

## THE MEANING OF EXTINCTIVE PRESCRIPTION IN GUERNSEY

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*The principle of extinctive prescription in Guernsey is said to be well understood, but closer examination of the concept and its usage suggests that that may not be so. This article undertakes a comparative analysis of the principle and considers how it should be classified in Guernsey.*

“‘When I use a word’, Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean—neither more nor less’.”

1 Each Guernsey aspirant learns that, in Guernsey, as a matter of customary law there is extinctive prescription, and not limitation periods; this is presented as a fundamental difference from the English law in which they are qualified. Having previously practised in one of the few areas of English law with statutory extinctive prescription, there is a clear difference between limitation and prescription from the English legal perspective<sup>1</sup> and so the effect of extinctive prescription in Guernsey seemed clear. However, I have had reason to reconsider the meaning of extinctive prescription in Guernsey and, by way of this article, have set out what it might be.

2 Before continuing, it should be noted that prescription can be classified into two types: acquisitive and extinctive. As Gallienne noted “*Il y a deux espèces de prescriptions: la prescription à fin d’acquérir et la prescription à fin de se libérer*”.<sup>2</sup> Both acquisitive and extinctive prescription are derived from Roman law<sup>3</sup> and found in

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<sup>1</sup> The former bars the remedy, the second extinguishes the right.

<sup>2</sup> Gallienne, *Traité de la renonciation par loi outrée et de la garantie*, at 314 (1845).

<sup>3</sup> Acquisitive prescription appears to be derived from the concepts of *usucapio* (in relation to *meubles*) and *longi temporis praescriptio* (in relation to *immeubles*). Pure extinctive prescription appears to be derived from *de triginta annorum praescriptione*, in the Theodosian Code, introduced in the 5th century AD.

many jurisdictions, including Guernsey and its neighbouring jurisdictions of Jersey, France, England and Wales,<sup>4</sup> and Scotland.

3 The principles of acquisitive prescription are, it seems, uncontroversial and so this article will not consider acquisitive prescription much further.<sup>5</sup> It is the meaning of extinctive prescription in Guernsey that appears somewhat unclear and worthy of more detailed consideration.

4 The term “extinctive prescription” appears to have different meanings in different jurisdictions; in some it is a procedural rule, in others, a substantive rule, in some it extinguishes the underlying right of action, in others, it simply bars the remedy. Thus whilst the term is a common legal term, there is no common meaning. So, in order to put this discussion into context, extinctive prescription is considered by way of a comparative analysis of English, Scottish, Jersey, and French law. This is followed by a discussion of the relevant Guernsey law. However, this article is written with the caution of the Privy Council in the case of *Vaudin v Hamon* in mind, namely—

“If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter.

While it may be true, in a very general sense, that there is some basic similarity between Roman law, at various periods, the various customary laws applicable in different parts of France, the Civil Napoleonic Code, the law applicable in Jersey and that which governs in Guernsey, this similarity is of a too general and approximate character to be of much assistance in a particular case: it covers, quite clearly, large differences in matters not only of detail but of principle. Examination of the various laws of prescription in fact shows examples, within these supposedly analogous systems, of purely extinctive prescription, prescription extinguishing the remedy but not the right, prescription defined purely in terms of acquisition, and prescription effective both to

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<sup>4</sup> Henceforth “English law” for convenience.

<sup>5</sup> Save to note, in broad terms, that nothing appears fundamentally to have changed since Gallienne described it as “*l’acquisition de la propriété d’une chose par la possession paisible et non-interrompue qu’on en a eue pendant le temps réglé par la loi*” (*op cit* at 314–315), but see further comment on Guernsey law below.

confer title and to extinguish adverse claims. It is not uncommon, within a single system, for the law to select different combinations of these elements in relation to different subject matters, and also to progress from one kind of prescription to another . . .

