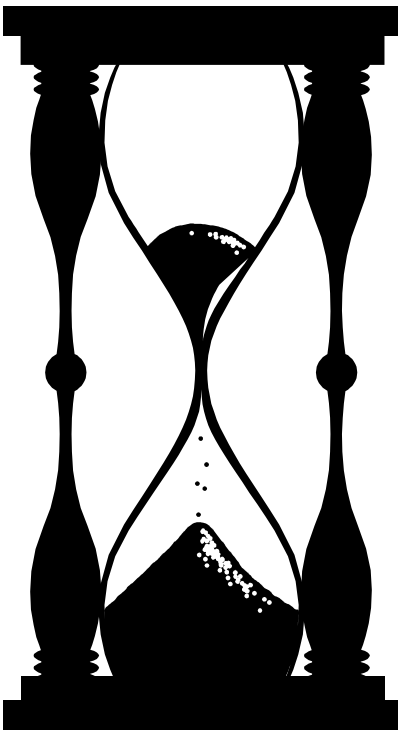
NULLUM TEMPUS OCCURRIT REGI: *An Antidemocratic Anachronism Survives in New Hampshire*

By Michael J. Malaguti[1]

I. INTRODUCTION

At common law, the doctrine of sovereign immunity shielded the monarch from all legal liability.[2] This followed logically from the generally accepted proposition that "the king can do no wrong."[3] A corollary to the doctrine of sovereign immunity exempted the monarch from generally applicable statutes of limitations.[4] This doctrine is known as *nullum tempus occurrit regi*—"time does not run against the king."[5] Historically, sovereign immunity and *nullum tempus* have allowed the monarch to "enjoy [] complete immunity from suit"[6] and to institute suit himself for an infinite time after a cause of action accrues.[7]



Surprisingly, both doctrines survived and prospered even after the American Revolution.[8] During the twentieth century, sovereign immunity came under attack and has been largely abolished or limited. But even where sovereign immunity has been completely abrogated, *nullum tempus* often survives.[9] Such is the case in New Hampshire, where the Supreme Court recently breathed new life into *nullum tempus* in *State v. Lake Winnipesaukee Resort* despite a legislative waiver of sovereign immunity.[10]

The *Lake Winnipesaukee* decision is flawed because the Court erroneously distinguishes nullum *tempus* and sovereign immunity and mistakenly reasons that a legislative prohibition on adverse possession against the state is functionally a codification of *nullum tempus*. In so reasoning, the Court neglects the essential differences between tort and contract law on one hand, and property law on the other, and glosses over substantial authority recognizing that *nullum tempus* is merely an aspect of sovereign immunity. In Part I, I will briefly chronicle the Court's unanimous decision before outlining the problems with that decision in Parts II, III, and IV. In part V, I call for the New Hampshire legislature to abolish *nullum tempus* since the doctrine is little more than a vestige of feudalism *State v. Lake Winnipesaukee Resort*.

In May 2001, Lake Winnipesaukee Resort ("LWR") retained Peerless Golf, Inc. ("Peerless") to build a golf course.[11] During construction, the New Hampshire Department of Environmental Services ("DES") became aware of environmental problems stemming from the construction.[12] DES issued an order in August 2001 "requiring LWR to mitigate environmental damage and to cease disturbing soil."[13] Peerless completed construction after DES lifted the order.[14]

In August 2006, the state filed suit in New Hampshire Superior Court seeking civil monetary penalties for the alleged violation of two New Hampshire statutes:[15] "Fill and Dredge in Wetlands"[16] and "Water Pollution and Waste Disposal."[17] Given that the alleged violations took place more than four years before[18] and the general statute of limitations in New Hampshire is three years,[19] Peerless asserted the statute of limitations as an affirmative defense and moved to dismiss. [20] The Superior Court denied Peerless' motion, but allowed an interlocutory appeal to the Supreme Court.[21] On appeal, the Supreme Court addressed squarely the issue of "[w]hether the state has an unlimited period of time within which to bring suit under [the] civil enforcement statutes [at issue in this case] which do not contain specific limitations periods."[22]

