

CHAPTER 52

Statutes of Limitation

I. PRELIMINARY OBSERVATIONS

I. The Problem

THE conflicts law with respect to limitation of action by lapse of time has been discussed since the thirteenth century, and in this long history, "all possible and also impossible ideas have found advocates."¹ "Few arguments have been so much discussed and have occasioned so many varied and disparate opinions as that concerning the law controlling limitation of action."² Although the truth of these statements is all too apparent to students of conflicts laws, only two main systems have stayed in competition. They correspond almost exactly with the division between common law and civil law. In British jurisdictions and in the United States, in principle "limitation of actions" is said to affect the "remedy" only and to belong to the procedural law of the forum; every court applies the domestic statute of limitation, in principle excluding all foreign statutes. In the countries of the civil law, after long drawn-out debates, it is at present uniformly recognized that limitation of "action" is a misnomer and that it affects the substantive right; prevailing, it is determined by the law governing the obligation.

This contrast is notorious. Excellent surveys of the world literature in older and recent writings have tended to uniform conclusions in favor of the substantive classification.³

¹ I VAREILLES-SOMMIÈRES 261; quoted by DE NOVA 96 § 17.

² DIENA, I *Dir. Com. Int.* 440.

³ On the present doctrine in Continental literature, particular mention is due to JEAN MICHEL, *La prescription libératoire en droit international*

At least one energetic article has come forth to vindicate the viewpoint of the common law.⁴ The Institute of International Law in 1926 reached a sensible proposal for uniformly applicable rules.⁵ Must we go again over all this territory?

Unfortunately, it is still necessary to do so. Too much in the debates going on for so many centuries has been a strange mixture of obsolete legal terminology and concealed policy considerations; the policies have been too often one-sided or confused; and the provincial lawyer's thinking has usurped undue privilege. The subject, thus, has become an outstanding illustration of the necessity for an unbiased and supernational discussion.

Our inquiry, however, has to start with the municipal law. This exception from the habits of this present work does not include an inconsistency of methods. Although conflicts law ought to have its own standards and evaluations, analytical research serving the formation of uniform conflicts rules always requires investigation of similarities and dissimilarities of the various systems, and furnishes a particularly useful help when it reveals substantial analogies. In this matter, objective criticism discovers vital analogies despite different labels, concepts, and characterizations, which, together with their influence on practical solutions, must be questioned as a first step to a sound conflicts law.

It is to be borne in mind that we are here concerned ex-

privé (Thèse, Paris, 1911) (second edition, Paris, unavailable), the substance of which Michel has condensed in 1 *Répert.* 292 ff; DE NOVA, *L'estinzione della obbligazioni convenzionali* (1931) 97-137; Batiffol §§ 575 ff., 586.

Other (selected) special treatments: WUNDERLICH, *Zur Lehre von der Verjährung nach internationalem Rechte*, in *Festschrift für Ernst Heintz* (Berlin 1926) 481-512; SCHOCH, *Klagbarkeit, Prozessanspruch und Beweis im Lichte des internationalen Rechts* (1934) 52 ff., 110 ff.; SCHLINK, "Die internationalprivatrechtliche Behandlung der Verjährung in den Vereinigten Staaten," 9 *Z.ausl.PR.* (1935) 418; PHILONENKO, "De la prescription extinctive en droit international privé," *Clunet* 1936, 259, 513.

⁴ I am speaking of the impressive article by AILES, "Limitation of Actions and the Conflict of Laws," 31 *Mich. L. Rev.* (1933) 474-502.

⁵ *Viennese Meeting*, 1924, 31 *Annuaire* (1924) 182.

clusively with the rules concerning ordinary obligations, and not claims flowing from property rights or obligations arising out of family relations or succession.

2. Historical Note

In order to gain an objective view of the problem, a few historical facts should be kept in mind.

In the ancient Roman common law (*ius civile*), most actions were "perpetual," whereas the praetorian actions were often limited to a year (*annus utilis*).⁶ Greek practice developed a rebuttable presumption against the existence of a debt after a long time,⁷ probably the model of a late Roman practice known to us by an imperial edict for Egypt.⁸ Theodosius II subjected the old perpetual actions to a *praescriptio longi temporis*, resulting in their "extinction" of the action and this prescription went over into Justinian's compilation.⁹ Almost all features of the modern provisions on "limitation of actions"—the English term itself is borrowed from Theodosius and Justinian—are contained in the Corpus Juris: commencement of the period when the action is born, causes and effects of suspension and interruption, revival, and so forth.

An important modification, however, was worked out in England after the civil war¹⁰ and in secular disputes in civil law;¹¹ the effect of the lapse of time, originally operating

⁶ See, e.g., BUCKLAND, *A Textbook on Roman Law* (ed. 2, 1932) 689.

⁷ PARTSCH, *Longi temporis praescriptio* 118 f.