Thus, although . . . it is proper to look at related systems of law, and commentators on them, in order to elucidate the meaning of terms, the particular legal provision under examination in any case, in this case the Guernsey law as to prescription, must in the end be interpreted in the light of its own terminology, context and history . . .”<sup>6</sup>

### **Extinctive prescription: a comparative analysis**

#### ***English law***

5 In general terms, extinctive prescription (in the sense of extinguishment of the underlying right of action) is not a substantive feature of English law, which instead generally uses limitation periods that bar the remedy. The effect of limitation is that, unless pleaded, it provides no bar to a claim brought outside the applicable limitation period. This was confirmed by the House of Lords in *Ketteman v Hansel Properties Ltd*, in which it was said that—

“A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim . . . but . . . Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded . . . If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely on a time-bar but prefers the court to adjudicate on the issues raised in the dispute . . .”<sup>7</sup>

6 There are, however, some special statutory prescription periods, enacted to implement international conventions<sup>8</sup> that create special causes of action and provide time periods after which those causes of action are extinguished. There is no possibility to extend, or interrupt,

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<sup>6</sup> [1974] AC 569, at 581H–582E, *per* Lord Wilberforce.

<sup>7</sup> [1987] AC 189, at 219E, *per* Lord Griffiths.

<sup>8</sup> *Eg* under certain maritime and aviation conventions, see in relation to the Convention relating to the Carriage of Passengers and their Luggage by Sea *Higham v Stena Sealink Ltd* [1996] 3 All ER 660.

those prescription periods. These are some of the very few prescription periods in English law.<sup>9</sup>

7 As a matter of English law, the distinction between limitation and prescription periods has long been relevant in determining the result of conflict of laws.

“As to foreign laws affecting the liability of parties in respect of bygone transactions, the law is clear that, if the foreign law touches only the remedy or procedure for enforcing the obligation, as in the case of an ordinary statute of limitations, such law is no bar to an action in this country; but if the foreign law extinguishes the right it is a bar in this country equally as if the extinguishment had been by a release of the party, or an act of our own legislature . . .”<sup>10</sup>

8 This common law distinction between limitation and prescription periods has resulted in the former traditionally being considered to be only a procedural rule<sup>11</sup> and the latter a substantive rule. A procedural rule may potentially be circumvented by forum shopping, but a substantive rule of law which forms part of the *lex causae* may not. (This demonstrates that understanding how the relevant rules operate is important from both the perspective of considering the practical consequences of the rule and understanding how such rules are classified for conflict of laws purposes.)

9 So, as can be seen from the above, “extinctive prescription”, as a matter of English law, is a substantive rule of law that automatically extinguishes the underlying right. (By contrast, “limitation” is used to describe a procedural rule that *may* be used, if pleaded, to bar the relevant remedy.)

### ***Scottish law***

10 Scotland also has a mixed legal system, similar to the Channel Islands, with its own common law and civil law that incorporates elements of Roman law. Thus, it will perhaps be no surprise that

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<sup>9</sup> Another example may also be that right of action created by the Civil Liability (Contribution) Act 1978.

<sup>10</sup> *Phillips v Eyre* (1870–71) LR 6 QB 1, *per* Willes J, at 29.

<sup>11</sup> Albeit the common law in England has been largely superseded by the Foreign Limitations Period Act 1984, which provides that foreign prescription or limitation periods are to be regarded as substantive. Further, more recent Commonwealth decisions have decided that limitation periods are substantive, *eg* the decision of the Supreme Court of Canada in *Tolofson v Jensen* [1994] 3 SCR, *Castillo v Castillo* (2005) 260 DLR 439.

Scotland has both limitation and prescription periods, the latter of which is split into two categories: positive prescription (which is effectively acquisitive prescription) and negative prescription (which is effectively extinctive prescription). The Scottish law on prescription and limitation has usefully been codified by the Prescription and Limitation (Scotland) Act 1973, from the wording of which it appears that the distinction between limitation and negative prescription, as a matter of Scottish law, is the same as English law insofar as the former bars the remedy and the latter extinguishes the underlying right of action, but see further below.

11 The Scottish Law Commission report on prescription,<sup>12</sup> which preceded the Act, noted that the period of long negative prescription may be interrupted or suspended, including by the defence of *non valens agere cum effectu*. The report noted that for some short periods of negative prescription there was no extinguishment of the underlying right. These special short periods of negative prescription were replaced, in the 1973 Act, by a new uniform short period of negative prescription. The Law Commission considered whether such period should be procedural or substantive, and concluded that it should be substantive.<sup>13</sup> This recommendation is given effect in the 1973 Act.

12 Thus the Scottish negative prescription differs from the English concept of extinctive prescription in that it may be interrupted or suspended, but otherwise appears to have the same effect, namely a substantive rule that extinguishes the underlying right.

