

C.H. van Rhee, 'The Role of Exceptions in Continental Civil Procedure', in: P. Brand, K. Costello and W.N. Osborough (eds.), *Adventures of the Law. Proceedings of the Sixteenth British Legal History Conference, Dublin 2003*, Dublin, 2005, p. 88-105.

THE ROLE OF EXCEPTIONS IN CONTINENTAL CIVIL PROCEDURE

Prof. Dr. C.H. van Rhee, Maastricht University¹

Introduction

Exceptions are a complicated phenomenon in the history of European civil procedure. The concept is known not only on the European Continent, but also in the British Isles. In his *An Introduction to English Legal History*, for example, Professor J.H. Baker mentions dilatory and peremptory exceptions in the context of pleading.² Although the relationship between exceptions in England and on the Continent will not be discussed in this paper, it is important to note that the terminology at least coincides in Civil Law and Common Law jurisdictions. A similarity in terminology may indicate a relationship. Although such a relationship needs to be proven as regards exceptions, it is clear that in respect of other aspects of civil procedure more than nominal relationships do exist, for example as regards the 'essoins' of the medieval Common Law,³ which were also to be found in Continental civil procedure.⁴ I think that this needs to be emphasised for it shows that the 'approximation' of English and Continental civil procedural law is not a recent phenomenon. It started long before the introduction of the Civil Procedure Rules of Lord Woolf in 1999.⁵ This being stated, let us now return to the exceptions on the European Continent.

In Continental Europe, different opinions have been voiced regarding the definition of *exceptiones* and their role in civil litigation. Even though they form a problematic area of the law, recently promulgated legislation continues to make use of them. An example is the Spanish Code of Civil Procedure.⁶ We also encounter them in the recently modernised Dutch Code of Civil Procedure.⁷ The decision to retain *exceptiones* is remarkable in the light of recurrent pleas to have them abolished. These pleas have been voiced in the Netherlands for at least a century.⁸

¹ The author would like to thank Jan Hallebeek (Amsterdam) and Eric Pool (Amsterdam) for their critical remarks on a draft version of this paper. The present paper is a slightly revised version of an article that was published in L. de Ligt, J. de Ruiters, E. Slob, J.M. Tevel, M. van de Vrugt, L.C. Winkel (eds.), *Viva Vox Iuris Romani - Essays in Honour of Johannes Emil Spruit* (Amsterdam, 2002), 297-313.

² J.H. Baker, *An Introduction to English Legal History* (London, 2002), 77.

³ J.H. Baker, o.c., 58; P. Brand, 'Delay in the English Common Law Courts (twelfth to fourteenth centuries)' in C.H. van Rhee (ed.), *The Law's Delay. Essays on Undue Delay in Civil Litigation* (Antwerp/Oxford/New York, 2004), 36-37.

⁴ E.g. C.H. van Rhee, *Litigation and Legislation. Civil Procedure at First Instance in the Great Council for the Netherlands in Malines (1522-1559)* (Brussels, 1997), 290-291 (the act of casting the 'essoins' was called 'sinnen' or 'sumen' in Dutch). See also P. Hyams, 'The Common Law and the French Connection' in R.A. Brown (ed.), *Proceedings of the Battle Conference on Anglo-Norman Studies*, II (Ipswich etc., 1979), 77.

⁵ On this subject see also: C.H. van Rhee, 'Civil Procedure: A European Ius Commune?' in *European Review of Private Law* (2000), 589-611; C.H. van Rhee, 'Towards a Procedural Ius Commune?' in J. Smits, G. Lubbe (eds.), *Remedies in Zuid-Afrika en Europa* (Antwerp, 2003), 217-232; C.H. van Rhee, 'English and Continental Civil Procedure: Similarities Today and in the Past' in J. Sondel et al. (eds.), *Roman Law as Formative of Modern Legal Systems. Studies in Honour of Wiesław Litewski* (Krakow, 2003), 201-216.

⁶ Ley 1/2000, January 7, de Enjuiciamiento Civil, Article 405.

⁷ Articles 11, 110, and 128.

⁸ In a legislative proposal dating from the start of the 20th century, the distinction between defence on the merits and *exceptiones* had actually been removed. However, this proposal was not promulgated. See below and also

The present article focuses on aspects of the historical development of exceptions, more specifically on an important division of *exceptiones* introduced by Gaius in his *Institutes* (IV,120). The central theme of this article is the role of this division in determining the point at which particular defences had to be introduced in the proceedings. I will conclude by tracing the process by which this long significant distinction between different types of exception has disappeared from modern Dutch civil procedure. I shall start my inquiry at the time of the Roman formulary procedure, for this is the procedure where the concept of *exceptiones* (most probably)⁹ first appears in history; according to Gaius, they were unknown in the older procedure of *legis actiones*.¹⁰ Subsequently, I will make some remarks with reference to developments in the medieval *Ius Commune*. The French Code of Civil Procedure (1806) is the next stop. Finally, Dutch law in the 19th, 20th and the beginning of the 21st centuries will be discussed.

Roman Law

The formulary procedure

In an often discussed paragraph in his *Institutes* (IV,116), Gaius explains why *exceptiones* were introduced. He writes: 'Exceptions have been provided for the protection of defendants, since it is often the case that, though a man is liable at *ius civile*, his condemnation in an action would be inequitable.'¹¹ On the basis of this paragraph one may conclude that Gaius considered *exceptiones* to operate as 'equitable' corrections of the *ius civile* (they could, of course, also operate as corrections of the *ius honorarium*). They had either a procedural character, for example when it was claimed that the judge lacked jurisdiction, or were based on grounds derived from substantive law.¹² *Exceptiones* took the guise of a clause inserted in the *formula* of remedies (actions) of strict law granted to the plaintiff at the request of the defendant. If proven, they resulted in the plaintiff losing his case, even though he himself had also succeeded in proving the necessary facts.

