

ACQUISITIVE PRESCRIPTION—ITS EXISTING
WORLD-WIDE UNIFORMITY

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The recent appeal of Lord Justice Kennedy¹ for unified laws covering the various fundamental transactions of business and of domestic relations is not a mere dream, but rests on a solid foundation of fact,—namely the too-often overlooked agreement as to essentials which exists in modern law throughout the world.

So thoroughly have the principles of Roman law survived or been re-absorbed in all modern jurisprudence that a movement for unification of the private laws of the world is a natural result of this situation. The world of today is witnessing a virtual economic unity, and also something approaching a political unity as a result of the growth of arbitration and treaties: is it time to try to supplement these unities by a unification of private laws?

Perhaps in no department of private law is there a better opportunity for such unification than in the law of acquisitive prescription, which already is of world-wide agreement as to its essential doctrines.

The origin of the term "prescription" is interesting. It arose from the way of pleading in a Roman lawsuit the acquisition or extinction of a right by lapse of time: it was what was alleged—written first (praescriptio)—in the very beginning² of the commission³ to the trial referee and before the statement of the plaintiff's claim. It thus indicated to the referee⁴ that he was to try the preliminary allegation before he proceeded to the main issue.⁵

¹ See his *Address* as President of the International Law Association at London, 1910.

² Prae-scriptio,—literally something "written first or before"—*Gaius*, 4, 132.

³ *i. e.*, the "formula" or "short decree" of the praetor or other magistrate containing written instructions to the person or persons appointed to try the issues of a case.

⁴ *i. e.*, the "judex", "arbiter", "recuperator".

⁵ If the praescriptio was found to be true, the suit was dismissed or suspended.

There were many such praescriptiones⁶ pleadable by either the plaintiff or the defendant: one of the most important was the praescriptio setting forth acquisition or extinction of a right by lapse of time.⁷ Subsequently, by metonymy, this term of pleading served to denote the substantive right itself, which was then likewise called "praescriptio",—whence the modern legal term "prescription".

Roman law in its final development recognized *two sorts of prescription,—acquisitive and extinctive.*⁸ The difference between the two is merely the effect of lapse of time upon the right prescribed. Acquisitive prescription⁹ is the acquisition of a right by lapse of time; extinctive prescription is the extinction of a right by lapse of time.¹⁰ Extinctive prescription is not a mode of acquiring ownership, while acquisitive prescription is. Extinctive prescription is but a mode of extinguishing an obligation or right in person, and is based on the principle of the limitation of actions.

Acquisitive prescription may be defined as the acquisition of a thing by possession thereof as if owner for the period of time fixed by law.¹¹ It is acquisition by operation of law: the courts then refuse to recognize the title of the old owner. The purpose of constituting prescription is to put an end to litigation.¹²

In modern law prescription is also a recognized mode of acquiring ownership.¹³ "Prescription is a manner of acquiring the

⁶ The best known were the "praescriptio prejudicii" (*i. e.*, the suit ought not to have been brought at all—*Gaius*, 4, 133), and the "praescriptio fori" (*i. e.*, the suit is not within the jurisdiction of the Court—*Digest* 2, 8, 7). Both of these exist in modern law, but under other names.

⁷ This was technically known as "praescriptio temporis",—a praescriptio possible for a defendant to plead.

⁸ The Civil Code of *Chile* very sharply draws the distinction between these two kinds of prescription,—see articles 2492, 2498, 2514.

⁹ "Praescriptio acquisitiva",—see Mackeldy, *Civil Law*, (Kauffman's Edition) §202 (Kauffman's note); Civil Code of *Chile*, 2492, 2498.

¹⁰ "Praescriptio extinctiva",—see Mackeldy, *Civil Law*, §202 and 276 Kauffman's notes; Civil Code of *Chile*, 2514.

¹¹ *Digest* 41, 3, 3; *Gaius*, 2, 41-61; Ulpian, *Reg.* 19, 8; *Inst. of Justinian* 2, 6; *Code* 7, 26-40; *Novel* 22; *Nov.* 119, 7; *Nov.* 131, 6; *Cod. Theodos.* 4, 13; Paulus, *Sent.* 5, 2.

¹² "Ut aliquis litium finis esset"—*Digest* 41, 10, 5. See Broom, *Legal Maximus*, p. *695 note 3.