### *Jersey law*

13 The Jersey Law Commission consultation paper on prescription and limitation<sup>14</sup> describes the distinction between extinctive prescription and limitation in similar terms to the distinction found in English law, and notes that Jersey law uses both terms “occasionally interchangeably”.<sup>15</sup> In Jersey it is clear that there are different periods of either extinctive prescription or limitation, according to the matter at

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<sup>12</sup> Scot Law Com/No 15: Reform of the Law Relating to Prescription and Limitation of Actions.

<sup>13</sup> Noting that the assistance of the reports of the 1967 New South Wales Law Reform Commission and of the 1969 Ontario Law Reform Commission, which recommend limitation periods extinguishing the underlying right.

<sup>14</sup> Jersey Law Commission Consultation Paper No 1/2008/CP, March 2008.

<sup>15</sup> *Ibid*, para 17. Interestingly the recent judgment of Royal Court of Jersey in the matter of *MacFirbhisigh and Ching v C.I. Trustees and ors* [2015] JRC 233 appears to use the terms “prescription” and “limitation” interchangeably (paras 331–339).

issue, and there does not appear to be an underlying central concept. For example, although there appears to be extinctive prescription within the English law meaning of the term, there also appears to be limitation, as the Jersey Law Reports<sup>16</sup> note that in the case of *In re Wooley*,<sup>17</sup> the Court found that—

“In a case in which the limitation period has clearly expired, the plaintiff’s cause of action is not extinguished but the availability of the remedy should be barred: to allow him to proceed would be to waste time and money. It would therefore be improper for the defendant in such a case to apply to strike out the claim as disclosing no reasonable cause of action . . . he should do so on the grounds that it is frivolous and vexatious and an abuse of the process . . .”

14 It also seems that Jersey prescription may be suspended where the person whose right is prescribed is under an *empêchement*, on the basis that *contra non valentem agere nulla currit prescriptio*. Thus, in this regard, the Jersey law of prescription is similar to the Scottish in that it may also be suspended as it does not run against someone who is unable to act.<sup>18</sup> However, the meaning and extent of extinctive prescription appears to vary subject to the nature of the claim, so it seems best not to attempt to set out an overarching definition.

### **French law**

15 Article 2219 of the *Code Civil* provides that—“*La prescription extinctive est une mode d’extinction d’un droit résultant de l’inaction de son titulaire pendant un certain laps de temps.*” In addition art 2254 states that—“*La durée de la prescription peut être abrégée ou allongée par accord des parties. Elle ne peut toutefois être réduite à moins d’un an ni étendue à plus de dix ans.*”

16 If “*droit*” is understood as the right to bring an action, rather than the underlying cause of action, then in fact prescription, as a matter of French law is, in broad terms, conceptually similar to the English system of limitation. That said, it appears that there has been some debate on whether the French law of prescription acts as a procedural bar (the procedural theory), or extinguishes the remedy (the

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<sup>16</sup> 1991 JLR N-11c.

<sup>17</sup> Royal Ct.: Crill, Bailiff, 2 December 1991.

<sup>18</sup> Subject to the relevant legal tests being met.

substantive theory).<sup>19</sup> However more recent commentary suggests that it is in fact a procedural bar.<sup>20</sup>

17 It is also worth noting that the period of prescription may also be extended, or shortened by agreement of the parties and may also be interrupted or suspended<sup>21</sup> in certain circumstances (a discussion of these rules is outwith the scope of this article). However, these broad powers and rights to amend the period are, perhaps, supportive of the idea of prescription as a procedural bar rather than a substantive extinguishment of the underlying right. Thus the nature of extinctive prescription in France appears to be similar to the nature of limitation as a matter of English law.

### **Extinctive prescription in Guernsey**

18 In order to consider extinctive prescription fully, this section considers the sources of the Guernsey law of prescription, the current Guernsey law of prescription and Guernsey jurisprudence before considering the likely meaning of extinctive prescription as a matter of Guernsey law, in order to interpret it in the light of “its own terminology, context and history”.