Exceptiones are divided by Gaius into two groups. He distinguishes *exceptiones dilatoriae* and *exceptiones peremptoriae*.¹³ As regards the former *exceptiones*, Gaius remarks that they are defences *quae ad tempus valent*, i.e. defences which can only be advanced for a (limited) period of time. An example of a situation in which they could be used is when it had been agreed that something would not be claimed within a specific period. If, nevertheless, an action was brought within the agreed period, a dilatory exception could be introduced.¹⁴ Gaius also further distinguishes *exceptiones dilatoriae ex persona*. The author gives as an example the *exceptio cognitioria*, which could be requested if the opposing party had appointed a representative in an action without having the power to do so, or if a representative had been

C.H. van Rhee, "'Ons tegenwoordig sukkelproces". Nederlandse opvattingen over de toekomst van het burgerlijk procesrecht rond 1920' in *Legal History Review*, 68 (2000), 344. More recently W.D.H. Asser, then Advocate-General at the Dutch Supreme Court (*Hoge Raad*), claimed that the concept of *exceptiones* should be struck from the statute book. See HR 22 October 1993, NJ 1994, 374. See also W.D.H. Asser, 'Rechtsvordering, de geschiedenis voorbij?' in M.E. Franke et al. (eds.), *Historisch vooruitzicht. Opstellen over rechtsgeschiedenis en burgerlijk recht* (BW-krant jaarboek 1994) (Arnhem, 1994), 46-48.

⁹ E.g. H. Seelig, *Die prozessuale Behandlung materiellrechtlicher Einreden - heute und einst* - (Cologne etc., 1980), 14.

¹⁰ Gai. Inst. IV,108.

¹¹ 'Comparatae sunt autem exceptiones defendendorum eorum gratia cum quibus agitur. Saepe enim accidit, ut quis iure civili teneatur, sed iniquum sit eum iudicio condemnari.'

¹² Kaser/Hackl, *Das römische Zivilprozessrecht* (Munich, 1996), 242 and 261.

¹³ Gai. Inst. IV,120. See also D 44,1,3. On the latter text, see D. Simon, *Untersuchungen zum Justinianischen Zivilprozess* (Munich, 1969), 96: '[...] eine mit ziemlicher Sicherheit überarbeitete Stelle, in der aber die ursprünglich gaianische Vorstellung noch zu fassen ist [...].'

¹⁴ Gai. Inst. IV,122.

appointed who was not allowed to undertake representation.¹⁵ *Exceptiones peremptoriae* are, according to Gaius, defences ‘that are available at any time and cannot be evaded.’¹⁶ By virtue of them the defendant argued that the plaintiff could never succeed in his claim, for example because judgement had already been pronounced on the same issue (the defence of former adjudication or *res iudicata*).¹⁷

The above division probably did not have any significance in regard to the point in the proceedings a particular exception could be introduced (a role performed, as will be seen below, by this division in later periods). After all, in principle the insertion of all *exceptiones* in the *formula* had to be requested before *litis contestatio* (joinder of issue), i.e. in the initial phase of the procedure (*in iure*): this was the time when the magistrate established by which *formula* the *iudex* would have to decide the case.¹⁸

The real significance of Gaius’s division becomes clear if one realises that Gaius made his classification from the perspective of the plaintiff, who in the initial phase of the proceedings (*in iure*) had to decide whether or not to continue the action.¹⁹ If at this stage the plaintiff came to the conclusion that the defendant could successfully plead one or more *exceptiones dilatoriae*, he was advised to postpone the action until the grounds for that exception had disappeared.²⁰ If he nonetheless continued his action, he would lose his case. Additionally he would lose the possibility of starting new proceedings after the period of time during which the dilatory exception could be invoked had passed. If the plaintiff decided that the defendant could invoke one or more *exceptiones peremptoriae*, a postponement of the action was of no use, since these exceptions did not disappear as a result of lapse of time. This also explains why Gaius categorises the above *exceptiones ex persona* as *dilatoriae*. After all, even though they did not disappear as a result of lapse of time, they could be neutralised by a postponement of the action until, for example, instead of the original ‘representative’, a representative who was allowed to act as such had been appointed.²¹

On the basis of the above one may conclude that in the first centuries of the Christian era, the role of *exceptiones* in civil litigation was tightly linked to certain peculiarities of the Roman Law of that period. As a result, a change in the concept of the exception was unavoidable following later developments in Roman Law. As will appear below, these developments are of great significance for a study of the modern concept.

The cognitio procedure

The concept of *exceptio*²² changed when the formulary procedure was relegated to the background. This development resulted eventually in the formal abrogation of this type of litigation in 342 AD. As a result the *cognitio* procedure was the only procedure left.²³ This

¹⁵ Gai. Inst. IV,124. On the *exceptio cognitioria* (and the *exceptio procuratoria*), see D. Simon, o.c., 66ff.

¹⁶ ‘quae perpetuo valent nec evitari possunt.’

¹⁷ Gai. Inst. IV,121.

¹⁸ M. Lemosse, ‘À propos du régime des exceptions dans le procès postclassique’ in *Studi in onore di Cesare Sanfilippo*, I (Milan, 1982), 244. Some doubt as to the relevance of the division for the moment of introduction of defences is caused by Gaius IV,125. There it is stated that *exceptiones peremptoriae* could be requested later in the proceedings on the basis of *restitutio in integrum*. At the same time, Gaius claims that it was an open question whether this was possible as regards *exceptiones dilatoriae*. The reason for his uncertainty is not clear. On this text, see F. Eisele, *Zur Geschichte der processualen Behandlung der Exceptionen* (Berlin, 1875); M. Amelotti, *La prescrizione delle azioni in diritto Romano* (Milan, 1958), 78ff.

¹⁹ D. Simon, o.c., 94.

²⁰ Gai. Inst. IV,123.

²¹ D. Simon, o.c., 95-97.

²² In the *cognitio* procedure the term *praescriptio* was used as a synonym for *exceptio*. See Kaser/Hackl, o.c., 487.