⁸ Papyrus Flor. No. 61, 1, 45 (85 A. D.); for an application, see Papyrus Oxyrhynchos No. 68 (131 A. D.).

⁹ C. Theod. 4, 14, 1, 3 (A. D. 424); C. Just. 7, 39, 3, 2: *hae autem actiones annis triginta continuis extinguuntur, quae perpetuae videbantur, non illae quae antiquitus fixis temporibus limitantur.*

¹⁰ See ANGELL 310 § 285 on the development through *Brown v. Hancock* (1628) Cro. Car. 115, 79 Eng. Re. 701; *Tankersley v. Robinson* (1629) Cro. Car. 163, 79 Eng. Re. 742; *Stile v. Finch* (1634) Cro. Car. 381, 79 Eng. Re. 932.

¹¹ In canonist procedure since the end of the fourteenth century, the court took notice *ex officio*. The German doctrine adopted the defense theory as late as the nineteenth century. See ERNST HEYMANN, *Das Vorschützen der Verjährung* (1895) and KIPP, 45 Z. Handelsr. (1896) 608.

automatically, was changed into a mere defense to be pleaded by the defendant at his pleasure. The influence of canon law and English equity jurisdiction may be neglected in a discussion restricted to obligations.¹²

Byzantine, Continental, and English sources all speak of "action" as the object of limitation. The meaning of the word is indicated by the long and firm doctrinal tradition coming from classical Roman law and represented by the category of *jus quod pertinet ad actiones*,¹³ co-ordinate with the law of persons and the law of things. Roman and English professional legal practice started from a few formulas of procedure to be used in certain cases. The progress consisted in increasing the number and refining the use of these formulas until the procedure *extra ordinem* in one system and equity in the other became the means of new developments. But not withstanding the dissolution of formalism and the enrichment of the system, the ancient juriconsults and the English jurists until the nineteenth century¹⁴ considered the decision of lawsuits as the object of all their efforts, and the question under what conditions a petition (action) could be judicially recognized and enforced as their central problem.

Actio, hence, technically the acting of the plaintiff in introducing and pursuing his claim, in the classical texts covers both the procedural activity of the plaintiff and his right to win his cause. An *actio in personam* particularly is

¹² The comparatively few cases in which *laches* has been applied not to property claims but to suits for restitution, do not directly apply the statute of limitation, see Restatement of Restitution § 148. The recent judgemade German "*Verwirkung*" (see comments on § 242 BGB.) is analogous and clearly substantive. Whether also the equitable institution of *laches* is substantive—as I assume and a Note in 79 U. of Pa. L. Rev. (1931) 341 evidently implies—and whether therefore it is to be applied by foreign judges, is an interesting question to be discussed under the general problem of broad judicial discretion exercised upon foreign authorization.

¹³ GAIUS IV 1 ff.; Just. Inst. 4, 6 ff.

¹⁴ PLUCKNETT, A Concise History of the Common Law (ed. 4, 1948) 361 f. defines the process of separation of law and procedure since the eighteenth century and concludes: "Much experimentation is going on, both in England and America."

a formulary means of proceeding, but it is also an obligatory right: "*Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi.*"¹⁵

The pandectists, though slowly continuing the work of the Corpus Juris in the transformation of the system of actions into a system of rights, nevertheless retained the double-sided concept of action. In the nineteenth century, the "law of actions" was conceived as the borderland between private and procedural law, including the effects on the right in issue of the commencement of a suit and the judgment. The development of "action" in the English technical language seems obscure, but may have followed similar lines. A late testimony, however, is furnished by the English Sale of Goods Act and its American parallel. After having described in four parts the sales contract and its contents, these acts in a "Part V, Actions for Breach of the Contract" include the "remedies" of the seller and the buyer as to the price, rescission, general damages, etc., but contain almost nothing referring to procedure. Breach of contract, just as commission of a tort, produces rights for the injured party. While these rights are referred to as actions and remedies, these terms consider the rights as objects, but not as means, of procedure.

Holdsworth, it is true, thinks that it is reasonably clear from the words of James I's statute "that the statute affected not the right under a contract but the right to enforce it."¹⁶ This can scarcely have been the idea. By prescribing that the actions should be commenced and sued upon within six years, or otherwise its enforcement would be denied, the statute destroyed the only form in which the right appeared in the legal world. When later, in 1698, the court of the King's Bench said of a claim, "It is a debt though barrable by pleading of the statute,"¹⁷ it meant only

¹⁵ CELSUS, Dig. 44, 7, 51; Just. Inst. 4, 6 pr.

¹⁶ 8 HOLDSWORTH 65.

¹⁷ Wainford v. Barker (1698) 1 Raym. (ed. 4, 1790) 232.

to save the claim for accounting in an administration proceeding before an ecclesiastical court. Subsequently, other effects of the debt were recognized. But the contrast between right and remedy was superimposed on the statute.