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<sup>19</sup> Terré, Simler & Lequette, *Droit civil, les obligations* (7th edn), para 1403—

*“Extinction de l’action en justice ou de l’obligation elle-même? Deux conceptions de la prescription s’opposent. Pour les uns, la prescription éteint seulement l’action en justice, et non le droit lui-même du créancier. Selon cette thèse, dite ‘processualiste’, la prescription serait un moyen de procédure privant le créancier du droit de poursuivre le débiteur. Pour les autres, c’est non seulement l’action en justice, mais aussi le droit qui est éteint par la prescription: cette thèse est dite ‘substantialiste’.”*

<sup>20</sup> Janke and Licari, “The French Revision of Prescription: A Model for Louisiana?”, 85(1) *Tulane Law Review* and Fricero, *Le nouveau régime de la prescription et la procédure civile, Colloque à la Cour de Cassation, 11 Mai 2009*, at 5, para 7 which suggests that the codification of art 2249 “tendrait à accréditer l’idée que la prescription est un mode d’extinction de l’action en justice”.

<sup>21</sup> See further the *Code Civil, Livre III, Titre XX* (“*De la prescription extinctive*”).

*The sources of the Guernsey law of prescription*

19 Prescription seems to be a fundamental feature of Guernsey law, appearing in the *Grand Coutumier* of the 13th century, *La Charte aux Normands* of 1315, and *L'Approbation des Lois* of 1583.<sup>22</sup>

20 Prescription also features in the works of Thomas Le Marchant,<sup>23</sup> Laurent Carey and, as noted above, James Gallienne. From Le Marchant it appears that *L'Approbation* recognised three types of prescription: that of a year and a day (*prescription annale*), that of 30 years (*prescription trentenaire*), and that of 40 years<sup>24</sup> (*prescription quadragénaire*), which list, Le Marchant noted, did not include various other types of prescription, such as the six months for sale of goods, or two or three years for the salary of the Procureur. Le Marchant also noted that—

*“possession quadragénaire vaut titre, sauf toutesfois ès cas cy dessus exceptés, aussy le terme de trente ans prescrit tous titres et actions mobilières et personnelles, mais il n’y faut oublier cette règle générale, que prescription est interrompue par un seul adjournement quand mesme il seroit fait par devant un juge incompetent.”*

21 Gallienne described extinctive prescription in Guernsey as *“une fin de non-recevoir qu’un débiteur peut opposer contre l’action du créancier qui a négligé de l’exercer, ou de faire reconnaître son droit pendant le temps réglé par la loi”*,<sup>25</sup> namely the period after which a creditor may no longer pursue a debtor or after which a right may no longer be pursued under the law.

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<sup>22</sup> The history and evolution of Guernsey Law is detailed in Chapter 6 of Dr Ogier’s *The Government and Law of Guernsey* (2nd edn, 2012, States of Guernsey) and also in Dawes, “A Brief History of Guernsey Law” (2006) 10 *Jersey Law Review* 4.

<sup>23</sup> *Remarques et Animadversions sur l’Approbation des Lois et Coustumier de Normandie* (1826).

<sup>24</sup> Chapter 29, Livre VIII

*“Nous n’usons du vingt-neufiesme chapitre des Prescriptions excepté la prescription d’an et jour, quant à recevoir les procez de Clameur de Haro et autres y contenue du dit an et jour, excepté aussy la prescription de trente ans en meuble et déception, et la prescription de quarante ans, desquelles trois prescriptions nous usons entièrement.”*

Le Marchant, *ibid*, Tome I, at 391–392.

<sup>25</sup> Gallienne, *Traité de la renonciation par loi outrée et de la garantie*, at 315 (1845, Guernsey).



22 In particular, Gallienne notes that “*Elle opère l’extinction jus persecuendi in judicio quod sibi debetur*”.<sup>26</sup> This appears to be simply the extinction of the right to bring an action, rather than extinction of the underlying cause of action. Gallienne also states that it is possible to renounce prescription—

*“il est défendu de renoncer d’avance à s’en servir; mais lorsqu’elle est acquise, elle devient une espèce de propriété à laquelle on peut renoncer.*

*Il n’y a que les personnes capables d’aliéner qui puissent renoncer à la prescription acquise. Cette renonciation peut être expresse ou tacite . . .”*<sup>27</sup>

23 Gallienne cites the case of *Le Moigne v Torode* (1833) in support of the above, noting that this confirmed that if prescription is not pleaded as an exception the Court may find that it has been tacitly renounced.<sup>28</sup>

24 This commentary and classification then appears to have been overtaken by the enactment of legislation relating to *prescription mobilière*, which appears to be purely extinctive, and *prescription immobilière*, which appears to be both extinctive and acquisitive. Thus, following enactment of the relevant legislation, it appears that the two main types of prescription in Guernsey law might now be better classified as *prescription mobilière* and *prescription immobilière*, in addition to the (now rather limited) *prescription annale*. These are detailed further below.

