res habils, titulus, fides, possessio, tempus: A medieval mnemonic hexameter?

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A medieval mnemonic hexameter?

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1. Introduction

Generations of law students in any part of the world learned at the very beginning of their studies that “an old hexameter formulates the requisites of adverse possession thus: res habilis, titulus, fides, possessio, tempus.”²

This quotation is delivered under the name of Roscoe Pound, the great American lawyer, who lived from 1870-1964 and became a law professor at Harvard in 1910. In 1945, at the age of 76, Pound resigned from teaching to accept an invitation from Chiang Kai-Shek to codify Chinese laws. The quotation is significant. It contains the qualification: old hexameter, thus suggesting that the hexameter relates to Roman law. Pound was not the only modern lawyer who was of the opinion that he quoted a brief description of the Roman law of prescription. The meaning of this last word will be elucidated in paragraph 2.

Other scholars gave an even more precise description of the hexameter. During the Second World War, on the other side of the Atlantic, the Dutch scholar J.C. van Oven wrote his textbook on Roman law, that soon became the standard in the Netherlands (and abroad). It goes without saying that he devoted several pages to the institutions of usucapio and praecriptio longi temporis. Van Oven quoted the very same hexameter, called it a mnemonic aid and he added a date. He was of the opinion that the hexameter dated back to the Middle Ages.³ In the recent past the hexameter apparently crossed several borders. And indeed, in Italy it was Pound’s and Van Ov-

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¹ * Honorary Professor of Private Law Nelson Mandela Metropolitan University Port Elizabeth, Honorary Judge in the Court of Appeal Amsterdam; Professor Emeritus University of Amsterdam.
³ Van Oven, p. 87: Zoo heeft men in de middeleeuwen alle verjaringsvereischten van het Romeinsche recht in een vermaarden hexameter saamgevat, een mnemotechnisch ezelsbruggetje waarvan vele generaties van studenten in het Romeinsche recht hebben gebruik gemaakt: Res habilis, titulus, fides, possessio, tempus.
en’s contemporary Antonio Guarino who used similar words, adding some more intriguing remarks. Guarino expressed the opinion that the content of the very same hexameter dates back to classical Roman law, but the form of the hexameter to the Middle Ages: La «usucapio» in età postclassica si fuse con la «praescriptio longi temporis» .... I requisiti dell’usucapio e della praescriptio longi temporis (requisiti determinatisi già nel corso dell’età classica) sono tradizionalmente sintetizzati in questo esametro di conio medioevale: «res habilis titulus fides possessio tempus».4 Also the most recent textbooks of Roman law, the Belgian one by C. de Koninck,5 and the Italian one by Katia Mascia,6 follow this opinion: the content of the mnemonic dates back to classical Roman law; its form to the Middle Ages.

Both parts of this hypothesis, however, deserve greater scrutiny. The Roman law of prescription is far from simple; its history is complicated and it is very unlikely that one simple mnemonic aid is sufficient to do justice to the development the different institutions went through. We know on the authority of Cicero that according to the Twelve Tables the usus auctoritas in respect of parcels of land was restricted to two years, usus of other assets to one year.7 It is, however, very difficult, or better: from an historical point of view impossible, to describe this regulation in terms that occur in the hexameter. Possessio as opposite to dominium is certainly a creation of later times; the requisites of good faith and good title are probably of classical origin and we should realize that even in classical times it was a much disputed question, if a causa putativa was sufficient to justify ususcapio. It was only as late as the enactment of the Lex Atinia (149 BC) that it became clear that stolen goods were exempt there from. Ususcapio, however, is only one of the two roots of the modern law of prescription; another important one is the praescriptio longi temporis, initially a mode of acquisition of full title in provincial land. A couple of years ago the München scholar Dieter Nörr devoted an important study to this institution and he showed, that