²³ On the *cognitio* procedure, see e.g. L. Wenger, *Institutes of the Roman Law of Civil Procedure*, translated by O.H. Fisk (New York, 1940).

procedure is the root from which medieval Romano-canonical process developed and is therefore the distant ancestor of modern continental systems of civil litigation. It was not confined by the ‘forms of action’ of the formulary procedure. An exception in this procedure may be defined as a preliminary defence which aims at having the claim dismissed on grounds other than the substance of the claim.²⁴ These grounds can have either a procedural character or be derived from substantive law.²⁵

The distinction between *exceptiones dilatoriae* and *exceptiones peremptoriae* continued to apply. However, regarding their definition, the perspective changed. Gaius had stressed that dilatory exceptions could only be advanced for a certain period of time. Justinian in his Institutes added, that they were exceptions *quae [...] temporis dilationem tribuunt*,²⁶ i.e. defences by means of which the defendant obtained a postponement of the action. With reference to peremptory exceptions, Gaius had stressed that they were valid for an indefinite period of time and, consequently, could not be evaded. Justinian, however, states that they could always be brought against the plaintiff’s action and could at all times block the case (*quae semper agentibus obstant et semper rem de qua agitur peremunt*).²⁷ This change in perspective was related to the formulary procedure being replaced by the *cognitio* procedure.

As stated above, the original division was based on features of the formulary procedure. After all, in the formulary procedure it was important for the plaintiff to distinguish dilatory from peremptory exceptions during the initial phase: *exceptiones dilatoriae* could be avoided by a postponement of the action at that stage. Such a postponement was crucial, since otherwise dilatory exceptions would acquire peremptory force.²⁸ In the *cognitio* procedure dilatory defences retained their temporary character even if the plaintiff decided to continue the action: in this procedure the plaintiff could always bring a new case on the same issue after having his action dismissed following a successful dilatory defence.²⁹ Nevertheless, the distinction between the two types of preliminary defences remained important in the initial stages of the proceedings, but now mainly from the perspective of the defendant: it played a significant role with respect to the moment particular defences had to be introduced and proven. This appears from the rules governing these aspects of the proceedings, which were closely linked to the traditional division of defences.³⁰ Of course, the distinction remained relevant for the plaintiff as well, but now only because it allowed him to decide whether or not a new action could be brought on the same issue after his action had been dismissed as a result of a successful preliminary defence (this subject will not be investigated in depth in the present article).

It was laid down that *exceptiones dilatoriae* had to be advanced and proven before *litis contestatio* (it should be noted that *litis contestatio* in the *cognitio* procedure, even though it was situated in the initial phase of the procedure, differed from the highly technical concept of *litis contestatio* in the formulary procedure).³¹ Later a distinction was made between *exceptiones* having a procedural character (whether these defences should be classified as

²⁴ Inst. 4,13pr, which replaces the above cited Gai. Inst. IV,116, may be mentioned in support of this interpretation. After all, it does not present the *exceptiones* as corrections of the *ius civile* (or the *ius honorarium*) anymore, but as defences against an in itself justifiable action.

²⁵ Kaser/Hackl, o.c., 487.

²⁶ Inst. 4,13,10.

²⁷ Inst. 4,13,9.

²⁸ For this reason, Gaius’s division of preliminary defences into dilatory and peremptory exceptions has been criticised. After all, dilatory exceptions were at the same time potential peremptory defences. See S. Solazzi, ‘Sulle classificazioni delle “exceptiones”’ in *Archivio Giuridico ‘Filippo Serafini’*, CXXXVII (1949), 3ff. See also M. Lemosse, o.c., 244-245.

²⁹ M.A. von Bethmann-Hollweg, *Der Civilprozess des gemeinen Rechts in geschichtlicher Entwicklung III: Der römische Civilprozess III (Cognitiones)* (Bonn, 1866), 267; Kaser/Hackl, o.c., 491.

³⁰ See also M. Lemosse, o.c., 246-248. Cf. P. Collinet, *La procédure par libelle* (Paris, 1932), 198.

³¹ C 8,35,12; H. Seelig, o.c., 27; Kaser/Hackl, o.c., 489.

dilatory or should be viewed as a separate class of defences is subject to discussion)³² and *exceptiones dilatoriae*. The former group of exceptions had to be advanced and proven before *litis contestatio*. Regarding the latter type of exceptions, however, it was determined that they only needed to be proven after the plaintiff had proven the facts advanced by him.³³

Originally, *exceptiones peremptoriae* needed to be advanced in the initial phase of the proceedings as well.³⁴ By the time of Justinian, however, it seems to have been possible to introduce peremptory defences at any stage in the proceedings.³⁵

The medieval ‘Ius Commune’

In medieval legal treatises preliminary defences were dealt with at length. The medieval *Ius Commune* adopted the division of exceptions into *exceptiones dilatoriae* and *exceptiones peremptoriae*.³⁶ This distinction continued to play a role from the perspective of the defendant who had to decide as to the moment when defences were to be introduced and proven. A notable development in the period under consideration was the consolidation of the preliminary procedural defences of the late *cognitio* procedure under the heading of *exceptiones declinatoriae iudicii* (also *exceptiones declinatoriae fori*). Since these declinatory exceptions were viewed as falling within the larger group of dilatory exceptions, the terminology *exceptiones dilatoriae solutionis* was coined in order to refer to the non-declinatory *exceptiones dilatoriae*.³⁷

With reference to the *exceptiones dilatoriae* (including the procedural defences now termed *exceptiones declinatoriae*) the rules of the late *cognitio* procedure continued to apply.³⁸ However, deviations from these rules can be found. In Canon Law, for example, we find a flexible approach to the introduction of dilatory defences if the defendant only gained knowledge of circumstances justifying such defences at a late phase of the proceedings.³⁹ Also dilatory defences which would result in the judgement being void (e.g. the defence of lack of jurisdiction *ratione materiae* or the defence that the judge or plaintiff was excommunicated) could be introduced at any stage in the proceedings.⁴⁰

Exceptiones peremptoriae continued to be subject to the Justinianic rule that their introduction was not linked to a particular phase of the proceedings.⁴¹ We also find deviations from this rule, where Canon Law distinguished a peculiar kind of peremptory exception, the so-called *exceptiones litis ingressum impediennes*. To this class belong the exceptions of

³² According to M.A. von Bethmann-Hollweg, *Der römische Civilprozess* III (Cognitiones), 264ff, procedural exceptions fell outside the traditional division of dilatory and peremptory defences. This seems to be the opinion of most modern authors too. See e.g. Kaser/Hackl, o.c., 584; D. Simon, o.c., 65ff and 93ff; H. Seelig, o.c., 27. P. Collinet, o.c., 197ff, is of the opinion that at least part of the procedural exceptions are dilatory *ex persona*.