¹³ *Anglo-American Law*, 2 Blackstone. *Comm.* p. 195-196, 263-266; Civil Code of *France* 2219 et seq; *Spain* 1940 et seq; *Germany* 937 et seq; *Italy* 2105 et seq; *Portugal* 517 et seq; *Austria* 1451 et seq; *Mexico* 1079 et seq; *Chile* 2498 et seq; *Argentina* 3999 et seq; *Louisiana* 3472 et seq; *California* 1000; *Switzerland* 661 et seq., 728; *Japan* 162 et seq.; *Quebec* 2183 et seq.

ownership of property—by the effect of time and under the conditions regulated by law.”¹⁴ “Ownership and other real rights are acquired by prescription in the manner and under the rules specified by law.”¹⁵ Although prescription was unknown to ancient Anglo-Saxon law,¹⁶ yet such rudimentary notions of it as the English common law developed were introduced from the Roman law by Bracton.¹⁷

There are two kinds of acquisitive prescription,—ordinary¹⁸ and extraordinary.¹⁹ The most obvious distinction between the two is the period of time required by law for the completion of each prescription,—ordinary prescription being completed in three, ten or thirty years, while extraordinary necessitates thirty or forty years or is immemorial.

Requisites of Every Prescription.—Both kinds of acquisitive prescription have three common requisites,—the property must be capable of being prescribed, there must be a continuous uninterrupted possession of the property for the period of time fixed by law, and there must be good faith.

1. *Prescriptible Property.*—The first requisite to every prescription is that the property must be capable of being prescribed. Things not susceptible to private ownership²⁰ are absolutely incapable of acquisition by prescription either in Roman²¹ or modern law.²² This is the general rule. “A title by prescription cannot

¹⁴ Louisiana Civil Code 3457, which literally translates the *French Civil Code* Article 2219. The Italian, Mexican, Chilean Civil Codes are as to this definition practically the same as the French: see *Civil Code of Italy* 2105; *Mexico* 1059; *Chile* 2492.

¹⁵ *Civil Code of Spain* (and *Philippine Islands*) 1930 (Walton’s ed.); *Porto Rico* 1831.

¹⁶ Scrutton, *Roman Law*, p. 49.

¹⁷ *Id.* p. 91, 92; Güterbock, *Bracton*, p. 118.

¹⁸ The terms “ordinary” and “extraordinary” are used in a modern code,—*Chilean Code* 2506. “Ordinary” prescription is known in Roman law as “praescriptio”, or “usucapio” (in the ante-Justinian law: usucapio in the Justinian law refers to prescription of movables only), or “possessio longi temporis” (in the ante-Justinian law).

¹⁹ Known in Roman law as “praescriptio XXX vel XL annis”, or “praescriptio longissimi temporis”, or “praescriptio immemorialis.”

²⁰ “Res extra commercium”—withdrawn from commerce.

²¹ *Inst. of Justinian* 2, 6, 1; *Digest* 41, 3, 9.

²² *Civil Code of Austria* 1455; *Spain* (Philippine Islands) 1936; *Porto Rico* 1837; *France* 2226, 714; *Louisiana* 3479, 3497; *Quebec* 2201; *Mexico* 1061; *Chile* 2498; *Italy* 2113. Things “extra commercium” are tacitly recognized in *Anglo-American* and *German* law: see 2 Blackstone, *Comm.* p. 14, 263; Robinson, *El. Law* §§38, 132-133; Schuster, *Prin. of German Law*, p. 59-60.

be acquired to property which is not capable of private ownership."²³ "Only the things—which are 'in commerce' can be prescribed."²⁴ "All things which are in commerce are susceptible of prescription."²⁵ "All things which are the object of commerce are capable of prescription."²⁶ But there may be things which, although susceptible of ownership, are by law temporarily withdrawn from the operation of prescription.²⁷ Prescription here is often said to be suspended.²⁸ The following are made thus exempted from prescription: dotal property during marriage,²⁹ and property of wards and minors during their guardianship.³⁰ But these exemptions are not absolute: ownership of even such exempted property can be acquired by prescriptive possession for thirty or forty years.³¹

And yet the running of prescription is suspended absolutely in one case,—stolen things. Stolen things³² and property taken possession of by violence³³ can never be acquired by adverse possession by the thief or wrongful ejector, who are forever barred from obtaining a prescriptive title no matter how long is their possession.³⁴ For their possession was acquired *mala fide*, and

²³ *French Civil Code* 2226 (Wright).

²⁴ *Mexican Civil Code* 1061 (Taylor).

