume the payment of that which had remained so long unclaimed, because the payment might have taken place and the evidence of it might be lost by reason of the

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[1] *O. W. Holmes, Jr.*, The Path of the Law, Harvard Law Review 10 (1879), p. 476.

[2] Forerunners of the gloss quoted by *Schermaier*, below p. 302 note 32, can be found in: *Summa Trecensis*, ed. H. Fitting, Berlin 1894, p. 248 (VII.29); *Azo*, Summa super codicem, Pavia 1484 repr. Turin 1966, p. 280 (C. 7.39); *Rogerius*, De praescriptione dialogus, in: Placentini de varietate actionum …, Munich 1530, p. 171: "Tunc demum oritur [xxx. annorum praescriptio], cum actor nullo iure petere impeditus desidiae negligentiaeue deditus quod ei etiam statim ius concedit, petere contemnit; et enim soli cum non egerit ei imputatur cui nil quominus ageret obfuit. ut C. de praescr. xxxx. uel xl. ann. l. Sicut (C. 7.39.3.1) et l. Cum notissimi (C. 7.39.7pr)."

persons not pursuing their rights".[3] This echoes one of the reasons, given by the canonist Henry of Segusio (Hostiensis; c. 1200–1271), why the Church should not come to the aid of creditors whose claims have expired: It would be unfair, if the Church compelled payment after thirty years, for the debtor may after all these years have lost the receipt of his payment, or believe the debt has been waived.[4] A claim should not hang above the head of the debtor as if it were a Damocles' sword. The English Chief Justice Best gave a firm expression thereof, stating that "long dormant claims have more of cruelty than of justice in them".[5]

Generally speaking a claimant may be cut off from pursuing his right in court for the simple reason that he has been guilty of negligence in bringing suit. The claimant's inactivity is more than a justification (found already in constitutions of Emperor Diocletian[6]) of limitation and prescription alone. Complementary to limitation two legal institutions developed independently in England and in Germany and Switzerland: laches (from Law French *lachesse*, carelessness) and *Verwirkung*.[7]

In 1767 Lord Camden said: "a Court of equity which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his right and acquiesced for a

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[3] *Thompson v Eastwood* (1877) 2 App Cas 215, 248. Similar justification and policy goals behind statutes of limitations are found in *Riddlesbarger v Hartford Insurance Company*, 74 U.S. 386, 390 (1868): [Statutes of limitations] are founded upon the general experience of mankind that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. This presumption is made by these statutes a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth. The policy of these statutes is to encourage promptitude in the prosecution of remedies.

[4] Cf. *Hostiensis,* summa Aurea, Venice 1574, c. 736 (X 2.26, II De praescriptione § Que res): "Quid enim si ego solui tibi nec recuperaui instrumentum, nec de solutione instrumentum recepi, uel ipsum forte amisi, et tu non conuenis me uel heredem meum elapsis 30 uel 40 uel pluribus annis, numquid iniquum esset quod bis idem exigeretur. (…)".

[5] *A' Court v Cross* (1825) 3 Bing 329 and 332; 130 ER 540, 541. Best CJ added that "Christianity forbids an attempt at enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge." See: Reports of cases argued and determined in the Supreme Court of the State of Vermont …, vol. VIII, Middlebury 1837, p. 466.

[6] C. 7.33.5, C. 7.36.1, C. 4.52.1.

[7] Cf. *A. Vaquer*, Verwirkung versus Laches, A tale of two legal transplants, Tulane European and Civil Law Forum 21 (2006), p. 53–72.

great length of time. […] Laches and neglect are always discountenanced, and therefore from the beginning of this jurisdiction, there was always a limitation to suits in this Court".[8] As Mike Macnair has shown (p. 337) it looks as though in equity the medieval concept of laches (Ibbetson, p. 213) is used to deal with cases which at Common law would have been caught by the statutes of limitation, without fixing a length of time. The bare fact of delay, however, is not enough to bar a remedy in equity. As Peter Birks has put the issue aptly, "the judge has to ask himself whether the staleness of the claim seriously disadvantages the defendant to a degree which, weighed in the balance against the claimant's entitlement to justice, requires the action to be discontinued".[9]

In the late nineteenth century, in Germany, where the existing limitation periods were considered too extended, the doctrine of *Verwirkung* developed. The judiciary considered the exercise of a right contrary to good faith, if the creditor's inactivity had lulled the debtor into believing that the right would not later be claimed. Franz Wieacker linked this doctrine with Hugo Grotius' justification of prescription, who in his *De iure belli ac pacis* compared the claimant's protracted inactivity with abandonment or a waiver of his right. "The moral basis suggested by Grotius has proved fertile in the modern idea of *Verwirkung* or estoppel".[10] Like liberative prescription *Verwirkung* requires a lapse of time, but the period is not necessarily fixed. Obviously, the timespan is shorter than the limitation period, but the lapse of time and the creditor's inactivity must have induced the debtor to believe that he does not any more intend to enforce his right. As Pascal Pichonnaz (p. 644) points out, its effect is *de iure* extinction of the subsisting right itself, not only of the right of action.

II. Status Quaestionis

Surprisingly little academic attention has been devoted traditionally to the doctrine of limitation as a general topic.[11]

In early-modern times only a few tracts were printed. In Paris Jean Lambert in 1507 published a collection of tracts, among them a thirteenth-century tract of Dino de Mugello, a list of all time limits, which was translated

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[8] *Smith v Clay* (1767) Brown's Chancery Reports 638.

[9] *P. Birks*, Unjust enrichment, Oxford 2005, p. 239.

[10] *F. Wieacker*, A history of private law in Europe, with particular reference to Germany, transl. by T. Weir, Oxford 1995, p. 232: "The moral basis suggested by Grotius has proved fertile in the modern idea of *Verwirkung* or estoppel."

[11] Cf. *R. Zimmermann*, Comparative Foundations of a European Law of Set-Off and Prescription, Cambridge 2002, p. 65.