The two elements of "action" were finally disjoined by the German Pandectist, Windscheid.¹⁸ He distinguished "*Anspruch*"—claim or pretense in precarious translations—and right to sue or "*Klagerecht.*" *Klageverjährung*, limitation of action, thenceforth was replaced by *Anspruchsverjährung*, limitation of claim. The ensuing German and later the Italian scholars have devoted an enormous amount of thought to both of these basic concepts. The German Civil Code, precisely at the place where it indicates the object of limitation of action, defines the *Anspruch* as "the right to demand from another person an act or a forbearance." (§ 194). While this means, in application to property, that the various rights flowing from a violation of property right are barred in contrast to the ownership, mortgage, etc., which is not necessarily affected, in the better opinion an obligatory right is identical with an *Anspruch* and object of limitation. Recent literature leaves no doubt that in any case the object affected by limitation is the right and not the procedural power of a plaintiff. Rather, it has been emphasized that the attempt of Windscheid and the German Code to save the elements of the Roman *actio* by inserting the "claim" between the substantive right and the procedural right of enforcement, has failed; it would simply be the right that is affected by limitation.¹⁹ But this is immaterial for our purpose.

What matters is that the law of limitation as well as the meaning of action have undergone important modifications,

¹⁸ WINDSCHEID, *Die Actio* 1856.

¹⁹ See CARNELUTTI, "Appunti sulla prescrizione," 10 *Riv. Dir. Proc. Civ.* (1933) I 32; BETTI, *Diritto processuale civile italiano* (1936) 166 f. § 38.

The literature on the procedural part of *actio* has produced an overwhelming variety of opinions.

although the Anglo-American legal language has persisted. Naïve students of the statutes of limitation are continuously misled by this terminology, although erudite jurists certainly should not need to be warned.

It seems opportune to make one more general observation. American discussions have shown meritorious endeavors to clarify the relationship between substance and procedure. Through Walter Wheeler Cook's writings, it has been recognized that the line of delimitation between these two fields may vary according to the purposes of the rules of law to be subordinated. From this acknowledgment of the relativity of terms, seemingly some scholars have concluded that the concept of procedure is flexible to the degree that it does not possess any general meaning. A further inference may be that a domestic statute of limitations is "procedural" in the meaning of conflicts law, although a foreign statute may be substantive. All this is mistaken. There is no ground for contending that for the purpose of conflicts law—that is, for the question whether domestic or foreign law should apply—several concepts of procedure are necessary or useful. The main, and probably the exclusive reason for discussing the scope of procedure in this field is afforded by the universally recognized principle that foreign private law is potentially applicable but foreign procedural law is not. The idea underlying this principle is simple and although it needs certain exceptions, it does not call for subtle conceptual distinctions. The idea is this: Every court wants to administer justice in the forms and methods regulated for proceedings at the forum. Court and parties are not to be disturbed in their observance of the legal rules prescribing the steps to be taken for instituting, pursuing, and terminating lawsuits. This includes, indeed, rules limiting the time in which a procedural act such as pleading, objection, offer of evidence, or appeal must

be made.²⁰ Whether it also includes the right of a defendant to withstand the exercise of a superannuated substantive right by opposing to the cause of action a counterright on the same plane—"A plea of limitation is an answer to the merits"²¹—, is the problem of conflicts law to be discussed in the next chapter.

II. MUNICIPAL CONCEPT

I. Main Features of Limitation

The specialists of conflicts law sometimes seem to be entirely unaware of the fact that limitation of action has the same structure under all the statutes of the world. Whatever the influence which the *Corpus Juris* or the statist doctrines may or may not have exercised on English courts, it is a strange mistake to attribute the rift in the conflicts rules to a substantial cause. There are local deviations from the over-all picture²² but, roughly, the institution is universally organized on the following lines.

(a) *Lapse of time*. The period of limitation starts to run when the cause of action is completed (*actio est nata*). The march of time is suspended by infancy and other individual incapacity to litigate. It is interrupted, in the language of Justinian, when debtors "acknowledge the debt whether by payment or otherwise" (*debitum agnoverint vel per solutionem vel per alios modos*, C. J. 8, 39, 4).

(b) *Defensive remedy*. Contrary to original ideas, the court takes notice of a completed limitation only if the defendant avails himself of the bar, in the form prescribed

²⁰ Unanimous opinion, relating to the "peremption d'instance," see for France, 2 ARMINJON 345, VALÉRY 1010; for Italy, DE NOVA 120, 193 n. 1; for the Netherlands, MULDER 232. In Louisiana, the term seems to be used as equivalent to a time period destroying the right, cf. Hollingsworth v. Schanland (1924) 155 La. 825, 99 So. 613, that is, "déchéance" in the French language, below.

²¹ WOOD, 1 Limitations 304 § 63a.