²⁵ *Spanish Civil Code* 1936 (Walton).

²⁶ *Porto Rican Civil Code* 1837.

²⁷ The "res inhabiles" of the *Roman Law*,—Sohm, *Roman Law*, (3d English edition) §64.

²⁸ ROMAN LAW:—*Code* 5, 12, 30; *Code* 7, 40, 1, §2; *Code* 7, 39, §4; Mackeldy, *Civil Law* §277. MODERN LAW:—*Civil Code of Chile* 2509; *France* 2252; *Louisiana* 3521-3527; *Germany* 202-205; *Italy* 2119-2120; *Mexico* 1119-1126.

²⁹ ROMAN LAW:—*Code* 5, 12, 30. MODERN LAW:—*Civil Code of Mexico* 1116; *Louisiana* 3524-3525; *Italy* 2120; *France* 2255-2256; *Germany* 204; *Chile* 2509; *Argentina* 3970; *Switzerland* (code of obligations) 153; *Japan* 159.

³⁰ ROMAN LAW:—*Code* 7, 35, 3. MODERN LAW:—*Civil Code of Austria* 1494; *Mexico* 1115; *Louisiana* 3522; *France* 2252; *Italy* 2120; *Germany* 204; *Chile* 2509; *Argentina* 3966; *Switzerland* (code of obligations) 153; *Japan* 159.

³¹ The period of time required for the Roman "extraordinary" prescription. See also Sohm, *Roman Law*, §64, p. 339-340.

³² Provision of the Roman Law of the XII Tables,—see *Inst. of Justinian* 2, 6, 2.

³³ Provision of the Lex Julia et Plautia,—see *Inst. of Justinian* 2, 6, 2.

³⁴ ROMAN LAW:—*Inst. of Justinian* 2, 6, 2-4; *Digest* 41, 3, 4, 6-21; Sohm, *Roman Law* p. 339-340. Not even the longest prescription known to the Roman Law—the "extraordinary"—is available. MODERN LAW:—*Civil Code of Spain* 1956; *France* 2279; *Italy* 2146; *Mexico* 1090; *Austria* 1464; *Portugal* 553.

will forever remain so.³⁵ But a restoration of the property to the possession of the owner purges it of its taint, and makes it again capable of prescription.³⁶ A third party obtaining the property in good faith from the thief or wrongful ejector is not disqualified from acquiring it by prescription.³⁷ And the law of England also favors a bona fide purchaser of stolen goods,³⁸ who buys them prior to the thief's conviction.³⁹

2. *Continuous Uninterrupted Possession.*—Another requisite of every prescription in both Roman and Modern law is a continuous uninterrupted possession of the property for the period of time fixed by law.⁴⁰ There are two ways of interrupting a prescription: natural interruption,⁴¹ or actual loss of the possession, and legal interruption,⁴² or the bringing of a suit against the possessor's right. Both ways of interruption are recognized in modern as well as in Roman law.⁴³

In both Roman and Modern law the person intending to prescribe the property can, to complete the period of prescription, add together all the times of possession of other persons in privity with him, such as that of a decedent from whom he inherited or that of the person selling to him.⁴⁴ The period of prescription is

³⁵ "Vitium rei inhaerens",—Mackeldy, *Civil Law*, §277.

³⁶ *Digest* 41, 3, 4, 6; *Digest* 50, 16, 215; *Inst. of Justinian* 2, 6, 8.

³⁷ See Sohm, *Roman Law*, §64, p. 340.

³⁸ Purchased in "market overt".

³⁹ See 24 and 25 *Vict.* ch. 96 §100; Williams. *Inst. of Justinian*, p. 103. After the thief is convicted, the bona fide purchaser may have to return the property to its owner.

⁴⁰ ROMAN LAW:—*Digest* 41, 3, 25. MODERN LAW:—Civil Code of Louisiana 3487, 3500, 3506; France 2229; Germany 937; Italy 2106; Portugal 517; Chile 2507; Argentina 3948; Mexico 1079; Austria 1460; Quebec 2193; Japan 162; Switzerland 661; *Anglo-American Law*—Robinson, *El. Law*, §§132-133.

⁴¹ "Usurpatio naturalis",—Mackeldy, *Civil Law*, §277.

⁴² "Usurpatio civilis",—Mackeldy, *Civil Law*, §277.