4 A. Guarino, Diritto Privato Romano, Napoli 19765, p. 625
6 Katia Mascia, L’usucapione. La casistica giurisprudenziale di acquisto della proprietà di beni mobili ed immobili e di altri diritti realiattraverso il decorso del tempo, Mattellica 2007, p. 14: I requisiti dell’usucapio sono tradizionalmente sintetizzati nel seguente esametro di conio medievale: res habilis, titulus, fides, possessio, tempus ...
7 Tab. 6.3 according to Cicero Topica 4.23: Usus auctoritas fundi biennium est … ceterarum rerum omnium … annuus est usus.
there is still much uncertainty regarding its development, specifically about the requirements of good faith and good cause.\(^8\) So much is clear, however, the two institutions merged in the time of Justinianus, as we can see from a constitution of 531, which is transmitted in C. 7.31.1. The constitution reserved the word *usucapio* for moveables and defined the required time of adverse possession as three years, whereas the *praescriptio longi temporis* was used for immoveables, also in Italy, whereby the required time of adverse possession was defined as 10 years *inter praesentes* and 20 years *inter absentes*.

In regard to the first part of the hypothesis the following may be raised. The thesis that the content of the hexameter is essentially and substantially of Roman nature raises several questions. This thesis presupposes a continuity and fixed outline of the Roman law of prescription, which in fact never existed. However, we will not go further into the history of the substantive Roman law of prescription. We now leave that part aside and we turn our attention to the second part of the hypothesis, namely that the hexameter is of medieval origin. Middle Ages, however, is an extremely wide concept. Dependant on the chosen perspective they lasted almost 1000 years, from the end of Antiquity, the fall of the Roman Empire, until the discovery of America. If legal historians want to understand the phenomenon of legal development they have to study the dynamic process in far more detail than just an indication of a millennium. In order to verify the general hypothesis that the wording of the mnemonic dates back to any specified period of legal history we have to determine more exactly the writer or the circle of writers who formulated the mnemonic and the meaning he or they wanted to bring across. Here exactly we meet the recent work of our colleague and friend Guido Tsuno who recently published an excellent work on legal dictionaries.\(^9\) We will see if those dictionaries, which are described by Tsuno, are useful tools for those who try to find out who the author was, whether he was indeed a medieval lawyer, as many modern scholars believe he was, and eventually we will try to find out the meaning of the hexameter: *res habilis, titulus, fides, possessio, tempus*.

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2. A terminological remark

In the context of the law of prescription, there are differences in the use of terminology and the definitions of the terms that are most often used: namely, prescription itself and limitation. The former is often found, although not exclusively, in the civil-law context, while the latter is the term generally accepted in common-law jurisdictions. The fundamental distinction to be made between prescription and limitation appears to depend on whether the claimant’s right to bring an action has been barred, or if the right in the object has been altered by duration in another’s possession. Limitation focuses on the action or claim while prescription refers to the impact of the effluxion of time on the underlying right of ownership. Both terms lead to similar objectives, the possible extinction of a claim or a right, but prescription appears to be wider because it allows for the possibility of the acquisition of rights. Therefore we will in this contribution mainly use the word “prescription”.

3. In search of the mnemonic hexamer in the medieval legal literature

Medieval law in the context of the rule we are looking for is composed of at least two components, secular and canon law. Our search has to start in the works of the glossators and the canonists. For these scholars there existed loci ordinarii (or leges solemnes) to discuss questions of law. In their glosses the medieval jurists referred to similar and contrary texts, but as a whole these references turn out to be limited in number. Cross-referencing shows a limited number of texts. By reading all these allegationes the reader eventually returns to the same principal texts, the loci communes, the sedes materiae where a specific question of law is discussed. The loci communes turn out to be the same in the works of the glossators and commentators, though the emphasis may shift from one of these texts to another. For the canonists the sedes materiae shifted in the thirteenth century from texts in the Decretum to texts in the decretals. Once the modern reader is aware of the sedes materiae he can relatively easily follow the development of the legal doctrine throughout the ages. Consequently, the student who wishes to study the medieval history of a certain doctrine should first establish the sedes materiae. Classical tools for this purpose are firstly the Index et Summa omnium quae continentur tam in Textu quam in Glossa, composed by the Spanish lawyer Staphan Daoys (ca 1550-1619), which is added as the sixth volume to the later editions of the Corpus iuris civilis with the glosses, for the last time in 1627.10 There is a survey of the printed