²² For the United States, cf., e.g., Credit Manual of Commercial Laws (1945) 267.

by the procedural law, such as a special plea.²³ The German Code, emphasizing the substantive character of this defense, expresses it in the terms of a private law "exception," that is, the debtor's right to refuse performance,²⁴ which operates outside judicial proceedings as well as in court.

Even apart from extrajudicial acts employing the defense, the procedural disposition of the effect of limitation is a most characteristic point of the law of limitation. Under the influence of moralistic and natural law conceptions, it has become traditional to explain that it must be left to the conscience of the debtor whether he will resort to a defense regarded as immoral by some social philosophers. However, barons returning from exile after the English civil war, probably had good reasons for acknowledging their old debts.²⁵ Preserving credit, desire for a test, and other considerations looking to the future usually are active motives.

With all statutes recognizing the defendant's right to dispose of the bar,²⁶ it is difficult to believe that the state claims a paramount interest in avoiding stale claims so as to insist on the application of its own statute of limitation. Certainly, courts are glad to be spared the difficult ascertainment of old causes of action. But a public policy so stringent as has been vindicated in support of the Anglo-American theory is scarcely reconcilable with the fact that the protection of the statute is in the discretion of the defendant. As it is said in France:

Prescription is not absolutely a means of public policy; it does not go beyond the sphere of the particular interests

²³ WOOD, 1 Limitations (ed. 3) § 7.

²⁴ BGB. § 222 par. 1.

²⁵ This is a suggestion by HESSEL E. YNTEMA.

²⁶ England: See POLLOCK, Contracts 638 f.

United States: 53 C. J. S. 958 § 24 n. 49; 34 Am. J. 318 § 405 n. 9.

Austria: Allg. BGB. § 1501.

France: C. C. art. 2223; cf. DALLOZ, Répert., Prescription Civile Nos. 47 ff.

Germany: BGB. § 222: right to refuse performance.

of the creditor and debtor. Moreover, it involves an evaluation of moral nature; certain consciences would not admit they were liberated without having paid, whatever the age of the debt. If, then, the debtor insists on paying, it would be wrong to consider that he contracts a new debt or that he makes a gift to the creditor.²⁷

(c) *Waiver*. This character of the bar by limitation is confirmed by the almost universal rules that a debtor is free to waive a completed limitation by agreement²⁸ and the widely held opinion that parties may in advance agree on a shorter period than the statutory period.²⁹ Although the codes usually do not allow the parties to enlarge the period or to waive the bar before it is acquired, courts have often favored party autonomy.³⁰

(d) *Effect*. What is the effect of a judgment dismissing the claim on the ground of limitation? Fine considerations of this problem were expounded by Story in his personal remarks in *Leroy v. Crowninshield*.³¹ But in his treatise, Story borrowed from Boullenois³² the idea that such judgment merely abates the action, since it denies but the remedy.³³ This was mistaken. The old scholars disputed the

²⁷ RADOUANT in Planiol et Ripert, 7 *Traité Pratique* 715 § 1380.

²⁸ Austria: Allg. BGB. § 1502.

France: PLANIOL et RIPERT, 7 *Traité Pratique* § 1387.

Italy: C. C. (1942) art. 2937 par. 1.

Switzerland: C. Obl. art. 141 par. 1 (*a contrario*).

Anticipatory waiver of prescription is invalid.

²⁹ United States: Order of Travelers v. Wolfe (1947) 331 U. S. 586, 608 n. 20 emphasizes the extraterritorial effect.

France: Constant practice; BAUDRY-LACANTINERIE et TISSIER § 96; "an astonishing permission," PLANIOL et RIPERT, 7 *Traité Pratique* § 1349.

Germany: BGB. § 225 sent. 2.

Italy: On the controversy, see DE NOVA 98 n. 2.

Switzerland: On the possibility of extinguishing the debt of contractual limitation, see OSER-SCHOENENBERGER art. 129 n. 1.

³⁰ For France, see PLANIOL et RIPERT, 7 *Traité Pratique* 683 § 1350.

On evasion through choice of law, permitted by German courts, see *infra* p. 515 n. 103, *cf.* p. 503.

³¹ (1820) 2 Mason 151, Fed. Cas. No. 8269.

³² BOULLENOIS, 1 *Traité de la personnalité et de la réalité des loix* (1766) 82 ch. 3 obs. 23 p. 530.