⁴³ ROMAN LAW:—*Digest* 41, 3, 2, and 5; *Code* 7, 32, 10; *Code* 7, 40, 2 and 3; *Code* 7, 33, 1; *Digest* 44, 3, 10. MODERN LAW:—Civil Code of Louisiana 3516-3518; France 2242-2246; Italy 2123-2125; Chile 2501-2503; Germany 940-941; Spain 1944-1945; Mexico 1117; *Anglo-American Law*,—Robinson, *El. Law*, §§132-133.

⁴⁴ ROMAN LAW:—*Inst. of Justinian* 2, 6, 12-14; *Digest* 44, 3. MODERN LAW:—Civil Code of Louisiana 3493-3496; France 2235; Spain 1960; Porto Rico 1861; Austria 1493; Mexico 1077; Germany 943-944; Chile 2500; *Anglo-American Law*—Robinson, *El. Law*, §§132-133.

held to be completed at the end of its last day in Roman, French, Spanish, German, Italian, Mexican and Japanese law.⁴⁵

3. *Good Faith*.—The last requisite of every prescription in both Roman and Modern law is good faith⁴⁶ on the part of the possessor.⁴⁷ To possess by force, or secretly, or upon sufferance is not possession in good faith.⁴⁸ In other words the possession must be peaceable, and open or public.⁴⁹ So too in English law user which is by sufferance or secret will not establish a prescriptive law.⁵⁰

Moreover the Roman law required that the party who prescribes must begin in good faith his possession.⁵¹ But here English law apparently differs from the Roman: the possession need not originate bona fide.⁵² And yet this difference is not after all so real: cases in Roman law where the usual kinds of prescription are not available admit of the rare immemorial prescription,⁵³ and a possession begun mala fide can serve as a basis for a perpetual usage or exercise of a right.

⁴⁵ "Totem postrenum diem",—*Digest* 41, 3, 6. Civil Code of *France* 2261; *Germany* 188; *Italy* 2134; *Spain* 1960; *Mexico* 1129; *Japan* 141.

⁴⁶ "Bona fides". The "Conscience", on which equity in our law acts, very closely resembles the Roman "bona fides",—see Spence, *Equity* 411.

⁴⁷ ROMAN LAW:—*Inst. of Justinian* 2, 6, pr. Mackeldy, *Civil Law*, §277, §281, note E: Sohm, *Roman Law*, §64, p. 340. MODERN LAW:—Civil Code of *Louisiana* 3479, 3506; *France* 2265; *Italy* 2136; *Spain* 1955, 1957; *Porto Rico* 1856, 1858; *Anglo-American Law*—Robinson, *El. Law* §§132-133 (it must be "peaceable", "notorious").

⁴⁸ "Nec vi, nec clam, nec precario . . . possides",—*Digest* 43, 17, 1, 5 (Ulpian). This was originally a provision of the Praetor's edict.

⁴⁹ See Markby, *Elements of Law*, §583: our "Peaceable" and "open" are regarded as equivalent to the Roman "nec vi", "nec clam".

⁵⁰ *Smith v. Miller*, 11 Gray (*Mass.*) 145; *Perrin v. Garfield*, 37 *Vt.* 304; *Carger v. Fee*, 140 *Ind.* 572; *Wiseman v. Lucksinger*, 84 *N. Y.* 31; *Cronkhite v. Same*, 94 *N. Y.* 323; *Johnson v. Skillman*, 29 *Minn.* 95; *Colchester v. Roberts*, 4 *Mees. & W.* 769; *Cook v. Gammon*, 93 *Georgia* 118; *Daniel v. North*, 11 *East* 372.

⁵¹ *Digest* 41, 4, 2; *Digest* 41, 3, 15, 2. See also *Digest* 41, 4, 7, 4,— "mala fides superveniens non nocet": but the *Canon law* required him to have been in good faith the entire period of prescription,— "unde orportet, ut qui praescribit, in nulla temporis parte rei habeat conscientiam alienae," cap. 5, X, 2, 26; Mackeldy, *Civil Law*, §277, 2 note D (end), §281 note E.

⁵² Williams, *Inst. of Justinian*, p. 100; Markby, *Elements of Law*, §582. Markby severely criticises an English decision holding that the commencement of possession must be "bona fide", *i. e.* peaceable and open.

⁵³ See Mackeldy, *Civil Law*, §283.

Special Requisites of Ordinary Prescription.—In addition to the general requisites of prescriptible property, its continuous uninterrupted possession, and the exercise of good faith ordinary prescription⁵⁴ has some special requisites. These are good title and time.