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10 Daoys, s. Index iuris civilis copiosus Non solum ea quae in glossis, sed & textuum omnium veros sensus continens ; Omnia nunc repurgata ...[ Corpus iuris civilis
editions by E. Spangenberg.\textsuperscript{11} The Index by Daoyz is described by Tsuno on the pages 58-60 of his book. The second classical tool is the \textit{Repertorium iuris copiosum} of Johannes Bertachinus (1148-1497) for both roman and canon law, described by Tsuno on p. 43-45. The third one in this row is the \textit{Thesaurus}, originally composed by the Portugese Bishop A. Barbosa (1590-1649), which saw many reprints, revised and extended by others, among whom Samuel Stryk (1640-1710).\textsuperscript{12}

Under the heading of \textit{praescriptio} these dictionaries deal with the different requirements of prescription, among which the five elements of the mnemonic \textit{vers}, but the mnemonic aid as such is not mentioned. Similar pictures show other dictionaries. Arnold de Reyger, \textit{Thesaurus juris civilis et canonici locupletissimus} (mentioned by Tsuno op p. 89 of his book) does not even refer to the word \textit{usucapio}.\textsuperscript{13} Nevertheless consultation of these dictionaries is useful, since they refer the reader to Inst. 2.6 and to D. 41.3 as the \textit{sedes materiae} for the discussions of prescription. Indeed, we will find there some useful texts. Reading those titles with their glosses in the later editions of the Corpus iuris civilis with the Accursian gloss draws the attention towards an addition ascribed to Franciscus Accursius with the lemma \textit{Iure civili} ad Inst. 2.6 pr.:

\begin{quote}
Totus iste titulus dividitur in novem partes. Nam ponit primo quod ad usucapionem requiritur bona fides, et iustus titulus, et spatium temporis. Secundo quod licet praedicta interveniant, non tamen procedit usucapio propter naturam vel vitium rei. Tertio rediens ad primam regulam ponit qualiter in re aliena mobili possit tradens habere bonam fidem …..
\end{quote}

Three of the elements of our hexameter are formulated by Franciscus Accursius. There follows a short description of the content of the whole title of the Institutes, which in similar wordings, but without any reference to Franciscus Accursius, appears in the Commentary to the Institutes by

\textsuperscript{11} See for a chronological survey of the printed editions: E Spangenberg, Einleitung in das römisch-Justinianische Rechtsbuch oder Corpus iuris civilis romani (1817; repr. 1970) 650-926. His work will be superseded by the forthcoming bibliography of Osler.

\textsuperscript{12} Barbosa, Agostinho, Thesaurus locorum communium iurisprudentiae Ex axiomatibus Augustini Barbosae et analectis Jo. Ottonis Taboris, aliorumque concinnatus .. [Loci communes iurisprudentiae cum additionibus aliorum iurisconsultorum], Coloniae Allobrogum 1737

\textsuperscript{13} Arnold de Reyger, Thesaurus juris civilis et canonici locupletissimus, qui instar Bibliothecae instructissimae esse poterit, cum in eo non solum variae iuris materiae, in praxi et foro usitatissimae et quotidiana ... in usum eorum qui in Aulis et Foro versantur ordine alphabeticus deegustus . . . Leipzig 1604.
Angelus Aretinus de Gambilionibus ad Inst. 2.6. These texts enumerate the necessary conditions which have to be fulfilled before title passes by way of prescription. This finding gives rise to further research in the different commentaries to the Institutes.

Indeed, it is to be expected that that road will seem promising. Introductory courses like the course on the Institutes are more likely to give way to mnemonic tools such as hexameters than more advanced courses on the Codex. Consequently, it seems recommended to glance at a number of later commentaries on the Institutes. Consultation of these commentaries indeed shows a similar picture. When elucidating or introducing Inst. 2.6 the scholars enumerate the number of requirements for prescription which they are about to discuss. Angelus Aretinus (de Gambilionibus) discusses ad Inst. 2.6 under paragraph 9 the notion of *res habilis* and he states:

*Requiritur ergo in prescriptione habilitas rei, ita quod si sit res que non potest usucapi, non currit prescriptio, ut est res sacra vel furtiva, ut infra eod. § Furtive [Inst. 2.6.2]. Sin autem a principio res erat prophana et habilis ad prescribendum et postea efficiatur sacra vel furtiva, interrumpitur usucapio, ut l. pe. ff de do. [D.39.5.34] et l. Qui universas, ff de acq. poss. [D.41.2.30].*