³³ STORY § 576.

question whether the defense of prescription belonged to the *exceptiones ordinatariae* (procedural) or to the *decisoriae* (substantive). The first were objections to the court taking cognizance of the complaint because a prerequisite condition of the proceeding was missing. The latter exceptions went to the merits. Some authors considered prescription as substantive for the reason that it was an *exceptio peremptoria*; this argument was correctly refuted by Boullenois, whom Story quoted comprehensively.³⁴ But on the other hand, this exception was also not to be stamped as procedural because of its preliminary character, i.e., preventing the court from looking into the other merits.³⁵

Since Baldus, old and modern Italian and French authors have prevailingly categorized this exception among the *decisoriae* and the judgment as going to the merits.³⁶ Boullenois was part of a minority to which, it is true, Ulric Huber belongs.³⁷ Story³⁸ was perhaps misled by Pothier's remark³⁹ that in France the judgment of dismissal took the form of "*fin de nonrecevoir*." The category of a nonreceivable demand half-way between an action "*mal fondée*" and an action "*déboutée d'instance*" corresponds with defenses various in nature, which were joined together by the French science of the seventeenth and eighteenth centuries for certain procedural ends.⁴⁰ It happens that this complex group

³⁴ STORY § 579 p. 720, giving a translation.

³⁵ Correctly, WOOD, 1 Limitation 304 § 63a.

³⁶ On Baldus, Salicetus, Paulus de Castro, Dumoulin, and the entire literature to the end of the 16th century, MICHEL 27-31; Burgundus, MICHEL 39; the great majority of successors of d'Argentré, *id.* 63 f.; the 19th century, *id.* 137-142.

³⁷ HUBER, De conflictu legum § 7 (Guthrie tr. Savigny 511). On VOET, father and son, see *infra* Ch. 52 ns. 12, 13.

³⁸ STORY § 580 and notes.

³⁹ POTHIER, Prescriptions, Introduction, sect. II § 30 par. 1; Obligations § 687. Pothier did say, however, that the creditor conserves his claim but has no action any more, a proposition that puzzled Bugnet; *cf.* POTHIER'S description of *fin de non-recevoir*, Procédure Civile, sect. I § 35.

⁴⁰ See the informative article by BÉQUET, "Etude critique de la notion de fin de non-recevoir en droit privé," 47 Revue Trim. D. Civ. (1947) 133.

of defenses, affected by a procedural reform of 1935,⁴¹ has recently been the object of a new discussion and apparently approaches its dissolution. There is no doubt where in this new development *prescription* belongs. The Court of Cassation has expressly declared it to be "a means of defense on the merits" ("*un moyen de défense au fond*").⁴²

This is the universal practice, including the United States.⁴³ Only because in England and this country limitation has territorial effect, this *res judicata* is said to be restricted to the forum.⁴⁴ Correspondingly, when an action is dismissed by a foreign court on the ground of limitation, the action may be brought again at the forum.⁴⁵ Evidently, this reasoning is wrong when the foreign court means to dismiss the suit with prejudice.

Merely "procedural" obstacles to a favorable decision have no effect on the cause of action. With the traditional antithesis of remedy and debt or cause of action, there can be no doubt that a judgment on the merits affects more than the remedy.

Perhaps, the question may be raised how a dismissal on the ground of failure of jurisdiction should be characterized. But thus far, this question seems outside discussion of our subject.

(e) *Natural obligation*. Finally, in all systems the true kind of limitation leaves intact some important effects of the debt. There remains in the language of natural law and Lord Mansfield⁴⁶ a "moral" obligation, usually designated

⁴¹ Decret-Loi, Oct. 30, 1935, D. 1935.4.421; C. Civ. Proc. art. 192, amended.

⁴² Cass. civ. (Feb. 23, 1944) S. 1944.1.117 at 120 with note by MOREL.

⁴³ United States: WOOD, 1 Limitations 304 § 63a; FREEMAN, 2 Judgments 1538 § 726.

Civil law: MICHEL 144.

⁴⁴ Bank of United States v. Donnally (1834) 8 Pet. S. C. 361; Warner v. Buffalo Drydock Co. (C. C. A. 2d 1933) 67 F. (2d) 540; CHEATHAM, Cases 330.

⁴⁵ Harris v. Quine (1869) L. R. 4 Q. B. 652; DICEY 856 No. 14.

⁴⁶ See 8 HOLDSWORTH 26.

by the Romanistic term a natural, or by some pandectists and Sir Frederic Pollock an imperfect, obligation. The debtor may still discharge the barred debt by payment, not as a gift; he cannot recover such payment at all or only under specified conditions. He can revive it to full effect by a new promise or an acknowledgment (at common law without new consideration);⁴⁷ also, the debt may be secured by pledge, mortgage, suretyship, or insurance, etc.

Anglo-American lawyers have assumed that these residual effects are due to the fact that the debt is intact and only the remedy is affected. American decisions have, for instance, concluded that the creditor may still claim foreclosure of a mortgage as only the remedy is alleged to be eliminated.⁴⁸ But the German Code which more than any other has accentuated that the debt itself is affected by the exception, fully recognizes this particular effect after the debt is barred.⁴⁹ Legal effects cannot depend on how we describe the weakening of the creditor's right. "A statute transforming an enforceable debt into a natural obligation, is not a procedural rule."⁵⁰

2. Limitation and Preclusion

Modern Continental laws have developed in contrast with limitation (*prescription*) a concept of preclusive periods of time (*déchéance* or *délai fixe*, *Ausschlussfrist*). Preclusion seems to me a good term to indicate this group. Its most typical characteristics are that the time runs without suspension and interruption, as in the ancient *actiones*

⁴⁷ On the change of background in history, see HOLDSWORTH, 39 Law Q. Rev. (1923) 146 and 8 History 39.