#### ***Prescription mobilière (and annale)***

25 The first Order in Council relating to *prescription mobilière* appears to be that registered on 6 July 1844,<sup>29</sup> giving effect to a provisional Ordinance of Chief Pleas of 11 April 1836, in which the 30-year prescription period for “personal actions and suits relating to personal property” was reduced to 10 years.

*“Qu’à compter du 1<sup>er</sup> Juin 1836 toute demande mobilière par action créée, et pour laquelle il n’y aura ni reconnaissance par*

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<sup>26</sup> *Ibid*, at 315.

<sup>27</sup> *Ibid*, at 316

<sup>28</sup> *Ibid*, at 316, fn 3, although the relevant act of Court is registered at the Greffe it has not been possible to find the judgment in order to corroborate Gallienne’s analysis.

<sup>29</sup> *Ordres en Conseil*, Vol I, at 86.

*écrit, ni Acte de Cour non-périmé, sera prescrite après dix ans de sa création.*<sup>30</sup>

26 This did not affect matters caught by *prescription annale*, which was expressly preserved (as detailed in Livre VIII, ch 29 of Terrien). This was swiftly followed by the Order in Council relating to *prescription trentenaire* registered on 31 July 1847,<sup>31</sup> which was described as a law “relating to prescription or limitation as applied to claims relating to personalty”.<sup>32</sup> This provided that—

*“Toutes choses mobilières et actions personnelles qui se prescrivent maintenant par le laps de trente ans seront à l’avenir prescrites par le laps de dix ans.”*<sup>33</sup>

### ***Prescription immobilière***

27 The first Order in Council relating to *prescription immobilière* appears to be the *Loi “de la prescription immobilière”*,<sup>34</sup> registered on 13 March 1852, in which the 40-year prescription period in “matters concerning the Realty” was reduced to 30 years. This provided that—

*“Toutes choses immobilières, et actions réelles ou dépendantes de la réalité, qui se prescrivent maintenant par le laps de quarante ans, seront à l’avenir prescrites par le laps de trente ans; et suffira la tenue de trente ans pour titre compétent en matière héréditaire.”*<sup>35</sup>

### ***The current Guernsey law of prescription***

#### ***Prescription mobilière***

28 There are two laws that presently contain the rules relating to *prescription mobilière*. The first of importance is the *Loi relative aux prescriptions*<sup>36</sup> which provides, *inter alia*, that—

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<sup>30</sup> *Ibid*, at 89, art 1.

<sup>31</sup> *Ordres en Conseil*, Vol I, at 163. This extinctive prescription appears to have been derived from *de triginta annorum praescriptione omnibus causis opponenda*, the 30-year prescription in all matters, which appears in the Theodosian Code, introduced in the 5th century AD.

<sup>32</sup> *Ibid*, at 163.

<sup>33</sup> *Ibid*, at 167, art 1.

<sup>34</sup> *Ordres en Conseil*, Vol I, at 207. (This prescription period appears ultimately to have been derived *longissimi temporis praescriptio* (in relation to immoveables), the period of 40 years seems to have first appeared in the 4th century AD.)

<sup>35</sup> *Ibid*, at 209, art 1.

<sup>36</sup> 1890, *Ordres en Conseil*, Vol II, at 326.

*“Toutes demandes mobilières et actions personnelles qui se prescrivent maintenant par le laps de dix ans seront à l’avenir prescrites par le laps de six ans.”*<sup>37</sup>

29 The reference to “*chose mobilière*” which appeared in the previous Order in Council has gone, but it seems meaningless to prescribe a corporeal chose, and that all that should be extinguished by prescription is the right of action, which is caught by the wording of this Order in Council.

30 The second law is the Law Reform (Tort) (Guernsey) Law 1979,<sup>38</sup> which interestingly makes no reference to the earlier Orders in Council cited above. This Law is written in English and refers to “limitation” and not “prescription”; in addition to providing certain special time limits, it also provides that—

“Notwithstanding the provisions of any enactment or any rule of law, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.”<sup>39</sup>

31 There is also provision for the Court to override the time limits in the Law (s 8) and for the period to be extended (s 9) or postponed (s 11).