This is a good example of his teaching and his discussion of the different requirements for acquisition of ownership by way of prescription. We will not quote the way he deals with the other requirements he mentions, such as the title (*usus pro titulo habetur in iuribus incorporalibus*), good faith (*bona fides in quo tempore exigitur et mala fides medio tempore interveniens an interrumpat usucapionem*) the time (*statutum quod creditor non petens debitum intra 30. annos cadat a iure suo, an valeat*) and eventually possession (*continuation possessionis qualiter probatur*), nor the other questions he deals with, such as the question whether it is possible to renounce prescription. It is sufficient that we observe that Angelus Aretinus enumerates a certain number of requirements for prescription, but he does not mention nor quote our hexameter.

The same holds true for quite a few other commentators of the Institutes. Nicasius de Voerda (1440 – 1492), 14 and Oinotomus (Schneidewein) 15 respectively mention in their commentaries to Inst. 2.6 in total five requirements, whereas Francesco Verde (1631-1706) needs no less than 18 *lemmata* to describe the requisites for prescription. Verde summarizes those lemmata in a rather imprecise way by stating:

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14 Nicasius de Voerda, Super Institutionibus Excellentissimu ... Nicasii lectura insignis, iam noviter corr. ... super 4 libros Institutionum ... ; Lipsiae 1541

15 Schneidewein, Johann In quatuor Institutionum Imperialium D. Iustiniani libros, Commentarii, Straßburg 1580, Venetiis 1615.
Non incipit usucapiio deficien{ae} uno ex dictis requisitis simul, scilicet bona fide, possessione etc. et aetas puppillaris impedit usucapiionis ortum. ... Nec currit praescriptio contra Ecclesiam deficien{ae} praelato...16

Arnold de Reyger, whose name and work we just mentioned, stated:17 Sed praescriptio ut habeat locum, decem requiruntur. Voerda and Schneidewein, however, deserve special interest. Their teaching on Inst. 2.6 runs as follows:

Non usucapies nisi sint tibi talia quinque:
Bona fides, iustus titulus, res non vitiosa,
Quod res tradatur, et tempore continuetur.

This seems very much related to a mnemonic aid for students. There is, however, something more to be said. The quotation as such seems to be taken from the gloss Quod autem praescriptione ad C. 16 q. 3:

Illi tamen quattuor casus sunt speciales, unde versus. Non usucapies nisi sint tibi talia quinque: Recta fides, iustus titulus, res non vitiosa, Quod res tradatur, et possessio continuetur.

The textual differences are minor: the canon law gloss reads recta fides where Voerda and Schneidewein put bona fides and the gloss reads possessio whereas Voerda and Schneidewein put tempore.

This origin of the gloss Quod autem praescriptione reminds us of the fact that there is more to be said about medieval learned law. Alongside the components of the Corpus iuris civilis (as it was later called) there is also the canon law which deserves our attention. Also canon law knows the prescription as a mode of acquiring full title in a thing. There are, however, important differences (and similarities) between the two approaches.

The first source for our knowledge about the canon law doctrine of prescription is the 26th title of the 2nd book of the Decretals of Gregory IX. This title is entirely dedicated to the law of prescription. The second one is the text of the Regulae iuris, composed by Bonifacius VIII (who lived from 1235 to 1303 and was pope from 1294 until his death). In 1230, pope Gregory IX (1227-1241) had commissioned Raymond of Peñafort to compose a collection that would replace the various collections of decretals until then in circulation. The collection is arranged according to the pattern

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16 Francisco Verde, Tyrocinium, ac universi juris civilis instructio: juxta formam quatuor librorum Institutionum Imperialium, in duos tomos divisum, Neapoli 1727 ad Inst. 2.6, lemma 18.