⁴⁸ First Nat'l Bank of Madison v. Kolbeck (1945) 247 Wis. 462, 19 N. W. (2d) 908, Note, 161 A. L. R. (1946) 886. The concurring vote of Fowler, J., is significant: as long as there is no payment of the debt, there is no extinguishment of it; without a debt there can be no mortgage.

⁴⁹ BGB. § 223 par. 1.

⁵⁰ DREYFUS, L'acte juridique en droit privé international (Thèse 1904) 377.

perpetuae, and that judicial notice is taken of the preclusion of action, at least when the lapse of time is on the face of the pleadings.⁵¹ Usually these periods are short and intended to precipitate some act such as giving notice of defects, consent, or an overdue performance. Where the bringing of an action is conditioned by a time limitation, the distinction of this group from limitation is the more delicate as many transitory types exist in between. Suspension because of impossibility of suing, for instance, may be excluded in limitation cases and allowed in preclusion cases. Each single statute must be properly investigated.⁵² Continuous attempts, it is true, have been made in the common law countries, in conflicts law, to distinguish an operation of the law "extinguishing the right" from limitation as restricting the exercise of the right, a contrast that has retained a few followers also on the Continent.⁵³ This served to establish the possibility for a period of time to affect the right. But the formula is wrong.

What is more, conflicts law cannot establish any distinction between the varying shades of municipal institutions. No satisfactory line can be drawn to determine which of the foreign statutes responds to the usual, domestic, type of limitation of "action" and which not. Carrying out such a distinction "would lead to incertitude and injustice."⁵⁴ It is unnecessary if all limitations are classified into the scope of the law governing the contract.⁵⁵

Evidently, the convenience of a simple comprehensive

⁵¹ France: PLANIOL et RIPERT, 7 *Traité Pratique* 735 § 1402 f.

Germany: ENNECERUS, Vol. I, 1 § 211 III.

Italy: C. C. (1942) arts. 2964 ff.; ENRICO GIUSINI, *Decadenza e prescrizione* (Univ. Torino, *Memorie dell'Istituto Giuridico* II No. 54) 63.

⁵² BAUDRY-LACANTINERIE et TISSIER §§ 36 ff.; PLANIOL et RIPERT, 7 *Traité Pratique* 737. VAN BRAKEL, 1 *Nederl. Verbintnissenrecht* (1942) 263.

⁵³ 12 AUBRY et RAU 534, 535 n. 9; BAUDRY-LACANTINERIE et TISSIER 35. Apparently also MODICA, 1 *Teoria della decadenza* (1906) 178 (according to GIUSINI, *supra* n. 51, at 11).

⁵⁴ BATIFFOL 455 § 578.

⁵⁵ MICHEL 150 ff.; DE NOVA 192 (120).

rule has also motivated a provision of the Treaty of Versailles. Each state participating in a clearing of prewar debts was declared to be responsible for the payment of debts due by its nationals, except—among other cases—“in a case where at the date of the outbreak of the war the debt was barred by the laws of prescription in force in the country of the debtor.”⁵⁶ This English draft, intending to reproduce the French version (“*la dette était prescrite*”), included not only a “debt due” in the case of a limitation of action under English concepts but also all other time restrictions.⁵⁷

In American law, limitation of action is sharply distinguished in theory from time periods for the exercise of a right, the lapse of which extinguishes the right. But in practice the difficulties of classification are certainly not less than in Europe. Where the distinction has become significant in conflicts law the result is unhappy.⁵⁸

3. Right and Remedy

Although customarily used by Anglo-American courts and noncritical lawyers, the antithesis of right and remedy was employed in the nineteenth century only by a few Continental advocates of the *lex fori*.⁵⁹ In fact, the entire idea is unique. Who would describe the debt of a minor as a right unimpaired by the fact that he cannot be sued on it?

For a sound construction of the legal phenomenon presented in our case of an actionless debt, its two sides ought to be considered. A debt that can be enforced in court if the defense of limitation is not affirmatively pleaded, certainly

⁵⁶ Treaty of Versailles, Annex § 4 to art. 296 (b); Annex § 4 par. 1.

⁵⁷ RABEL, *Rechtsvergleichung vor den Gemischten Schiedsgerichtshöfen* (1924) 55 f.; followed by WUNDERLICH, *supra* n. 3, 492.

⁵⁸ Cf. GOODRICH 203 on the difficulty of determining whether a limitation is on the right; and *infra* pp. 507-508.