³³ C 4,19,19; Kaser/Hackl, o.c., 584; D. Simon, o.c., 97; M. Lemosse, o.c., 243ff.

³⁴ Kaser/Hackl, o.c., 489.

³⁵ C 7,50,2pr. and C 8,35,8; Kaser/Hackl, o.c., 585; P. Collinet, o.c., 306-307 and 358-359; D. Simon, o.c., 99-101. See also the literature referred to by M. Lemosse, o.c., 245, note 6. For detailed information on exceptions at the time of Justinian, see P. Collinet, *La nature des actions, des interdits et des exceptions dans l'oeuvre de Justinien* (Paris, 1947), 487ff. On the time for the introduction of peremptory exceptions in practice, see U. Zilletti, *Studi sul processo civile giustiniano* (Milan, 1965), 168: ‘Ora in tanto ciò è possibile, in quanto vi sia una tendenza che sul concreto piano processuale unifichi le eccezioni dilatorie sostanziali e le eccezioni perentorie in una più generica categoria di ‘difese’ spettanti al convenuto, favorita anche dall’emergere di *praescriptiones* di incidenza puramente istruttoria.’

³⁶ A. Engelmann et al., *A History of Continental Civil Procedure* (Boston, 1927), 467.

³⁷ P. Fournier, *Les Officialités au Moyen Age* (Paris, 1880), 161; A. Engelmann et al., o.c., 468; H. Hoehne, ‘Pili Medicinensis Summula’ in *Ius Commune*, IX (1980), 161ff; W. Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii*, I (Kraków, 1999), 305 and 309ff.

³⁸ P. Fournier, o.c., 167; W. Litewski, o.c., 309.

³⁹ X 2,25,4. P. Fournier, o.c., 162-163; W. Litewski, o.c., 307-308.

⁴⁰ X 2,25,12. See also VI 2,12,1; Clem. 2,10,1; P. Fournier, o.c., 163; W. Litewski, o.c., 308.

⁴¹ See above and W. Litewski, o.c., 308.

former adjudication (*res iudicata*), settlement out of court (accord) and submission to arbitration. These defences could be introduced before the dilatory exceptions. Since they did not necessarily bar the plaintiff from bringing a new action on the same issue, their classification as peremptory exceptions is not always justified (they may have been classified as such for historic reasons).⁴²

The French Ordinance of 1667

The important French Ordinance on civil procedure of 1667⁴³ was, to a large extent, reproduced in the 1806 *Code de procédure civile*. Since the 1667 Ordinance incorporates many medieval developments in civil procedure, it may rightly be viewed as the link between medieval and 19th-century civil procedure. The Ordinance also serves this purpose for Dutch procedural law, since the Dutch Code of Civil Procedure (1838) was to a certain degree a copy of the French 1806 Code. The 1667 Ordinance is discussed extensively by Pothier in his *Traité de la procédure civile*, which will be used together with the Ordinance as the point of departure in discussing preliminary defences in French law before codification.⁴⁴

The Ordinance mentions the usual categories of preliminary defences: declinatory (these were also known as *fins de non procéder*)⁴⁵ (Article VI.3), dilatory (*titre 9*), and peremptory (Article V.5) exceptions. As regards peremptory defences, Pothier introduced a distinction not expressly to be found either in the 1667 Ordinance or in Roman or medieval sources:⁴⁶ they concern either ‘la forme’ or ‘le droit’.⁴⁷ According to Pothier, the former ‘tendent à faire renvoyer le défendeur de la demande contre lui donnée’ because of defects in the writ of summons or its service. These defects could, for example, arise when the claim was omitted from the writ (‘parce que l’exploit de demande n’est pas libellé’) or when in his report the bailiff (*huissier*) did not mention the place where he was registered.⁴⁸ Peremptory defences concerning ‘la forme’, if successful, ended an action without barring the plaintiff from bringing a new case on the same matter. It is therefore hard to see why these defences were classified as peremptory other than for historical reasons. The *exceptiones peremptoriae* which concerned ‘le droit’ were also known as *fins de non recevoir*. They were defences ‘qui, sans entrer dans le mérite de la demande, tendent à prouver que le demandeur n’a pas le droit de la former, n’y est pas recevable [...]’.⁴⁹

On the basis of the above distinctions, the following rules applied concerning the moment particular defences had to be introduced. As was usual, declinatory defences had to be advanced before the other preliminary defences.⁵⁰ If successful, they could result in a referral (*renvoi*) of the case to the competent court (Article VI.1 of the 1667 Ordinance). Next came, according to Pothier, peremptory defences concerning ‘la forme’.⁵¹ Subsequently, dilatory exceptions had to be introduced. According to Article IX.1 of the 1667 Ordinance a defendant who wished to advance several dilatory defences needed to propose them

⁴² On the particular character of the *exceptiones litis ingressum impediennes*, see J. Kohler, *Prozessrechtliche Forschungen* (Berlin, 1889), 88ff. See also A. Engelmann, o.c., 469; P. Fournier, o.c., 168.

⁴³ F. Isambert et al. (eds.), *Recueil général des anciennes lois françaises, depuis l’an 420 jusqu’à la Révolution de 1789*, XVIII (Paris, 1829), 103ff.

⁴⁴ I consulted *Oeuvres de R.-J. Pothier contenant les traités du droit français*, VI (Brussels, 1832).

⁴⁵ R.-J. Pothier, o.c., I.II.IV.I. The following defences were considered to be declinatory in character: the defence ‘pour cause d’incompétance’, the defence ‘pour cause de privilège’, and the defence ‘pour cause de litispendence’ (R.-J. Pothier, o.c., I.II.IV.I).