17 Arnold de Reyger, Thesaurus juris civilis et canonici locupletissimus vol. 2, s.v. praescriptio
of the *compilationes antique* that Bernard of Pavia had invented. The collection is divided into five books and each book into titles. To memorise the subjects of the books, the students used a mnemonic aid: "*iudex, iudicium, clericus, connubia, crimen.*" The collection is known under the name of Liber Extra or Decretales Gregorii IX. After the promulgation of the Liber Extra in 1234 the popes did not stop writing papal letters on questions of law. The canonists used to collect these *extravagantes* and to refer to them in their commentaries. The popes promulgated several collections themselves, pope Innocent IV (1243-1254) published Novellae (1245, 1247, 1253) and pope Gregory X (1271-1276) published Novissimae (1276). After a request from the law school in Bologna, pope Boniface VIII replaced these decretals with a new exclusive collection, the Liber Sextus. It follows the structure of the Liber Extra: both the order of the books and of the titles. It concludes (after its predecessor’s example) with a very famous chapter that bears the title Regulae iuris.18 Most of the 88 Regulae have their counterparts in the corresponding title of the Digest, D. 50.17, but one searches in vain for counterparts of Bonifacius’ first five Regulae on prescription. They are as follows:

1. Beneficium ecclesiasticum non potest licite sine institutione canonica obtineri.
2. Possessor malae fidei ullo tempore non praescribit.
3. Sine possessione praescriptio non procedit.
4. Peccatum non dimittitur nisi restituatur ablatum.
5. Peccati venia non datur nisi correcto.

These *regulae* show the repudiating attitude of canon law vis à vis prescription, which canon law considers as the *auxilium improborum*. A central notion of canon law is the notion of sin, *peccatum*, among which mortal sins. In this context the 8th Command takes a central position: *furtum non facies*. *Avaritia* counts under the mortal sins. He who knowingly and willingly keeps assets of another in order to acquire by effluxion of time full ownership commits the sin of greed. This observation leads to at least two consequences: prescription of ecclesiastical goods is impossible. Everybody is supposed to know the nature of those goods and the impossibility of acquisition thereof. This is the background of Verde’s commentary to the Institutes we just mentioned. The second consequence is that the Church admits prescription only hesitatingly and stresses good faith as a necessary prerequisite for the acquisition. Consequently, according to canon law the requirement for prescription of *bona fides* is only fulfilled if the adverse possessor at no point knows about the fact that the asset in reality belongs

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to another. Bonifacius VIII formulated this explicitly in the second one of his Regulæ iuris, but he was certainly not the first to codify this deviation from civil law.

The 20th chapter of the 26th title of the second book of the Liber Extra refers to a papal decision of Innocentius III during the Lateran Council under the heading: *Non in foro canonico nec civili valet praescriptio cum mala fide*:

Innocentius III. in concilio generali.
Quoniam omne, quod non est ex fide, peccatum est, synodal iudicium diffìnimus, ut nulla valeat absque bona fide praescriptio tam canonica quam civilis, quum generaliter sit omni constitutioni atque consuetudini derogandum, quae absque mortali peccato non potest observari. Unde oportet, ut qui praescribit in nulla temporis parte rei habeat conscientiam alienae.

The text is a good example of the multiple meanings of the word *fides*. Everything that is not rooted in faith is sin. Consequently greed, which is not rooted in faith but is a mortal sin, is an invincible hurdle to acquisition of full title by way of prescription. More or less the same was said earlier in the very same title, chapter 5 by Pope Alexander III

Capitulum V.
Possessor malae fidei non praescribit.

Alexander III. Salernitano Archiepiscopo.

Vigilanti studio cavendum est, quam summa dimensio divini iudicii ab initio censuerit propria dimittere, aliena non appetere, ne malae fidei possessorum simus in praedìis alienis, atque rebus [maxime] ecclesiasticis, quoniam nulla antiqua dierum possessio divino iure iuvat aliquem malae fidei possessor, nisi resipuerit, postquam se noverit aliena possidere, quum iure etiam bonae fidei possessor dici non possit. Ephesinus enim legislator Origenis patruus solum propter vitandam miserorum segnitiem et longi temporis errorem et confusionem primus tricennali vel quadragenali praescriptioni vigorem legis imposuit. Nobis autem tam in rebus cognitis quam in rebus latentibus placuit non habere vigorem.