The New Hampshire Supreme Court handed down a unanimous *Lake Winnipesaukee* decision in June 2009.[23] The Court held that, "although [*nullum tempus*] seldom surfaces within [its] jurisprudence, [the doctrine] endures as a recognized doctrine of law in New

Hampshire."[24] In so holding, the Court addressed two broad issues: whether, and to what extent, *nullum tempus* is a vital part of the state's common law, and if the doctrine survives, whether to abolish it in *Lake Winnipesaukee*.

The Court began its decision by examining the line of New Hampshire cases which deal, directly or indirectly, with *nullum tempus*. The first of these was *Weber v. Chapman*, an 1861 case that held "[a] grant will be presumed from lapse of time, against the state or sovereign, as well as against individuals. And the same doctrine applies with equal force, and should be applied for the same reasons, to the case of public highways."[25] *Weber* stood for the proposition that individuals could obtain title to public lands by adverse possession.[26] But the decision was quickly abrogated by statute and reversed by the Court.[27] In two twentieth century decisions—*In re Dockham Estate*[28] and *Reconstruction Finance Corporation v. Faulkner*[29]—the Court applied *nullum tempus* and reaffirmed its continuing vitality under New Hampshire common law. The *Lake Winnipesaukee* Court also noted that "the legislature codified the principle of *nullum tempus* almost 150 years ago when it provided that prescriptive periods do not run against public highways . . . [and that] '[n]o right shall be acquired by . . . adverse possession of [state] land, as against the state or its grantees.'"[30]

LWR and Peerless argued alternatively that *nullum tempus* should be abolished in light of the legislature's abrogation of sovereign immunity.[31] To this argument the Court devoted little energy, noting only that "it is well established that sovereign immunity and *nullum tempus* are distinct doctrines," and that the abrogation of the former need not lead inexorably to the abrogation of the latter.[32] In support of this reasoning, the Court cited supreme court decisions from Iowa and Pennsylvania.[33] Finally, the Court stated that the legislative waiver of sovereign immunity evinces no support for the argument that an abrogation of sovereign immunity necessarily implies an abrogation of *nullum tempus*.[34]

II. NULLUM TEMPUS IS NOT CODIFIED IN NEW HAMPSHIRE

The Court's decision is not susceptible to criticism for its examination of its own precedents. There is no question that *Weber* was anomalous in relation to a clear, if infrequently visited, trend in favor of retaining *nullum tempus*. But the Court rested much of its holding on what it calls the legislature's codification of *nullum tempus*.[35] To be sure, the legislature has codified the proposition that individuals cannot take title to state lands by adverse possession.[36] But nothing in the statutes the Court cites mentions *nullum tempus*. The wedge the Court hammers into this logical gap is that precluding adverse possession against the state is the same as preventing individuals from asserting the statute of limitations as a defense against the state in all personal actions. While it is true that the procedural mechanism by which an adverse possessor of state lands would take title is a statute of limitations (a prescriptive period) on ejectment,[37] it does not follow that the prescriptive period for adverse possession purposes is the same, or substantially similar to, the statute of limitations for personal actions. Indeed, in New Hampshire, these periods differ by 17 years and are imposed by different statutes.[38]

The statutes of limitations on ejectment (adverse possession) and personal actions look so different because they arise from distinct bodies of law. Personal actions are grounded in tort and contract law.[39] Tort law is concerned with allocating risk and loss.[40] Tort law's focus is on conduct.[41] Contract law could be said to focus on conduct as well. It is defined as "an agreement . . . to do or not do a particular thing."[42] Property law, conversely, is concerned with "rights among people that concern things."[43] Its primary focus is on the rights and responsibilities of ownership.[44] Though it is notoriously difficult to reduce bodies of law down to a sentence or two, there is a clear difference in focus between tort and contract law on one hand, and property law on the other.