⁵⁹ RADOUANT in Planiol et Ripert, 7 *Traité Pratique* 654 § 1325 remarks that this is a rather muddled idea.

survives the running of the period of time.⁶⁰ But if it is awkward after the lapse of time to deny the existence of a right, it is still less reasonable to think it unaffected by the absence of the faculty of unconditional judicial enforcement. The correct description of the situation is very simple. "*Le droit du créiteur n'est pas éteint mais transformé.*"⁶¹ The German and Swiss Codes express the same truth by stating that limitation of action affects the "claim."⁶²

A rapidly increasing number of leading Anglo-American scholars have professed their disapproval of the procedural or remedial theory. Lorenzen has expounded his criticism in an authoritative article.⁶³ Westlake was in opposition.⁶⁴ Falconbridge calls both right and remedy ambiguous and misleading terms.⁶⁵ Stumberg considers procedure to be the method of presenting the facts, whereas limitation concerns the legal effect of a fact upon a right.⁶⁶ Cheshire⁶⁷ and Beckett,⁶⁸ as well as Goodrich⁶⁹ and several judges⁷⁰ have declared to the same effect. From Story in his first decision⁷¹

⁶⁰ POLLOCK, *Contracts* (ed. 12) 504.

⁶¹ RADOUANT in Planiol et Ripert, 7 *Traité Pratique* 726 § 1393.

⁶² BGB. § 194; *cf.* ENNECCERUS-NIPPERDEY § 212.

Switzerland: See OSER-SCHOENENBERGER 640 f.

⁶³ LORENZEN, "The Statute of Limitation and the Conflict of Laws," 28 *Yale L. J.* (1918) 492, Selected Articles 352.

⁶⁴ WESTLAKE § 238. See also GUTHRIE in his translation of Savigny 267 ff.

⁶⁵ FALCONBRIDGE, *Conflict of Laws* 242.

⁶⁶ STUMBERG 141.

⁶⁷ CHESHIRE (ed. 3) 830: "English law is at the moment unfortunately committed" to this view.

⁶⁸ BECKETT, 15 *Brit. Year Book Int. Law* (1934) 66, criticized by MENDELSSOHN BARTHOLDY, 16 *Brit. Year Book Int. Law* (1935) at 31 n. 2, by arguments opposed in the present book.

⁶⁹ GOODRICH 201.

⁷⁰ *Gilpin v. Plummer* (C. C. D. C. 1812) Fed. Cas. No. 5451; *Cochburn, C. J.*, in *Harris v. Quine* (1869) L. R. 4 Q. B. 652. See also Note, 9 *U. of Chi. L. Rev.* (1942) 723.

⁷¹ *LeRoy v. Crowninshield* (1820) 2 *Mason* 151.

A curious attempt to refute Story's doubts has been made by Mr. Justice Wayne in *M'Elmoyle v. Cohen* (1839) according to the report by ANGELL 59, but the passage is not included in 13 *Pet. S. C.* 324, 327 (38 *U. S.* 169, 172). Angell's praise of these polemics against the better informed Story seems unaccountable.

to Wharton⁷² and the just-mentioned writers, the rule has been upheld exclusively because it "is now too firmly settled to be shaken" (Wharton). But knowing the truth ought to have consequences.

American doctrine has utilized this inveterate antithesis of right and remedy for various purposes, but quite unnecessarily. Thus, the requirement that a time limit on the "remedy" must be pleaded specially, has not been extended to the defense of "extinction" of the right by lapse of time.⁷³ In reality, the difference is that between an exception opposed to a correct cause of action and the denial of the cause of action. Both positions are taken in purely procedural manner. They might not have been distinguished at all if the historical special treatment of limitation of action had not been looked upon with disfavor.

Also the fact that federal courts in diverse citizenship cases have now to follow the substantive law of the state courts but preserve their procedural rules, has nothing to do with the opposition of right and remedy. The proof is that the state statutes on limitation apply.⁷⁴ Even when a federal statute creates a liability without adding a time limitation, the general state statute is resorted to.⁷⁵ Federal law may incorporate state "remedies" as well as "substance."

⁷² 2 WHARTON 1271 § 545.

⁷³ *Lewis v. Mo. Pacific R. Co.* (1929) 324 Mo. 266, 23 S. W. (2d) 100; and see 54 C. J. S. 491 § 357 n. 21.

⁷⁴ *Guaranty Trust Co. v. York* (1945) 326 U. S. 99, 105, 107, 111; see cases cited by Goodrich, J., in *Anderson v. Andrews* (C. C. A. 3d 1946) 156 F. (2d) 972; PUTMAN, 1945 Annual Survey 53, 1946 *id.* 62.