Here we encounter an important difference between the canon law and the civil law of prescription. Whereas the civil law admitted the right of prescription in favour of him who had been in good faith only at the beginning of his possession (*mala fides superveniens non nocet*, a rule that still survives in art. 2269 Code civil), canon law required good faith in him who prescribed for all the time of his possession; and it refused to acknowledge prescription in the case of a civil action against a possessor of bad faith (cc
X, lib. II, tit. 26. 5 and 20; VI, lib. V, tit. 12, (De Reg. Jur) 2.). We find this distinction clearly made by those writers who compare canon and civil law. An example is Balthasar Knorr (1607-1675), a lawyer from Celle in Germany who became Regierungsrat in the Fürstentum Grubenhagen.¹⁹

Ad praescriptionem longi temporis requiritur bona fides justusque titulus, illumque praescribens probare tenetur et oportet ut qui praescribit in nulla temporis parte rei habuerit conscientiam alienae, l. I in f. ff. de publ. in rem act. [D. 6.2.1], l. un. C. de usur.cap. 5.17.19 & 20. X. [X 2,26,20].

4. In search of the mnemonic hexameter in modern legal literature

We saw an important difference between the canon and the civil law of prescription. On the other hand, the similarity between them deserves perhaps more attention than the differences. Both legal systems are concerned with the requirements for prescription. Both legal systems tried to enumerate and to systematize them. Helpful in that respect was the notion of Regula iuris. Peter Stein drew the attention to the writer of the first great commentary to Bonfacius’ ultimate title of the Liber Extra, Dinus de Mugello.²⁰ Dinus began his commentary by citing a remark made by the Roman jurist Celsus (D.9.2.27.16), that it is nothing new for a law to enumerate certain matters specifically and then add a general word which embraces the matters specified. Dinus took this remark by Celsus out of its context and used it to justify ending a collection of decretals with a title of general principles. The implication was that the title de regulis contained in brief the essence of all that had gone before. As a consequence we have to distinguish between at least two types of post-medieval legal literature. On the one hand the commentaries to the different parts of the Corpus iuris civilis and to the Corpus iuris canonici continued to appear. In these commentaries the requirements for the acquisition of ownership by way of prescription are summarized. Franciscus Accursius and Angelus Aretinus de Gambilionibus had found no less than 9 requirements, Nicasius de Voerda (1440 – 1492),²¹ respectively Oinotomus (Schneidewein)²² mentioned in their commentaries to Inst. 2.6 in total five requirements, whereas Franc-

¹⁹ Balthasar Knorr, Compendium juris axiomaticum ex jure divino, canonico, civili, feudali .... Ratisbonensis 1680, s.v. Praescribere, Praescriptio n. 7
²⁰ Dinus de Mugello, Tractatus super regulis iuris in Sexto, Parisis 1500.
²¹ Nicasius de Voerda, Super Institutionibus Excellentissimu ... Nicasii lectura insignis, iam noviter corr. ... super 4 libros Institutionum ... ; Lipsiae 1541
²² Schneidewein, Johann In quatuor Institutionum Imperialium D. Iustiniani libros, Commentarii, Straßburg 1580, Venetiis 1615.
esco Verde (1631-1706) found even more. Arnold Vinnius (1588 - 1657) recalled only three (ad Inst. 2.6): Praecipua usucapioniis requisita. 1. Bona fides. 2. Possessio per tempus definitum continuata. 3. Justus titulus.23

Antonius Perezius (1583-1672 (74?)), a Spaniard who became professor of law at Louvain, however, had found five requisites in his commentary to the Institutes, which come close to our mnemonic aid:

Quae sunt requisita ad usucapionem? Possessio per Tempus legibus definitum, Bona fides, Titulus justus et ut res possit usucapi.24

Almost identical are the words used by the Leyden-professor Johannes Voet, who in his commentary to the Digest wrote:

Ad usucapionem requiritur praecipue justus titulus, bona fides, res non vittiosa, continuata possessio, tempus lege definitum et amplius ut absit error juris, quippe qui numquam in usucapionibus possessori prodest.25

The required absence of error is an original addition by Voet. Furthermore, the contours of our hexameter are already visible.

By mentioning the names of Francesco Verde, Arnold Vinnius, Antonius Perezius and Johannes Voet, however, we definitely left the Middle Ages behind us. None of the dictionaries mentioned by Guido Tsuno in his recent book showed us the direct way to the origin of the mnemonic aid, the verse res habilis, titulus, fides, possessio, tempus, but they focussed attention upon the commentaries to Inst. 2.6 and that road seems promising, as the commentary by Perezius shows.

