

12-30-2020

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Benjamin West Janke

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Benjamin West Janke, *Harry Dondorp, David Ibbetson, and Eltjo J. H. Schrage (eds.), Limitation and Prescription: A Comparative Legal History*, 13 J. Civ. L. Stud. (2020)

Available at: <https://digitalcommons.law.lsu.edu/jcls/vol13/iss2/7>

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BOOK REVIEW

LIMITATION AND PRESCRIPTION: A COMPARATIVE LEGAL HISTORY, edited by Harry Dondorp, David Ibbetson, Eltjo J. H. Schrage (Duncker & Humblot 2019), ISBN 978-3-428-55626-7, 679 pp., €109.90.

To the uninitiated, it would seem that prescription, as a source of comparative law, is not as rich as other areas of study. After all, numbers are mere expressions of the universal mathematical language. The selection of a number for any particular “prescription” is equally arbitrary (and necessary) in civil law, common law, and mixed jurisdictions.¹ It has often been lamented, including by the subject book’s editors, that “[s]urprisingly little academic attention has been devoted traditionally to the doctrine of limitation as a general topic,”² especially until the late-twentieth century. The editors rightly acknowledge exceptions to that gap,³ and recent Continental law reforms, including in France and in Germany, have engendered renewed interest since the turn of this past century.⁴

1. Douglas Nichols, *Contra Non Valentem*, 56 LA. L. REV. 337, 347 (1995) (“Civilians and common-law scholars alike concede that prescription and limitations are as arbitrary as they are necessary”).

2. LIMITATION AND PRESCRIPTION: A COMPARATIVE LEGAL HISTORY 3 (Harry Dondorp, David Ibbetson & Eltjo J. H. Schrage eds., Duncker & Humblot 2019).

3. *Id.* (citing, e.g., REINHARD ZIMMERMANN, COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION (2002)).

4. See, e.g., François-Xavier Licari, *Le nouveau droit français de la prescription extinctive à la lumière d’expériences étrangères récentes ou en gestation (Louisiane, Allemagne, Israël)*, 61 REVUE INTERNATIONALE DE DROIT COMPARÉ [RIDC] 739 (2009); Francis Limbach, *Droit français et allemand de la prescription: zones de lumière et zones d’ombre*, 42 REVUE LAMY DROIT DES AFFAIRES 105 (2009); Dossier Dalloz, *Réforme de la prescription (loi no. 2008-561 du 17 juin 2008 portant Réforme de la prescription en matière civile)*. One regrettable feature of the work is the absence of Louisiana law, which is ample and a fertile ground for discussion as a mixed jurisdiction. While the work does analyze other mixed jurisdictions (especially Scotland), there are unique aspects of prescription in Louisiana—especially as it relates to grounds for suspension and interruption—that would have provided useful opportunity for commentary. For example, the longer than usual gap between Louisiana’s general one-year liberation prescriptive period for most tort claims and the ten-year period for most contract claims likely gives rise to more opportunities to invoke suspension including through

For some time, limitation and prescription got short shrift—owing either to inherently flawed efforts to attempt interpretation out of something that is so “numerical, mathematical, [and] automatic” or to the fact that at least in most civil law jurisdictions, prescription “is relegated to the end of the Code, as if to challenge the great commentators to reach it before they run out of breath or die.”⁵ Through the intrepid efforts of editors Harry Dondorp, David Ibbetson, and Eltjo J. H. Schrage, *Limitation and Prescription: A Comparative Legal History* is evidence of a groundswell in scholarship focusing on limitations and prescription from historical and comparative perspectives.

Limitation and Prescription is the thirty-third contribution to the series *Comparative Studies in Continental and Anglo-American Legal History*. The first *band*, *Englische und kontinentale Rechtsgeschichte: ein Forschungsprojekt (English and Continental Research History: A Research Project)* (Helmut Coing & Knut Wolfgang Nörr eds., 1985), set the course for the object of the project: to compare various legal topics across jurisdictions and legal systems through the commission of essays of the current thinking on those topics. In fidelity to those who have reviewed previous contributions to the series, which includes one of the editors of this contribution,⁶ the second and more challenging goal of the project is for the organizers of each *band*—who are themselves experts in their fields—“to

contra non valentem. But to be fair, this work does not endeavor to provide a comprehensive treatise on prescription.