⁴⁶ The distinction certainly does not coincide with the medieval distinction between ordinary peremptory defences and *exceptiones litis ingressum impediennes*.

⁴⁷ R.-J. Pothier, o.c., I.II.II.

⁴⁸ R.-J. Pothier, o.c., I.II.II.I.

⁴⁹ R.-J. Pothier, o.c., I.II.II.II.

⁵⁰ R.-J. Pothier, o.c., I.II.III.

⁵¹ R.-J. Pothier, o.c., I.II.II.I.

simultaneously.⁵² An exception was made for the *exception pour délibérer* (i.e. a preliminary defence available to presumptive heirs who could thereby postpone the action in order to allow a decision about their acceptance of the succession), which could be introduced separately before the other dilatory exceptions (Article IX.2). Only peremptory defences concerning ‘le droit’ could, according to Pothier, be advanced at any stage prior to final judgement (to this end Pothier refers to C 8,35,8). However, Pothier limits this rule to cases where the defendant was unaware at earlier phases of the proceedings of grounds for introducing such defences. If he was aware of them, he ought to have advanced his peremptory defences during the initial stage of the proceedings. Nevertheless, a defendant who chose to introduce defences later without good cause was not barred from doing so: if he knowingly failed to advance defences before *litis contestatio*, he did not lose the right to advance them; he would, however, not be awarded the expenses of the proceedings on the merits which, retrospectively, appeared to have been unnecessary due to the success of a peremptory defence (he would, of course, recover his other expenses because of the successful outcome of the case).⁵³

The Code de procédure civil (1806)

In 1811 the French *Code de procédure civile* came into force in the Low Countries as a result of the annexation of the Netherlands to the French Empire. It remained the law in this area long after the Netherlands had regained their independence: the *Code* was only replaced by a native product in 1838. Since this article is also concerned with the antecedents of preliminary defences in the Netherlands, the point of departure here (in addition to the *Code*) is one of the rare Dutch handbooks on the French *Code* by W.IJ. van Hamelsveld, published in 1823.⁵⁴

Van Hamelsveld distinguishes the usual categories of preliminary defences, including the two types of peremptory defences introduced by Pothier.⁵⁵ It should be noted, however, that the terminology ‘peremptory defence’ does not occur as such in the *Code*.⁵⁶

We do not find many deviations from the 1667 Ordinance in regard to the timing of the introduction of exceptions. Declinatory exceptions, which, if successful, resulted in the remanding of the case to the competent court (*renvoi*), had to be advanced before all other defences. This is determined by Articles 168 and 169 of the *Code*. It should, however, be noted that in these Articles the term ‘declinatory defence’ is not used. Nevertheless, it appears that declinatory defences are meant where Article 168 refers to ‘la partie qui aura été appelée devant un tribunal autre que celui qui doit connaître de la contestation’. This phrase was interpreted as comprising defendants who could introduce the defence of lack of jurisdiction *ratione personae* (Articles 168 and 170), as well as the defences of *lis pendens* and *connexité* (Article 171).⁵⁷

Dilatory defences had to be introduced simultaneously, before a defence on the merits (Article 186).⁵⁸ According to Van Hamelsveld, the simultaneous introduction of dilatory

⁵² Attempts to concentrate the introduction of dilatory defences date from medieval Canon Law. See X 2,25,4; P. Fournier, o.c., 162; A. Engelmann, o.c., 468. Whether E. Deroy was right when he claimed that the concentration of the introduction of dilatory defences was an innovation of the 1667 Ordinance may therefore be doubted. See E. Deroy, *Des exceptions dilatoires* (Paris, 1898), 7.

⁵³ R.-J. Pothier, o.c., I.II.II.II.

⁵⁴ W.IJ. van Hamelsveld, *Manier van procederen in burgerlijke regtszaken volgens de thans nog bestaande wet van burgerlijke regtspleging*, 2 vols. (Amsterdam, 1823).

⁵⁵ W.IJ. van Hamelsveld, o.c., I, 83-84.

⁵⁶ Cf. J. ten Brink, *De exceptiën en hare wettelijke regeling* (Leiden, 1901), 39-40.

⁵⁷ See F.R. Pennink, *Aanteekeningen op verschillende artikelen van het Wetboek van Burgerlijke Regtsvordering* (Zutphen, 1853), 69. See also E. Pigeau, *La procédure civile des tribunaux de France*, I (Paris, 1807), 130ff.

⁵⁸ According to E. Deroy, o.c., 8, 159 and 168, this rule was difficult to apply. In his opinion the *Code* only recognised two defences which could be classified as dilatory, whereas it was exactly these two defences which, also according to the *Code*, could be introduced separately. By way of explanation Deroy suggests that Article

exceptions was justified by the fact that as a result only a single postponement of the action was necessary. Allowing the separate introduction of dilatory defences would have caused multiple postponements and, consequently, additional delay.⁵⁹ According to Article 187, the *exception pour délibérer* was exempt from this rule and could be introduced separately, before the other dilatory defences.⁶⁰ According to E. Pigeau, who played a prominent role in the preparation of the *Code de procédure civile*, dilatory exceptions could also be advanced separately, if the necessity of their introduction only became clear after the introduction of earlier dilatory defences.⁶¹ This rule, which originated in medieval Canon Law, was, however, not expressed in the *Code*, nor is it mentioned by Van Hamelsveld.