32 As can be seen from the above, *prescription mobilière* is purely extinctive in nature.

#### *Prescription immobilière*

33 One Law contains the rules relating to *prescription immobilière*, and that is the *Loi relative à la prescription immobilière*<sup>40</sup> which provides that—

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<sup>37</sup> *Ibid*, at 167, art 1.

<sup>38</sup> *Ordres en Conseil*, vol XXVII, at 50, this Law was enacted as a result of the report of the Accident law Reform Committee which reported to the States on 26 January 1972, having found that the prescription period for actions in tort was a year and a day, it has been said that the basis of the enactment of Part II of this Law was flawed (*per* Deputy Bailiff Day, *Holdright Insurance v Willis Corroon Management* (28.08.00)), at 24, para A.

<sup>39</sup> *Ibid*, s 4(1), which appears simply to replicate in part the provisions of the *Loi relative aux prescription* it is perhaps unfortunate that it is expressed negatively which seems to leave unaffected any prescription periods founded in tort subject to *prescription annale*.

<sup>40</sup> *Ordres en Conseil*, Vol IV, at 281.

*“toutes choses immobilières, et actions réelles ou dépendantes de la réalité, qui se prescrivent maintenant par le laps de trente ans seront prescrites par le laps de vingt ans; et suffira la tenue de vingt ans, bien entendu qu’elle soit de bonne foi, pour titre compétent en matière héréditaire.”*<sup>41</sup>

#### *Prescription annale*

34 Given the statutes above, it is not clear what actions are now be caught by *prescription annale*, but it would seem that this is likely to be limited to a few discrete causes of action,<sup>42</sup> the delimitation of which is outside the scope of this article.

#### **Guernsey jurisprudence**

##### *Prescription mobilière*

35 In *re Clemens’ Appeal*,<sup>43</sup> a criminal case, the report states that the Deputy Bailiff noted—

“that to be a successful defence prescription must be expressly pleaded and raised as a preliminary point; in the instant case it was not, and the appeal therefore failed on the ground also . . .”

36 In *Craigie v Estate of Dewis*<sup>44</sup> prescription was pleaded as an *exception de fonds*. However, the report states that the Deputy Bailiff held that—

“[the insurers] would not be prejudiced by his granting an extension of time, especially as the case was limited to quantum. The first exception [prescription] therefore fell . . .”

37 In *Holdright Insurance v Willis Corroon Management*<sup>45</sup> the Deputy Bailiff stated, in relation to the Law Reform (Tort) (Guernsey) Law 1979 that—

“The Law . . . refers to ‘limitation of actions’. ‘Prescription’, however, is a concept in Guernsey very different to the English concept of ‘limitation’. Prescription both establishes and

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<sup>41</sup> *Ibid*, at 284, "art 1.

<sup>42</sup> *Eg* actions relating to the *Clameur de Haro* or perhaps “*a réclamer choses saisies comme varech*”.

<sup>43</sup> (1985) 2 GLJ 58. This case also confirmed that there was no prescription in criminal matters in Guernsey.

<sup>44</sup> (1993) 15 GLJ 47.

<sup>45</sup> Judgment of the Ordinary Court, 25 August 2000.

extinguishes rights, in distinction merely to precluding remedies  
 . . .<sup>46</sup>

38 This supports the current perception of extinctive Guernsey prescription, as prescription which extinguishes the underlying rights. In *Ogier v Grand Havre Holdings Ltd*<sup>47</sup> Hancox, Lieut. Bailiff, stated that a successful plea of prescription would extinguish the cause of action completely. The issue does not, however, appear to have been considered by the Court in any detail.