The length of the statutory periods is instructive in this regard. Statutes of limitations on personal actions tend to be relatively short. In New Hampshire, for instance, the period after which claims are barred is three years.[45] By contrast, statutes of limitations on ejectment actions are invariably longer—usually five, 10, 15, or 20 years.[46] In New Hampshire, the period is 20 years.[47] The longer period is attributable to a different legislative aim. Whereas the statute of limitations on personal actions combats the evidentiary perils of stale claims, lost evidence, and faded memories, the statute of limitations on ejectment has a different function.[48] It is largely attributable to the utilitarian and societal policy goal of putting land to its highest and best use.[49]

The Court rests its whole holding on the unstated assumption that the statutes of limitation on personal and property actions are functionally equivalent. The development of the law of adverse possession does not support this assumption. While it is sometimes said that the common law doctrine of *nullum tempus* is the source of the rule that there can be no adverse possession against the state,[50] in New Hampshire there is a statute that performs that function—R.S.A. 539:6 (2007), which states: "[n]o right shall be acquired by . . . adverse possession of [state] land, as against the state or its grantees."[51] Even in jurisdictions where no such statute exists, the rule that there can be no adverse possession against the state more often derives from the theory that state lands are held in public trust for the benefit of all.[52] The Court's holding, then, is indefensible to the extent that the Court justifies its retention of *nullum tempus* on the basis of the doctrine's identity with or similarity to prescriptive periods for adverse possession.

III. NULLUM TEMPUS IS AN ASPECT OF SOVEREIGN IMMUNITY

It is also questionable whether, as the Court states, "it is well established that sovereign immunity and *nullum tempus* are distinct doctrines."[53] Substantial authority,[54] including decisions by the supreme courts of South Carolina, Maryland, New Jersey, Colorado, Washington, and Illinois, identifies *nullum tempus* as an aspect of sovereign immunity. Both are described as "royal prerogatives"—the "incidents of sovereignty."[55] Both were "justified on the principle that 'the king established his own rules for litigation.'"[56] The cases the Court relies on to support its view that the two doctrines are distinct

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acknowledge their philosophical commonalities while emphasizing that *nullum tempus*—unlike sovereign immunity, the cases say—preserves public rights, thereby protecting the public.[57]

But public rights are affected under both doctrines. Under sovereign immunity, the government is relieved of the obligation to *pay* damages.[58] Under *nullum tempus*, the government retains an ability to *collect* damages.[59] Functionally, these special privileges both affect the public in the same manner. As one commentator puts it, "[a]n obligation to pay and an inability to collect are, at least financially, two sides of the same coin."[60] If *nullum tempus* preserves public rights by *putting* money in state coffers, and sovereign immunity does the same thing by *keeping* it there, the public rights justification is really a distinction without a difference that cannot be invoked to sustain *nullum tempus*.

IV. FAIRNESS CONCERNS

Ironically, the state itself created the general three-year statute of limitations to combat the evils of stale claims, lost evidence, faded memories, and a lack of closure.[61] Like sovereign immunity, *nullum tempus* often produces injustice and unfairness by defeating these policy concerns.[62] "At a basic level," one commentator writes, "it is unfair for the government to have the ability to raise the defense of improper delay against a citizen suing it, while a citizen being sued by the government cannot do so."[63] The sheer infrequency with which the doctrine has been invoked also suggests that it is not a valuable arrow in the quiver of those who would protect public rights.[64]

Finally, it is worth mentioning the basic unfairness *nullum tempus* works on citizens. Citizens are left with the feeling that the government plays by different rules. The most eloquent discussion of protecting public rights cannot vitiate the sense of unfairness a citizen feels when she learns that the government can sue her 30 years after an occurrence, but she can neither defend herself by asserting the statute of limitations nor file a counterclaim or a contribution claim because her cause of action is long since barred.[65]

CONCLUSION

The New Hampshire Supreme Court's reasoning for retaining *nullum tempus* does not pass muster. The codification of the proposition that there can be no adverse possession against the state is not a codification of *nullum tempus*. The statute of limitations on personal actions and the prescriptive period for adverse possession are not sufficiently similar to support an analogy of one to the other. Moreover, since *nullum tempus* is merely an aspect of the broader doctrine of sovereign immunity, *nullum tempus* cannot be viable in a state where sovereign immunity has been substantially curtailed.