The time for introducing peremptory defences is unclear due to the fact that the *Code* does not use the terminology ‘peremptory defence’. It is not certain whether such defences were recognised at all, and if so, which defences should be classified as peremptory. As stated above, Van Hamelsveld claimed that Pothier’s distinction between peremptory defences concerning ‘la forme’ and ‘le droit’ continued to apply. As regards peremptory exceptions concerning ‘la forme’,⁶² Van Hamelsveld maintained that they had to be introduced before all other preliminary defences except for the defence based on lack of jurisdiction (*ratione personae*; as stated above, the defences of *lis pendens* and *connexité* should also be brought under this heading) (Articles 168-171).⁶³ As regards peremptory defences concerning ‘le droit’, Van Hamelsveld suggested applying the Roman rule that they could be introduced at all stages in the proceedings (C 7,50,2).⁶⁴ Pigeau, however, was of the opinion that a defendant who proposed a defence on the merits before a peremptory defence concerning ‘le droit’ should have his exception denied. More generally, Pigeau held that according to the *Code* the following order should be observed in introducing defences: declinatory defences, peremptory defences concerning ‘la forme’, dilatory defences, peremptory defences concerning ‘le droit’, and, subsequently, defences on the merits.⁶⁵

Exceptions based on lack of jurisdiction *ratione materiae* could be advanced at any stage of the proceedings (Article 170; cf. Article IV.1 of the 1667 Ordinance). According to Van Hamelsveld and French textbook writers this was because such lack of jurisdiction had to be taken into consideration *ex officio*, i.e. even if it was not introduced by way of a defence. This was because jurisdiction *ratione materiae* was considered to be a matter of *l’intérêt public*.⁶⁶

Dutch predecessors of the 1838 Code of Civil Procedure

The Dutch Code of Civil Procedure (1838) was not the first code drafted in the Netherlands containing procedural rules. In this section I will discuss four earlier (draft) codes dating from

186 was a direct copy of the equivalent rule in the 1667 Ordinance, which recognised more than two dilatory exceptions. See also C.W. Star Busmann, *De exceptio plurium litisconsortium in het burgerlijk procesrecht* (Utrecht, 1902), 49-50, who notes that Article 159 of the Dutch Code of Civil Procedure of 1838, in its turn, was a direct translation of Article 186 of its French counterpart.

⁵⁹ W.IJ. van Hamelsveld, o.c., I, 89.

⁶⁰ The wording of Article 187 makes it doubtful whether the defence *pour délibérer* can be classified as a dilatory defence (‘L’héritier [etc.] pourront ne proposer leurs exceptions dilatoires qu’après l’échéance des délais pour faire inventaire et délibérer’). Most authors do, however, classify this defence as such.

⁶¹ E. Pigeau, o.c., 188.

⁶² The following defences were considered to be peremptory concerning ‘la forme’: the defence that the claim was void due to irregularities in the service of the summons or otherwise, the exception that preliminary conciliation had been omitted, and exceptions concerning the person of either the plaintiff or the defendant (‘incapacité’ or ‘défaut d’intérêt’) (E. Pigeau, o.c., 141). Cf. Article 173 of the *Code*.

⁶³ See also E. Pigeau, o.c., 129.

⁶⁴ W.IJ. van Hamelsveld, o.c., I, 84-85. See also E. Pigeau, o.c., 129.

⁶⁵ E. Pigeau, o.c., 129 and 194.

⁶⁶ W.IJ. van Hamelsveld, o.c., I, 86. See also E. Pigeau, o.c., 130.

1799,⁶⁷ 1807/1808,⁶⁸ 1809,⁶⁹ and 1820⁷⁰ respectively (the 1820 draft is a draft of a Civil Code).⁷¹ Regarding preliminary defences, each code proposed a decisive break with the past.

The first three codes follow a similar pattern. They abolished the classification of preliminary defences into declinatory, dilatory and peremptory exceptions. Instead they determined that only eight named defences were to be introduced preliminarily. These defences had to be advanced simultaneously. All other defences were to be introduced at the same time as the defence on the merits. An advantage of these rules was that differences of opinion regarding the category of exceptions to which a particular defence belonged were prevented. As a consequence, the time for introducing specific defences was very clear.

The 1820 (draft) code approached preliminary defences from a slightly different angle. It reintroduced the familiar subdivision into declinatory, dilatory and peremptory defences. This division was significant for various reasons, for example as regards the ruling the court had to give when a defence of a particular type was successfully introduced. The division was also important in order in establishing whether or not a plaintiff could start a new action on the same matter after he had lost his original case due to a successful exception. Surprisingly enough the division did not play a role with reference to the time for introducing defences. Article 3292 contains a rule, which may be compared with the provisions concerning preliminary defences in the preceding (draft) codes. The Article lays down that nine specifically named exceptions could be introduced before the defence on the merits (most likely they had to be introduced at the same time, although this was not expressly stated in the 1820 draft); all other exceptions had to be joined with this defence.

The Dutch Code of Civil Procedure (1838)

The 1838 Code of Civil Procedure was, to a large extent, based on the French 1806 Code. The innovative Dutch ideas in regard to preliminary defences, reflected in the (draft) legislation from the period 1799-1820, did not leave many traces. The role of the traditional division in determining the moment particular defences had to be introduced, which was absent in the Dutch rules from 1799-1820, was again present in 1838 (at least, to a certain extent; see further below). Nevertheless, the 1838 Code was not an exact copy of its French counterpart. Differences between the Dutch legislation and the French 1806 *Code* in the area of preliminary defences can, to a large extent, be attributed to deliberations in the Dutch Parliament.⁷²

The important role played by the traditional division of exceptions as regards the moment of introducing defences does not appear directly from the Code itself. After all, like its French counterpart the Code only explicitly refers to dilatory exceptions in this respect (Article 159). However, parliamentary history shows that the legislator had the traditional division at the back of his mind when drafting the Code. This appears from Article 160, which in its final version determined that all 'other' preliminary defences, i.e. defences which had

⁶⁷ *Algemeene manier van procederen* (The Hague, 1799). The Articles 60-66 on preliminary defences are to be found in the section *Manier van procederen in civiele zaaken, zoo voor de burgerlyke rechtbanken als voor de departementaale gerechtshoven*.

⁶⁸ I consulted J. van der Linden, *Ontwerp Burgerlijk Wetboek 1807/1808*, ed. J.Th. de Smidt (Amsterdam, 1967). The Articles 21-32 on preliminary defences are to be found in book 4, title 6.

⁶⁹ *Wetboek op de regterlijke instellingen en regspleging in het Koninkrijk Holland* (The Hague, 1809), Articles 600-607.