5. See J. Denson Smith, *Forward*, in 5 CIVIL LAW TRANSLATIONS iii, 459, 461 (La. State L. Inst. trans., West Publ'g 1972) (citing Jean C. Carbonnier, *Notes on Liberative Prescription*, 50 RTDCiv. 171–81 (1952)).

6. See David Ibbetson's book review of *ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE* (Richard Helmholz & Reinhard Zimmermann eds., 1998), the nineteenth *band* of *Comparative Studies in Continental and Anglo-American Legal History*, in 4 EDINBURGH L. REV. 244 (2000), wherein the reviewer notes of the series:

Its recipe for success is well-tried: collect together specialists from different jurisdictions, facilitate debate amongst them in a spirit of critical co-operation, then publish the papers summarising their detailed researches together with an introduction by the convenor or convenors of the group—themselves experts in the field—gathering together the common themes which have emerged.

rise above the terminology and technicality of each system of law and seek out the points of real similarity and difference,” an endeavor requiring “leadership, scholarship, patience and diplomacy, not to mention a keen awareness of linguistic and cultural differences.”⁷

Under this framework, the editors’ introduction could just as well be an epilogue, save for one important caveat: for purposes of terminology, the reader should be cautious not to depart their familiar legal system and wade into the waters of whichever system is foreign (civil or common) without some orientation in language—including language that changes over time. A contemporary civilian, for example, might view “prescription” both as a mode of acquisition of rights (acquisitive prescription) as well as a mode of discharging debts (liberative prescription), just as, for example, German law distinguishes *Ersitzung* and *Verjährung*. This is so despite the fact that early-modern civilian jurists focused primarily on acquisitive prescription in their study of “prescription.” For example, Giovanni Balvo’s *Tractatus de praescriptionibus* and Robert-Joseph Pothier’s *Traité de la possession et de la prescription* primarily focused on acquisitive prescription; Pothier addressed liberative prescription separately in his *Traité des obligations*.⁸ But the contemporary civilian may be surprised to learn that the “Statute of Limitation of Prescription” of 1540, as explained in David Ibbetson’s examination of early modern English law, only concerns real rights (curtailing periods that had become “absurdly long” and reducing them to fifty or sixty years—eye-popping by today’s standards).⁹ The study of English law barring actions as a result of inaction is covered elsewhere, in Professor Ibbetson’s study of “The Limitations Act of 1624.”¹⁰

7. See *Preface* in *LIMITATION AND PRESCRIPTION: A COMPARATIVE LEGAL HISTORY*, *supra* note 2.

8. *Id.* at 10.

9. *Id.* at 213, 218.

10. *Id.* at 222.

The editors observe that by the early-modern era, just as the language of “limitation” had gained a foothold in the common law, so too did it have its place in procedural law.¹¹ This placement in the common law is in contrast with civil law jurisdictions, where liberative prescription is generally considered an area of substantive law. As such, the editors instruct that there is an important distinction “between civil obligations, which the law recognizes and enforces, and natural obligations, rights and duties the law merely recognizes.”¹² This dichotomy presents a noteworthy comparison both within the civil law and between civil and common law. In the civil law, the substantive civil obligation is extinguished through the passage of time. The interpretation of whether the natural obligation remains, however, has changed over time in civil law systems. For example, in Martin Schermaier’s contribution, *Contemporary Use of Roman Rules: Prescription and Limitation in the Usus Modernus Pandectarum*,¹³ the author observes that medieval jurists rejected the notion that a natural obligation remained beyond the civil obligation,¹⁴ and later scholars such as Raimond Théodore Troplong would agree. This is in contrast with contemporary French and German interpretations, where a debtor who mistakenly makes a payment beyond the limitation period cannot later recover the payment because the natural obligation remains.¹⁵ In this civil law construct, the limitation is still a substantive defense notwithstanding the survival of the natural obligation. At common law, the limitations period is raised as a procedural defense. In both systems, however, the defense must be pleaded.¹⁶

With this backdrop, the editors rightly caution that the study of limitations and prescription from a Continental and Anglo-

11. *Id.* at 34, 226.

12. *Id.* at 11.

13. *Id.* at 297.

14. *Id.* at 307.

15. *Id.* at 13.

16. There is draft legislation in Louisiana, which is currently under study, that would allow for Louisiana courts to recognize *sua sponte* defenses of prescription in certain limited cases involving consumer debt.