Whether by judicial decision or legislative action, it is time to retire *nullum tempus*. The Court, however, has signaled that it is unlikely to do so anytime soon. The doctrine has been lucky to survive this long given New Hampshire's historical impatience with the residues of despotism. It is now time for the New Hampshire legislature to abolish *nullum tempus*. This done, the words "live free or die"[66] will ring a little truer.

ENDNOTES

1. The author thanks Professor Dana Remus for her invaluable assistance with the draft and Saurabh Vishnubhakat for his edits and suggestions.

2. Dan B. Dobbs, The Law of Torts 693 (West Group 2000).

3. *Id.*

4. Sigmund D. Schutz, *Time to Reconsider Nullum Tempus Occurrit Regi—The Applicability of Statutes of Limitations Against the State of Maine in Civil Actions*, 55 Me. L. Rev 373, 374 (2003).

5. Black's Law Dictionary 1217 (Rev. 4th ed. 1968). "The rule refers to the king in his official capacity as representing the sovereignty of the nation and not to the king as an individual." *Id.*

6. Dobbs, *supra* note 1.

7. Schutz, *supra* note 3; Dobbs, *supra* note 1.

8. Dobbs, *supra* note 1.

9. *E.g., Dep't of Transp. v. Sullivan,* 527 N.E.2d 798 (Oh. 1998); *Bd. of Educ. v. A, C & S, Inc.*, 546 N.E.2d 580 (Ill. 1989); *City of Shelbyville v. Shelbyville Restorium, Inc.*, 451 N.E.2d 874 (Ill. 1983); *Dep't of Transp. v. J.W. Bishop & Co.*, 439 A.2d 101 (Pa. 1981).

10. 977 A.2d 472 (N.H. 2009); N.H. Rev. Stat. Ann. §§ 99-D (2001 & Supp. 2008), 491:8 (1997), 541-B (2007 & Supp. 2008).

11. *Lake Winnipesaukee,* 977 A.2d at 474.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. N.H. Rev. Stat. Ann. § 482-A (2001 & Supp. 2008).

17. § 485-A.

18. That no alleged violations took place after 2002 is undisputed. *Lake Winnipesaukee*, 977 A.2d at 474.

19. § 508:4.

20. *Lake Winnipesaukee*, 977 A.2d at 474.

21. *Id.*

22. *Id.* Note also that two other questions were submitted by the Superior Court: "(1) Whether a civil action brought by the State to recover a monetary penalty under RSA [chapter] 482-A and [RSA chapter] 485-A, is subject to the three-year limitations period set forth in New Hampshire's general limitations statute, RSA 508:4[.]" The general limitations statute applies only to "personal actions." The Court held that RSA 508:4 "does not clear[ly] and indisputabl[y] . . . include this action," allowing the Court to reach the issue of *nullum tempus*. *Id.* at 478. If the statute of limitations specifically mentions that the State is bound, the State *is* bound and *nullum tempus* provides no relief. *Id.* The Superior Court also submitted a second question: "(3) Whether the State is immune from RSA 508:4 under the doctrine known as *nullum tempus*[.]" *Id.* at 474. Since this is merely a restatement of question (2), I do not address it in this paper.

23. *Id.* at 472.

24. *Id.* at 475.

25. 42 N.H. 326, 336-37 (N.H. 1861).

26. *New England Box Co. v. Wood*, 123 A. 826, 827-28 (N.H. 1923).