#### *Prescription immobilière*

39 The leading case is that of *Vaudin v Hamon*<sup>48</sup> in which the Privy Council considered whether the extinctive and acquisitive parts of *prescription immobilière* were two separate bases on which a claim to title could be defeated, or whether those requirements were interrelated. Interestingly, the Privy Council held that, in order to defeat a claim to title of land, acquisitive prescription needed to be proved in order for there to be extinctive prescription—

“one thing the text certainly does not do is by prescription to extinguish an owner’s title to corporeal immovables unless another person was in a position to show an acquisitive prescriptive title; and, most importantly, as a condition of the latter, possession ‘paisiblement’ has to be shown. Even under the first sentence, which may operate extinctively, it is made clear that the purpose of the prescription is to enable a person to prove good title—‘pour titre compétent’. To suppose that, in relation to a corporeal immovable, it does nothing but provide for extinction of adverse claims after 40 years, would be inconsistent with the second sentence which requires that, in relation to corporeal immovables, possession must be ‘paisible’ . . .”<sup>49</sup>

40 Or, to put it another way, acquisitive prescription is a condition precedent to extinctive prescription in relation to title to an *immeuble corporel*. However, where the matter relates to an *immeuble incorporel* (such as a servitude or a right to pursue an *action réelle*), extinctive prescription may be sufficient on its own—

“In relation to these claims or rights the text provides for extinction by prescription but this extinction is accompanied by,

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<sup>46</sup> *Ibid*, at 24. paras C and D.

<sup>47</sup> Royal Ct, 2005-06 GLR N [29].

<sup>48</sup> [1974] AC 569.

<sup>49</sup> *Ibid*, at 583G, *per* Lord Wilberforce.

and indeed produces, a positive title free from them, in the owner of the property . . .”<sup>50</sup>

*The meaning of extinctive prescription in Guernsey*

41 Before reaching a conclusion, it should also be noted that in Guernsey prescription may be suspended, or interrupted, by *empêchement d’agir*. Further, it seems that prior to *Smith v Harvey*,<sup>51</sup> which found that the prescription period for personal injuries was six years (and not the year and a day previously thought to apply) the practice of the Guernsey Bar was commonly to agree extensions of time for service of proceedings where the prescription period was thought to have expired.

42 From all of the above, it seems that, in fact, Guernsey extinctive prescription is not so different from English limitation, as it appears also to be a procedural bar. The difference appears to be one of semantics rather than substance; indeed one translation of the French word “prescription” is “limitation”.

43 The basis for this hypothesis is as follows—

- (a) if Guernsey extinctive prescription truly extinguishes the underlying right, then it seems it is not possible:
  - (i) to agree an extension of time (as was the practice of the Bar prior to *Smith v Harvey*),
  - (ii) for the Court to hear a case even though the matter was prescribed (as seems to have happened in *Craigie v Estate of Dewis* and in *Le Moigne v Torode*, according to Gallienne);
- (b) this is consistent with Gallienne’s description of prescription as “*elle opère l’extinction jus persequendi in judicio quod sibi debetur*”;
- (c) it is consistent with the concept of being able to renounce the benefit of prescription once the prescription period has expired;
- (d) it is consistent with the report to Her Majesty in Council accompanying the Order in Council relating to *prescription mobilière* registered on 6 July 1844, which referred to “the term within which personal actions . . . may be instituted” and to “all rights of action” and with the report to Her Majesty in Council relating to *prescription trentenaire* registered on 31 July 1847, which referred to “prescription or limitation”;

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<sup>50</sup> *Ibid.*

<sup>51</sup> Guernsey Court of Appeal, No 9 (Civil) 1981.

- (e) it is consistent with the decision of the Privy Council in *Vaudin v Hamon*, which held that extinctive prescription is not on its own sufficient to extinguish title to an *immeuble corporel* unless acquisitive prescription is also proved; and
- (f) further, I have otherwise found no evidence that extinctive prescription in Guernsey extinguishes the underlying right.<sup>52</sup>

44 It is also interesting to note that in *In re Clemens Appeal* prescription seemed to fail in the same way as limitation in *Ketteman v Hansel Properties Ltd*, by reason of not being pleaded, further underlining the similarities. (Although, I would have suggested that the open ended ability for prescription to be interrupted or suspended without notice might be indicative of a procedural bar, this is a feature of Scottish law, where prescription does extinguish the underlying rights. Thus it seems that this aspect of prescription is not necessarily indicative of the effect of a prescription period within a particular jurisdiction.)

45 This is also consistent with the nature of extinctive prescription in France, which jurisdiction shares the same Roman law antecedents in relation to prescription; thus it seems that an analogy as to the general nature of French extinctive prescription (if not to its detail), is appropriate.