⁷⁰ I consulted *Ontwerp van het Burgerlijk Wetboek voor het Koninkrijk der Nederlanden aan de Staten-Generaal aangeboden den 22sten November 1820* (2nd ed., Leiden, 1864), Articles 3277-3293.

⁷¹ The 1815 draft of a Civil Code also contains rules on preliminary defences. Unfortunately, I did not have the opportunity to consult a copy of this unpublished draft. See, however, J. ten Brink, o.c., 38.

⁷² See J. van den Honert, *Handboek voor de burgerlijke regtsvordering in het Koninkrijk der Nederlanden* (Amsterdam, 1839), 274ff; J.J.F. Noordziek, *Geschiedenis der beraadslagingen gevoerd in de Kamers der Staten-Generaal over het ontwerp van Wetboek van Burgerlijke Regtspleging*, I (The Hague, 1885).

not been assigned a particular time for their introduction, were to be advanced together with the defence on the merits. Originally ‘other’ read ‘peremptory’, but because it was doubted whether all defences one wished to bring within the ambit of Article 160 did have a peremptory character, the term ‘peremptory’ was replaced by ‘other’.⁷³ Consequently, the Code made it necessary to determine whether a particular defence was dilatory in nature, or belonged to the category of ‘other’ exceptions.

In conformity with the French *Code*, Article 155 of its Dutch counterpart determined that the defence of the judge lacking jurisdiction *ratione personae* had to be advanced separately before the other defences. This defence was to be followed by defences based on *lis pendens* (Article 158), on *connexité* (also Article 158)⁷⁴ and on the nullity of the summons (Article 93). It was unclear whether the last defence had to precede or to follow the former two defences; the Code was ambiguous on this particular point.⁷⁵ Although the French *Code* of 1806 was also ambiguous on the point, it was generally held that the defence based on *lis pendens* and *connexité* should precede the exception based on nullity of the summons, since the former two defences were declinatory in nature, whereas the latter could be classified as peremptory concerning ‘la forme.’⁷⁶ This approach was of no help for Dutch procedural law, since Dutch procedure did not recognise peremptory defences concerning ‘la forme’ as a separate class of exceptions.⁷⁷

Dilatory defences came next in line. They had to be introduced simultaneously⁷⁸ with the exception of the defence *pour délibérer*, which could be advanced separately before the other dilatory defences (Article 159). Subsequently, three peremptory exceptions could be introduced separately: the defence of former adjudication (*res iudicata*), settlement out of court (accord) and the defence concerning the person of either the plaintiff or the defendant (Article 160). We do not find this rule in the French *Code*.⁷⁹ All other defences (except for the defence that the judge lacked jurisdiction *ratione materiae*, which could be advanced at any stage of the proceedings (Article 156)) had to be joined with the defence on the merits (Article 160). The latter rule was also absent in the French *Code* of 1806. As stated above, commentators on the *Code* made a distinction between peremptory defences concerning ‘la forme’ and peremptory defences concerning ‘le droit’ and referred to Roman law regarding the time for introducing the latter type of peremptory defences.

Lex Hartogh (1897)

An important moment in the history of preliminary defences in the Netherlands was the reforms in the Code of Civil Procedure produced by the *Lex Hartogh* (1897).⁸⁰ The *Lex Hartogh* aimed at reducing delay in civil procedure. It removed any reference to the traditional division of preliminary defences. In a new Article 141(2), which has been reproduced in a slightly modernised form in Article 128(3) of the present Code, we find it

⁷³ J. van den Honert, o.c., 280-281.

⁷⁴ In a defence based on *connexité* it was stated that the action should be brought before another court of law where a related lawsuit was pending.

⁷⁵ F.R. Pennink, o.c., 68-69.

⁷⁶ E. Pigeau, o.c., 141.

⁷⁷ R. van Boneval Faure, *Het Nederlandsche burgerlijk procesrecht*, I (Leiden, 1893), 326.

⁷⁸ According to A. de Pinto it was different if the ground for a dilatory defence only came to the notice of the defendant at a late stage in the proceedings. F.R. Pennink, o.c., 71-72, was, however, of the opinion that such a rule (which, as should be noted, originated in Canon Law, see above) was not recognised by the Dutch Code.

⁷⁹ The defence concerning the person of the plaintiff or the defendant could, according to Pigeau (o.c., 141), be introduced before the dilatory defences, since this defence could be classified as peremptory concerning ‘la forme.’ The defence of *res iudicata* and the exception of settlement out of court belong to the group of *exceptiones litis ingressum impediennes* of medieval of Canon Law. According to Canon Law, these defences had to be submitted in the initial stages of the procedure.

⁸⁰ 7 July 1896 (Stbl. 103).

stated that all preliminary defences are to be introduced jointly with an initial defence on the merits. Preliminary defences that are omitted at this time cannot in principle be introduced later. Conversely, if the defendant initially limits his defence to preliminary defences, he is not allowed to introduce a defence on the merits at a later stage. Originally, the only exception to this rule was to be found in Article 141(3), which states that the *exception pour délibérer* may be advanced separately before all other defences (currently the defence of lack of jurisdiction *ratione personae* may also be advanced separately; see below).⁸¹

Even though the traditional division was evidently absent, it continued to play a role. Soon after the introduction of the *Lex Hartogh* for example, the Dutch Supreme Court determined that peremptory defences were to be treated as equivalent to a defence on the merits.⁸² This meant that their introduction was not limited to the initial phase of the proceedings (at least, if at this stage an initial defence on the merits had been introduced). As a result the only *exceptiones* left within the ambit of Article 141 were declinatory or dilatory in nature. As regards declinatory exceptions, Article 141(2) originally also applied to the defence of lack of jurisdiction *ratione personae*, as a result of which this defence had to be joined with the defence on the merits. In 1954, however, a change in the Code of Civil Procedure was introduced (Article 154) which allowed the defendant to advance the defence of lack of jurisdiction *ratione personae* before all other defences.⁸³ It was not made clear whether this defence should precede or follow the *exception pour délibérer* (a defence which, as was stated above, can also be introduced separately during the initial stage of the proceedings). Another novelty introduced in 1954⁸⁴ was the rule that a successful defence of lack of jurisdiction *ratione personae* would result in a referral of the case to the court competent to hear the action (Article 157a(1) Rv). In the 19th century the legislator had expressly decided not to adopt a similar rule from the French *Code* (see above). At that time the rule was considered to be wrong, since it was felt that the judge lacking competence also lacked jurisdiction on the issue of remand, and that the judge to whom the case was remanded was not bound by the decision of his colleague without competence in the case.⁸⁵