In traces of the literature inspired by Dinus’commentary to the Regulae iuris, among which the commentary by Decius, which was edited by the French jurist Charles Dumoulin (Molinaeus, 1500-1566), we find in the course of the 16th and 17th century a new type of literature seeing the light, which is rarely described, the Maxims. These short dicta were immensely popular, as follows from Rabelais’description of the trial of Bridlegoose. This judge used to decide his cases by throwing the dice under invocation of the Holy Spirit. In defending this method Bridlegoose pointed out that the throw of the dice was governed by strict respect for the law. When

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23 A. Vinnius, Institutionum Imperialium commentarius academicus et forensis, Amsterdam, 1642 ad Inst. 2.6
24 Antonius Perezius - Institutiones imperiales erotematibus distinctae atque ex ipsis principiis regulisque juris passim insertis explicatae ... Lovanii 1760,
25 Johannes Voet, Commentarius ad Pandectas, Tom. II, Hagae Comitum 1707, ad D. 41.3 mr. 3.
the matter was obscure he used his small dice rather than the large, following the rule *simper in obscuris quod minimum est sequimur* (VI 5.12.30, going back to D. 50.17.9). When asked how he then pronounces judgement, Bridlegoose answered that he gave judgment to the party to whom first fell the best chance, according to the rule *prior tempore potior iure* (VI 5.12.5). The notion that these Regulae iuris did not merely reflect a summary of the contents of the Digest, the Decretum and the Decretals, but rather contained the general principles of law led to a special scholarly and forensic interest in the phenomenon of the Regulae. The importance of this new type of literature is shown by Jean Domat (1625 – 1695). In his *magnum opus* Les droits civiles dans leur ordre naturel he devoted a chapter to these principles under the title *Des règles du droit en general*. On the road to Domat, however, is a very interesting author Arnoldus I.F. Corvinus, who is nowadays famous for his explanation of the Digest, the Libri Feudorum and Canon law by way of aphorisms.26 By formulating these aphorisms Corvinus put himself in a tradition which had begun with the Aphorisms of Hippocrates. The oft-cited first sentence of that work is “Life is short, art long, opportunity fleeting, experience deceptive, judgment difficult.”27 Other famous collections of aphorisms are Adagia by Erasmus of Rotterdam, the Axioms by François de La Rochefoucauld and Thoughts by Blaise Pascal.

Corvinus dedicated two aphorisms to prescription. In his Digesta per Aphorismos strictim explicata he wrote ad D. 41.3:

Ad usucapionem autem perficiendam requiruntur tria:
(1) Possessio continuata per tempus lege definitum...
(2) Bona fides, id est, ut credat possessor eum a quo rem consecutus, fuisse dominum et habuisse ius alienandi... Jure Canonico per totum usucapionis tempus necessaria est ...

26 Arnoldus Corvinus, (alias Ravens), Professor of law in Maintz and Geheimrat in the court of the Kurfürst

27 Ὁ βίος βραχύς, ἡ δὲ τέχνη μακρή, ὁ δὲ καρπός ὅξυς, ἡ δὲ ποίρα σφαλερή, ἡ δὲ κρίσις χαλεπή, or, in a common Latin translation, which, however switches the first two statements: Ars longa, vita brevis, occasio praeceps, experimentum periculosum, iudicium difficile.
(3) Justus titulus ad usucapiendum idoneus, qui etiam causa vocatur.

In his Ius Canonicum per Aphorismos strictim explicatum he wrote in Book 3, title 33:

Ad praescriptionem perficiendam requiruntur quinque
(1) Ut res praescribi possit, (2) Bona fides, (3) Titulus justus, (4) Continuata possessio, (5) Ut possessio suo, non alieno nomine, contingat