46 Thus, given the terminology, context and history of extinctive prescription as a matter of Guernsey law, I consider that it may be similar to that in France, and to limitation in England, in that it only bars an action and does not extinguish the underlying right, and is thus a rule of procedure, rather than substance.

47 That is not to say that there is no extinctive prescription in Guernsey that acts so as to extinguish the underlying rights (for convenience “substantive extinctive prescription”). On the contrary, I consider that there is statutory substantive extinctive prescription, in similar areas to those in which it is found in English law, and I consider that it will likely arise on the same basis, not least because the relevant English statutes/international conventions have been given effect in Guernsey.

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<sup>52</sup> Save for *Ogier v Grand Havre Holdings Ltd*, but see para 38 above.

## Conclusion

48 As foreshadowed by the introduction, I cannot be certain that this analysis of the nature of extinctive prescription in Guernsey is correct. There may be other sources that lead to a different conclusion that I have not unearthed. That said, perhaps the whole concept of distinguishing between the different natures and types of prescription is one that more properly belongs in *Alice through the Looking Glass*. The judgment of La Forest, J in the case of *Tolofson v Jensen*,<sup>53</sup> which

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<sup>53</sup> *Tolofson v Jensen* [1994] 3 SCR, at 1069–1071—

“The common law traditionally considered statutes of limitation as procedural, as contrasted with the position in most civil law countries where it has traditionally been regarded as substantive . . . one can glean the two main reasons for the ready acceptance of this doctrine. . . The first was the view that foreign litigants should not be granted advantages that were not available to forum litigants. This relates to the English preference for the *lex fori* in conflict situations. The second reason was the rather mystical view that a common law cause of action gave the plaintiff a right that endured forever. A statute of limitation merely removed the remedy in the courts of the jurisdiction that had enacted the statute.

Such reasoning mystified continental writers such as M. Jean Michel (*La Prescription Libératoire en Droit International Privé*, . . . 1911 . . . who contended that ‘the distinction is a specious one, turning upon the language rather than upon the sense of limitation acts . . .’ In the continental view, all statutes of limitation destroy substantive rights.

I must confess to finding this continental approach persuasive. The reasons that formed the basis of the old common law rule seem to me to be out of place in the modern context. The notion that foreign litigants should be denied advantages not available to forum litigants does not sit well with the proposition, which I have earlier accepted, that the law that defines the character and consequences of the tort is the *lex loci delicti*. The court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order . . . Canadian courts have also begun to shatter the mystique of the second reason which rests on the notion that statutes of limitation are directed at the remedy and not the right . . . While correctly considering that a statute of limitation vests a right in the defendant, the Privy Council in *Yew Bon Tew* continued to cling to the old English view that statutes of limitation are procedural. Nonetheless the case seems to me to demonstrate the lack of substance in the approach . . . I do not think it is necessary to await legislation to do away with the rule in conflict of



considered limitation for conflict of laws purposes, illustrates this by showing that the French legal theory has moved from considering extinctive prescription as a substantive extinguishment of the underlying right to a procedural bar, and Canadian legal theory has moved from considering limitation as procedural bar to a substantive extinguishment. In each case, with plausible reasoning, this raises the question as to whether there is a meaningful distinction between the two classifications.

49 In my view there is, and must be, because a procedural bar can be waived, must be pleaded, and does not have to be given effect by the Court, whereas a substantive extinguishment cannot be waived, might not need to be pleaded and must be given effect by the Court. It is in the former category that extinctive prescription in Guernsey appears to fall.<sup>54</sup>

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laws cases. The principle justification for the rule, preferring the *lex fori* over the *lex loci delicti*, we saw, has been displaced by this case. So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend.”

<sup>54</sup> Last but not least, I must thank all who have led me to this point: Nik Van Leuven QC for kindly explaining the practice of the Guernsey Bar pre-*Smith v Harvey*; Advocate Howitt for quite rightly taking me to task over my assumption that Guernsey prescription is the same as English prescription; Advocate Hodgett, Crown Advocate Hookway and HM Comptroller, Megan Pullum QC, for bearing with me through all this, helping with my French and commenting on the draft; Advocate de Lisle for also assisting with my French conundrum; Dawn Robinson for assisting with the some of the research; and Dr Ogier for very kindly keeping my nose to the grindstone! However, I am wholly responsible for all errors in the above. In the words of Gallienne—“*celui qui devient auteur doit être préparé à en subir les conséquences*”.