⁷⁵ Federal antitrust laws: *Seaboard Terminals Corp. v. Standard Oil Co. of N. J.* (D. C. S. D. N. Y. 1938) 24 F. Supp. 1018; federal liability of National Bank stockholders: *Helmert v. Anderson* (C. C. A. 6th 1946) 156 F. (2d) 47; *Anderson v. Andrews* (C. C. A. 3d 1946) 156 F. (2d) 972; and see *Holmberg v. Armbrecht* (1946) 327 U. S. 392; *cf.* PUTMAN, 1946 Annual Survey 62.

4. Contrasting Legislative Policies

It has been an easy temptation to explain the Anglo-American doctrine by a peculiar conception of the purpose of limitation. Following other propositions of this kind, it has recently been said that in civil law an exception based on limitation flows from the obligation itself, but at common law a plea of limitation is made in the interest of justice.⁷⁶ This contrast begs the question of the conflicts law. The municipal regulations contain nothing to cause any difference in the relation between limitation statutes and conceptions of justice.

Another recent writer asserts that a deep-seated difference exists throughout French, English, and German laws between short and long periods of limitation; although short limitations are unmistakably a part of substantive law, the long periods, in his opinion, concern procedure.⁷⁷ Again, no proof is afforded.

Indeed, as usual, it is not true that different policies govern in the several jurisdictions or in the variants of the same institution. All municipal laws in this matter are guided by a complex of motives. It is in the public interest that peaceful situations should not be disturbed after a long time. A debtor should not be forced to answer claims of obscured origin. He should not have to preserve instruments, receipts, and accounts for an unlimited time. Witnesses and documents may disappear. The courts should not be troubled with difficult determinations of fact. The creditor may have been negligent in the enforcement or be deemed to have waived his claim. The debt may have been discharged in fact without receipt. This mixture of considera-

⁷⁶ MENDELSSOHN BARTHOLDY, "Delimitation of Right and Remedy," 16 *Brit. Year Book Int. Law* (1935) 20 at 31 n. 2. He adds another distinction, contrary to the facts found here.

⁷⁷ PHILONENKO, "De la prescription extinctive en droit international privé," *Clunet* 1936, 259, 513 at 527, 532, 545.

tions prevails everywhere without discernible variants.⁷⁸ It also colors all particular statutes with only one known exception.⁷⁹

5. Comparative Conclusion

In municipal law, limitation of action always affects the right, and the degree of this effect is no suitable criterion for distinctions. In this domain of internal effect, statutes of limitation belong to substantive, as contrasted with adjective, law. If the common law theory as formulated by past undeveloped scholarship is to be justified, and not respected simply because it exists, the reasons must be found in the field of conflicts policy.

On the side of the literature supporting the Continental theory, however, some unfounded views have been expressed. It has often been claimed that in contrast to England, Continental limitation of action "extinguishes" the obligation⁸⁰ and this term, as used in fact in the French Civil Code, has found much favor in other codes.⁸¹ But as we have seen, it can only be said in French law that the defendant may avail himself of the bar and that the judgment dismissing the action is *res judicata* on the merits. There are little-noted problems in modern law concerning the time when the obligation finally becomes ineffective in and outside of court. Yet an obligation enforceable so long as the debtor does not react, or generating any of the effects of a natural obligation, is not dead.

It has also been contended in supporting the Continental

⁷⁸ This is also the opinion of BATIFFOL 455 § 576.

⁷⁹ *Infra* Ch. 53 p. 502 on French C. C. art. 2275.

⁸⁰ E.g., DIENA, 1 *Dir. Com. Int.* 443; DE NOVA 132.

⁸¹ C. C. art. 1234: "Les obligations s'éteignent. . . . Et par la prescription, qui fera l'objet d'un titre particulier."

The new Italian Code starts its provisions on "prescrizione e decadenza," saying "Every right is extinguished by prescription, when the holder does not exercise it during the time determined by law," art. 2934.

conflicts rules that the debt carries in itself from its beginning the germ of its destruction through lapse of time.⁸² This argument could correctly be denied from the American side; it is a "false premise that there is some immutable, preordained duration" of the effectiveness of a debt.⁸³ The proof is that the law governing limitation may change, which is an important point for the doctrine of conflicts. In view of the structure of this legal institution, there is also no reason in the arguments of Savigny that failure to incur the lapse of time is a condition of the validity of the obligation,⁸⁴ or of Lainé that limitation is a modality inherent in the obligation.⁸⁵

In fact, the right of a debtor to bar the action of his creditor, by invoking its limitation by lapse of time, is always a substantive right, even though the lapse of time does not extinguish the claim and is not inherent in the debt.

⁸² E.g., 1 FRANKENSTEIN 595; DE NOVA 132 § 24.

⁸³ AILES, *supra* n. 4, 500.

⁸⁴ SAVIGNY § 574 at notes (t) ff.; his specified arguments, however, are still excellent.

⁸⁵ LAINÉ, 19 Bull. Soc. Législ. Comp. (1889-90) 55.