Recent developments

The *Lex Hartogh* remains the main landmark in the development of preliminary defences in the Netherlands up to this very day. This would have been different if a legislative proposal, drafted at the beginning of the 20th century, had been implemented.⁸⁶ In this proposal, *exceptiones*, apart from the *exception pour délibérer* and the preliminary defence of lack of jurisdiction *ratione personae* (both of which, under the proposal, had to be introduced at an early stage), stopped playing a role. As a general rule, according to the proposal all defences could be brought at any phase of the proceedings. The court would, however, be given a wide measure of discretion in this respect: if it was held that a particular defence could have been proposed earlier, the judge could refuse to allow the defence, at least if the late defence was considered to be detrimental to expediency or to the interests of the parties. Since, however, the proposal was not introduced the provisions on preliminary defences of the 1838 Code as modified by the *Lex Hartogh*, remained applicable.

⁸¹ It should be noted that as a result of the *Lex Hartogh* some of the former preliminary defences (especially those with a procedural character; see J. ten Brink, o.c., 78) are not classified as defences anymore, but as 'preliminary requests'. As regards these requests Article 141 (now Article 128(3)) is not applicable.

⁸² HR 6 May 1904, W 8063; J.A.H. Coops, *Grondtrekken van het Nederlands burgerlijk procesrecht* (Zwolle, 1966), 76. See also C.W. Star Busmann, o.c., 42-45.

⁸³ 21 January 1954 (Stbl. 27).

⁸⁴ 21 January 1954 (Stbl. 27).

⁸⁵ J. van den Honert, o.c., 277.

⁸⁶ See C.H. van Rhee, 'Ons tegenwoordig sukkelproces', o.c.

With reference to the interpretation of these provisions, an important judgement was rendered by the Dutch Supreme Court in 1993.⁸⁷ At stake was the question whether a certain defence (the defence that the action had been brought by the wrong person) could be classified as a preliminary defence in the sense of the above mentioned Article 141(2). The Supreme Court decided that this was not the case. It was held that only defences which on procedural grounds prevent the court from taking cognisance of the case on the merits can be classified as preliminary within the ambit of this Article. An example is a defence based on defects in the summons (a defence classified as peremptory concerning 'la forme' in French law, but as declinatory in Dutch law).⁸⁸

The 1993 ruling is also important under the present revised Code of Civil Procedure. As stated above, the revised Code has not introduced important changes as regards preliminary defences. Paragraphs 2 and 3 of Article 141 of the old Code, although modernised, are reproduced in Articles 128(3) and 128(4) of the revised Code, whereas the rule of Article 154(2) is to be found in Article 110(1).

Conclusion

It was Gaius who introduced the division of exceptions into *exceptiones dilatoriae* and *exceptiones peremptoriae*. Within the formulary procedure this division was relevant mainly for the plaintiff, who, when confronted with a dilatory exception, could avoid definitively losing his case by postponing the action. Only in the *cognitio* procedure did this distinction gain relevance for the defendant. After all, it was in this procedure that the question to which class an exception - now to be viewed as a preliminary defence - belonged became relevant in respect of the time when it had to be introduced and proven. It was also in the *cognitio* procedure that we find first traces of a third category of exceptions, i.e. procedural ones, termed declinatory exceptions in the Middle Ages.

Medieval law showed great interest in the theory of preliminary defences. Apart from giving procedural preliminary defences their specific name (i.e. declinatory exceptions), it introduced further distinctions. This occasionally led to conceptual unclarity. The same can be said about distinctions introduced in later times, for example Pothier's distinction between peremptory defences concerning 'la forme' and peremptory defences concerning 'le droit'. It is therefore no surprise to witness attempts to abolish the traditional distinction completely. In the Low Countries we find these attempts in draft legislation from the period 1799-1820. The draft legislation opted for an enumeration of specific defences that could be introduced preliminarily. Unfortunately, the Dutch Code of Civil Procedure promulgated in 1838 did not follow this approach, but introduced a system by and large based on the French 1806 *Code*. In the French *Code* and, therefore, in the Dutch Code the traditional categories of preliminary defences continued to play a role.

In 1897 the Netherlands witnessed an attempt to reduce delay in civil proceedings. In that year, the *Lex Hartogh* came into force. It determined that all but one preliminary defence (in 1954 an extra preliminary defence was added) had to be introduced jointly with an initial defence on the merits. Since, however, additional defences on the merits could be introduced at a later stage, it was necessary to draw a strict line between defences on the merits and preliminary defences. In doing so, the traditional categories of preliminary defences played a significant role.

Shortly after the introduction of the *Lex Hartogh* the Dutch Supreme Court determined that peremptory defences should be considered equivalent to a defence on the merits. As a result, these preliminary defences did not have to be introduced at an early phase of the proceedings any more, at least if some defence on the merits had been introduced initially.

⁸⁷ HR 22 October 1993, NJ 1994, 374.

⁸⁸ R. van Boneval Faure, o.c., III, 140.

Some 90 years later, the same Court determined that only defences having a procedural character were to be considered as having a preliminary character. Even though this was not stated explicitly, the ruling meant that the category of dilatory defences lost much of its relevance in Dutch civil procedure. As a result, the main type of preliminary defences left were the ones first distinguished as a separate class in the late *cognitio* procedure, i.e. the ones termed 'declinatory exceptions' by medieval lawyers. In the future, these exceptions will continue to play a role in Dutch procedural law. However, Gaius's division of preliminary defences in *exceptiones dilatoriae* and *exceptiones peremptoriae* has to a large extent been put to rest.