27. *Id.*

28. 227 A.2d 774 (N.H. 1967).

29. 122 A.2d 263 (N.H. 1956).

30. 977 A.2d at 476 (citing N.H. Rev. Stat. Ann. §§ 236:30, 539:6).

31. *Id.* at 477.

32. *Id.*

33. *Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d 163, 169 n.3 (Iowa 2006); *J.W. Bishop*, 439 A.2d at 104-05.

34. *Lake Winnipesaukee*, 977 A.2d at 477.

35. *Id.* at 476.

36. N.H. Rev. Stat. Ann. §§ 236:30 (1993), 539:6 (2007).

37. Adverse possession in the Anglo-American legal system traces to the Statute of Westminster in 1275, "which limited actions for the recovery of land by precluding a suitor from alleging dated claims." The more familiar Statute of Limitations was enacted in 1639, which set at twenty years the time in which claims to recover land must be brought." John G. Sprankling, Understanding Property Law 436-37 (LexisNexis 2000).

38. §§ 508:2, -4.

39. *Lake Winnipesaukee*, 977 A.2d at 477.

40. *See* Vetri et al, Tort Law and Practice 13 (LexisNexis 2006) (identifying as functions of tort law: deterrence, compensation, economic concerns, administrative efficiency, and fairness). Commentators differ on how risk and loss should be allocated. *See generally* Dobbs, *supra* note 1, at §§ 8-12. Some argue allocation should be made on the basis of culpability. *Id.* at § 9. Others argue for stricter liability with a diminished role for culpability as a measure. *Id.* at § 9-10.

41. *See* Black's, *supra* note 4, at 1660 ("A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction.")

42. *Id.* at 394.

43. Sprankling, *supra* note 36, at 2-3.

44. Denise R. Johnson, Lecture, *Reflections on the Bundle of Rights*, 32 Vt. L. Rev. 247 (2007).

45. N.H. Rev. Stat. Ann § 508:4 (2001 & Supp. 2008).

46. Hovenkamp & Kurtz, The Law of Property § 4.2 (West Group 2001).

47. N.H. Rev. Stat. Ann § 508:2, 3.

48. Schutz, *supra* note 3, at 388.

49. *See* Hovenkamp & Kurtz, *supra* note 45.

50. *See, e.g.*, Comment, Carl C. Risch, *Encouraging the Responsible Use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners*, 99 Dick. L. Rev. 197 (1994).

51. § 539:6.

52. *See, e.g.*, *Messersmith v. Mayor and Common Council of Riverdale*, 164 A.2d 523 (Md. 1960); Sprankling, *supra* note 36, at 448 (noting that most states follow the "public trust" doctrine).

53. *Lake Winnipesaukee*, 977 A.2d at 477.

54. *See* Schutz, *supra* note 3, at 382 n.74 (identifying at least six jurisdictions finding *nullum tempus* to be an aspect of sovereign immunity).

55. *Lake Winnipesaukee*, 977 A.2d at 475; Schutz, *supra* note 3, at 376. "The doctrine originated as one of the personal prerogatives of the King of England, 'justified on the ground that the kind was too busy looking after the welfare of his subjects to sue.' Its modern justification rests on the public policy that 'public remedies, in preserving the public rights, revenues, and property, ought not to be lost by the laches of public officers." *Id.*

56. Schutz, *supra* note 3, at 382.

57. *Fennelly*, 728 N.W.2d at 169 n.3.

58. Schutz, *supra* note 3, at 387.

59. *Id.*

60. *Id.*

61. *Id.* at 388.

62. *Id.* at 384-85.

63. *Id.* at 385.

64. *See supra* notes 24-29 and accompanying text.

65. Schutz, *supra* note 3, at 386. Schutz also argues that it is unjust for those charged with criminal conduct to have the benefit of statutes of limitations while those charged with civil offenses do not. *Id.* at 386.

66. "Live free or die" is the official motto of the State of New Hampshire. § 3:8.

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