1. *Good Title.*—No ordinary prescription can follow unless there was at its inception a just or sufficient cause⁵⁵—such as a sale, gift, exchange and the like—of transferring the property to the possessor.⁵⁶ In other words the prescriber must have acquired possession in a lawful manner,⁵⁷ and must hold the property as his own.

Modern law is the same as the Roman. There must be a “just title”;⁵⁸ “a title sufficient to transfer ownership”;⁵⁹ “a title legal and sufficient to transfer property”;⁶⁰ “a title . . . received from any person . . . honestly believed to be the real owner, provided the title were such as to transfer ownership”;⁶¹ “an instrument which is on the face of it capable of giving a title”;⁶² “that which is fundamentally believed to be sufficient to transfer ownership”;⁶³ “a title which would have sufficed for the acquisition of the property”;⁶⁴ “possession as if owner”;⁶⁵ “a belief of ownership”;⁶⁶ “a claim to be the owner”.⁶⁷ In one detail English law seems different from the Roman: although by English law as well as by Roman the enjoyment of possession must be “of right”, yet in English law it need not originate “of right”.⁶⁸ But this con-

⁵⁴ Known in Roman law as “praescriptio”, or “usucapio” (as to movables only in the Justinian law, but not in the ante-Justinian law), or “possessio longi temporis” (in the ante-Justinian law).

⁵⁵ “Justus titulus”.

⁵⁶ *Digest* 41, 3, 27; *Code* 3, 32, 24; *Code* 7, 14, 6.

⁵⁷ *i. e.* possess “bona fide pro suo.”

⁵⁸ Civil Code of *Spain* 1940 (Walton): *Louisiana* 3483; *Mexico* 1079.

⁵⁹ *Spanish* Civil Code 1952 (Walton).

⁶⁰ *Louisiana* Civil Code 3479.

⁶¹ *Louisiana* Civil Code 3484, 3483.

⁶² *French* Civil Code 2265.

⁶³ *Mexican* Civil Code 1080.

⁶⁴ *Austrian* Civil Code 1461.

⁶⁵ Civil Code of *Germany* 900, 937 (Wang); *Japan* 162 (Lönholm).

⁶⁶ *Spanish* Civil Code (Walton).

⁶⁷ *Anglo-American Law*—Robinson, *El. law*, §133.

⁶⁸ Williams, *Inst. of Justinian*, p. 100; Markby, *Elements of Law*, §582. Markby criticises severely an English decision holding that the commencement of prescription must be “of right”; he instances that a prescription may commence in trespass.

stitutes no substantial difference: even in Roman law, although an inception "not of right" would not lead to ordinary prescription, it should not be overlooked that it would serve as a basis for the extraordinary prescription of thirty years.⁶⁹

2. *Time*.—The other special requisite of ordinary prescription is the period of time fixed by law.⁷⁰ In Roman law this term was the expiration of three years for movables⁷¹ and of ten or twenty years for immovable property.⁷² Incorporeal things seem to have been considered as immovables.⁷³

These Roman periods of three years for movables and ten or twenty years for immovables have survived in the majority of the modern legal systems, although a few countries do not retain all three periods. The prescriptive periods in France, Spain, Austria, Italy, Louisiana, Quebec, Mexico, Japan are the same as the Roman periods of time.⁷⁴ By statute in England twenty years is the period of prescription for certain incorporeal hereditaments, as for instance an easement of light.⁷⁵ And this is also a common period in the United States.⁷⁶

According to Roman law if the parties were "present",⁷⁷ that is, both lived in the same province, the prescriptive period was ten years; if the parties were "absent",⁷⁸ that is, lived in different provinces, the prescriptive period was twenty years.⁷⁹ And this

⁶⁹ See *infra*, Note ⁸³ of this article.

⁷⁰ "Tempus".

⁷¹ *Inst. of Justinian* 2, 6, pr. This is the prescriptive period of time of the law of Justinian, and it was still referred to under the old name of *usucapio*.

⁷² *Inst. of Justinian* 2, 6, pr. This is the prescriptive period of the law of Justinian.

⁷³ Hunter, *Roman Law*, (4th edition) p. 419.

⁷⁴ Civil Code of *France* 2279, 2265 (three, ten and twenty); *Spain* 1955, 1957 (three, ten and twenty); *Porto Rico* 1856, 1858 (three, ten and twenty); *Italy* 2140, 2135, 2137 (three, ten and twenty); *Japan* 162, 163 (ten and twenty); *Quebec* 2258, 2268 (three and ten); *Austria* 1466; *Louisiana* 3538, 3544 (three and ten); *Mexico* 1086, 1088 (three, ten and twenty).