American framework is rife with concepts that do not fully equate, such as with civil law acquisitive prescription and common law “prescription.”¹⁷ Even where there are general equivalents, such as between civil law liberative prescription and common law limitation, the effects differ. Justinian was responsible for the “double partage” of *praescriptio*, combining *usucapio* as a mode of acquisition of ownership with *praescriptio* as a defense of limitation, merging both institutions into one.¹⁸ The marriage makes sense in many respects, as both share a similar balancing of interests of claimants and defendants, and the tension between social order, legal security, and equity.¹⁹ On the other hand, as observed in David Deroussin’s contribution, *Le Droit Français des Prescriptions depuis 1804, ou l’impossible simplicité*,²⁰ there is considerable disagreement regarding the utility of this merger when many scholars consider liberative and acquisitive prescription as “two species” based on “different principles.”²¹

Considering that “prescription” from either perspective shares common roots with Roman law and Canon law, and that it developed somewhat independently for at least some period of time in each of the Anglo-American and Continental law traditions, it is inevitable that attempts to harmonize the terminology will prove maddening. There are seldom any perfect translations in an area of study replete with rough equivalents and false cognates. In David Ibbetson’s contribution, *Limitations and Prescription in Early-Modern England*, he observes that the lack of “common terminology to refer to the situations where lapse of time barred or created rights suggests strongly that there was no common conception of the lapse of

17. *Id.* at 10.

18. *Id.* at 21.

19. *Id.* at 36 (citing, e.g., Bigot de Préameneu’s report to the *Corps législatif* in preparation of the French *Code civil*, in 15 PIERRE-ANTOINE FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 573–75 (1827; repr. Osabrück 1968)).

20. *Id.* at 459.

21. *Id.* at 480.

time,”²² as he bluntly assesses that “[t]here is little to be proud of in the development of the English law of limitation and prescription.”²³ One can quickly appreciate the “leadership, scholarship, patience, and diplomacy, not to mention a keen awareness of linguistic and cultural differences”²⁴ required of the *Comparative Studies* project and especially with respect to limitations and prescription. Equally engaging in this particular *band* is the extent to which the “good faith” (with Canon law roots) is pervasive in the *praescriptio*, as would be required of the likes of Bartolus de Saxoferrato, but vigorously disputed by others.

Even within each legal system, there are a multitude of different grounds for extinguishing rights by the passage of time other than just by prescription, such as abandonment, *péremption*, *déchéance*, and *forclusion*, *délai préfix*. Some systems provide for a “long stop” period, or a *délai-butoir*, which is usually distinguished from a peremptive limitation. Further complicating matters, the editors note that there are at least three different interpretations of determining the point of accrual of a limitation period.²⁵ Some of those methods are intended to provide for objective certainty, but despite those best intentions, courts have determined strict application of the point of accrual may violate a plaintiff’s fundamental rights.²⁶ The calculations relative to the interruption and suspension of prescription, including the application of *contra non valentem*, are no less controversial either. So then, for the neophyte who views prescription as a simple application of numbers, one can quickly appreciate that the academic study of prescription is not as simple as it seems.

French jurist Jean Carbonnier once questioned the paradox between the intense judicial initiative in the field of prescription,

22. *Id.* at 213.

23. *Id.*

24. *Id.* at *Preface*.

25. *Id.* at 39.

26. *Id.* (citing a case where the European Court of Human Rights found that the Swiss objective limitation of ten years, which runs regardless of the plaintiff’s knowledge, infringed the plaintiff’s right to a fair trial).

where the jurisprudence is plentiful, and the seemingly scant volume of scholarship among commentators who were perhaps “destined to slip” by trying to interpret something so “numerical, mathematical, [and] automatic.”²⁷ To be sure, commentators have quickly filled this void of scholarship over the past fifty years, with much if not most of it from a comparative legal perspective (although typically only within either the civil or common law framework). But the work of Dondorp, Ibbetson, and Schrage is more daring still, as it endeavors to explore and synthesize limitation and prescription from both a Continental and Anglo-American perspective.

Benjamin West Janke
Baker, Donelson, Bearman, Caldwell & Berkowitz P.C.

27. Jean C. Carbonnier, *Notes on Liberative Prescription*, 50 REVUE TRIMESTRIELLE DE DROIT CIVIL 171 (1952), reprinted in 5 CIVIL LAW TRANSLATIONS 468 (La. State L. Inst. trans., West Publ'g 1972).