Corvinus is aware of the differences and the similarities between the canon and the civil law of prescription. He divides the requirements slightly differently in his commentary to the Digest and his commentary to canon law, but the form of both aphorisms is almost identical. The hexameter we are looking for is, however not formulated by Corvinus. Unfortunately the same holds true for another Dutch scholar who wrote legal aphorisms, Alexander Arnoldus Pagenstecher (1659 – 1716). Pagenstecher read law in Leiden and heard the lectures given by Johann Friedrich Böckelmann (1632–1681). In 1696 Pagenstecher was appointed to the chair of private and commercial law at the university of Groningen. His name is notorious for a vehement debate with Cornelis van Bynkershoek on the question, whether Imerius could be taken for the author of the Authenticae to the Codex. Pagenstecher also wrote a book under the title Aphorismi Juris ad Institutiones Justinianae. The aphorism to Inst. 2.6, § 61 reads as follows:

Requisita ejusdem [usucapionis] sunt septem, quae in usum illum quem indicavi 1. aphor. 101.pr. teneat qui volet ex hisce:
Non usucapies nisi sint tibi talia septem:
Res habilis, justum tempus, bona causa fidesque,
Non data per dominum possessio continuata.

The reference to his own aphorism 101 to book 1 shows that Pagenstecher claims to be the author of this mnemonic aid. There he states explicitely: Nos, ut infirmitati memoriae humanae l. 44 de acq. vel. am.

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29 A.A. Pagenstecher, Aphorismi juris ad Institutiones Justinianae, First edition Duisb. 1690; I consulted the fourth edition, Amsterdam 1705.
Poss. [D.41.2.44] subveniremus, has causas intra metas horum distichorum aliquando coeruimus. Pagenstecher creates the impression that he is the author of the mnemonic aid, which he considers useful to students because of the general weakness of human memory. This impression is false. Since the days of Bonifacius VIII *Regulae iuris*, both those taken from D. 50.17 and those taken from the Liber Extra gained a growing importance, to begin with the commentaries by Dynus, Decius and many others. *Regulae iuris* achieved great authority, both on the scholarly and the forensic level. In court the party who can cite a rule in his favour expects to win the suit, unless the other side can prove that the *regula* does not apply to the facts of the case. The production of a relevant *regula* thus transfers the burden of proof to the other side. At both sides of the Channel lawyers tried to formulate *regulae* and maxims as a tentative step towards systematic generalization. Bacon and Finch did so in England; Everardus Bronckhorst in the Netherlands. In this context the very popular aphorisms by Pagenstecher also belong.

5. Conclusion

We are coming to the end of our search for the author of the mnemonic hexameter *res habilis, titulus, fides, possessio, tempus*. We started by analyzing a widespread hypothesis, namely that this hexameter is Roman as far as its substance is concerned, medieval in its form. Both parts have been shown to be false. The Roman law of prescription went through important developments from the days of the Twelve Tables to those of Justinianus, which eventually lead to the merger of *usucapio* and *praescriptio longi temporis*. On that foundation later scholarship built the modern doctrine of prescription, which nowadays stands in the centre of public attention, given the German recodification of the law of obligations, the Schuldrecht改革 of 2002 which entailed a fundamental change in the statutory regulations concerning prescription, the new French law of prescription of 17 June 2008, which was enacted on 15 January 2010 and the reports of not less than five different law commissions of countries adhering to the Common law, Ireland, Jersey, England and Wales, or qualifying as mixed legal systems, Scotland and South Africa. Later scholarship summarized the requirements for the defence of prescription in different ways. Both the number of requirements and the content of the various requirements might vary. In the days of the Pandektistik the number seems to have settled on
five. Both Dernburg\textsuperscript{30} and Sohm\textsuperscript{31} took this number as the starting point of their discussions. From there the hexameter was taken over in Italy. Bonfante quoted it in his Istituzioni,\textsuperscript{32} as did Pugliese recently.\textsuperscript{33} The latter called it an \textit{un esametro mnemonicamente utile} and he ascribes the verse to \textit{la tradizione romanistica}. Pugliese is probably right. Maybe there is not one single author to be identified and maybe we should ascribe the maxim to the Romanist tradition, the very same tradition in which Guido Tsuno and myself stand side by side.

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\begin{footnotesize}
\textsuperscript{31} Rudolph Sohm, Institutionen. Geschichte und System des römischen Privatsrechts, München etc 1917 (15. Aufl), S. 398: Aus dem Obigen ergeben sich die fünf Voraussetzungen der römischen Ersitzung welche der Vers zusammenfasst: \textit{res habilis, titulus, fides, possessio, tempus}.
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