⁷⁵ See 2 and 3 *William IV*, ch. 71; Williams, *Inst. of Justinian* p. 99.

⁷⁶ *Sibley v. Ellis*, 11 Gray (*Mass.*) 417; *Curger v. Fee*, 140 *Ind.* 572.

⁷⁷ "Presentes."

⁷⁸ "Absentes".

⁷⁹ *Code* 7, 33, 12; *Code* 7, 31, 1; *Novel* 119, 7; Mackeldy, *Civil Law*, §137, 2; Hunter, *Roman Law*, p. 290.

Roman extension of ten years more to absent persons has also descended into many modern legal systems.⁸⁰

Special Requisite of Extraordinary Prescription,—Time.—The general requisites of every prescription—namely prescriptible property, its continuous uninterrupted possession, and good faith—are supplemented in extraordinary prescription⁸¹ by only one special requisite,—the term of the prescription is thirty years (ordinarily) or forty years (occasionally).⁸² At the expiration of this term the property is acquired by prescription. Defective titles are cured, and things exempted from ordinary prescription are acquired by this lengthy extraordinary prescription.⁸³

The Roman period of thirty years still survives in the law of numerous modern countries: for instance France, Germany, Italy, Spain, Austria, Chile, Quebec, Louisiana.⁸⁴ In the law of England, by statute the period of thirty years suffices⁸⁵ for acquiring certain profits à prendre,—a form of incorporeal hereditaments. The occasional Roman term of forty years is also a prescriptive period in Austrian law.⁸⁶ By statute in England forty years is the prescriptive period for acquiring certain easements.⁸⁷

Immemorial Prescription.—The Roman law mentions another peculiar and very rare variety of extraordinary prescription,—

⁸⁰ For the purpose of prescription, “domicil in the same state”, or “domicil in a foreign state”, is almost always the equivalent of the Roman domicil in the same or different provinces. See the Civil Code of *Spain* 1957, 1958; *Porto Rico* 1858, 1859; *Chile* 2508. But in *France* (Civil Code 2266) there is a distinction, like the Roman in principle, between persons domiciled in or out of the “district” (ressort); and in *Austria* (Code 1474) there is retained the Roman distinction between absence or presence from or in a “province”.

⁸¹ Known in Roman law as the “*praescriptio XXX vel XL annis*”, or “*praescriptio longissimi temporis*”, in the law of Justinian.

⁸² *Code* 7, 39, 8, 1 (Justinian): *Code* 7, 31 (Justinian): Mackeldy, *Civil Law*, §281.

⁸³ Mackeldy, *Civil Law*, §281; Sohm, *Roman Law*, p. 340. See supra, Note ⁶⁹, of this article.

⁸⁴ Civil Code of *France* 2262; *Louisiana* 3548; *Spain* 1959; *Porto Rico* 1860; *Chile* 2510; *Italy* 2135; *Germany* 195; *Quebec* 2265; *Austria* 1470, 1480, 1478, 1468, 1477.

⁸⁵ 2 and 3 *William IV* ch. 71; Williams *Inst. of Justinian*, p. 99.

⁸⁶ Civil Code of *Austria* 1474, 1477.

⁸⁷ 2 and 3 *William IV* ch. 71; Williams, *Inst. of Justinian*, p. 99.

immemorial prescription.⁸⁸ Its basis is this principle: that if anyone uninterruptedly possessed a thing or right beyond the memory of man, he should be regarded as its lawful owner or holder. Hence it is a kind of subsidiary prescription where ordinary or extraordinary prescription would not be available, and is proved by witnesses who may qualify either by what they have seen themselves or heard from their ancestors: The prescriber has to prove a perpetual usage or exercise of a right.

Immemorial prescription was borrowed from the Roman by the Canon law,⁸⁹ and in this way its principles have made an impression on English law. Here is an interesting English blend of the Roman twenty year and immemorial prescriptions: in the English common law hereditaments are acquired by usage from time immemorial; but, according to Stephen⁹⁰ and other authorities,⁹¹ enjoyment for twenty years raises a presumption that it is immemorial.

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⁸⁸ "Praescriptio immemorialis" or "indefinita". *Digest* 43, 203, 4 (Pomponius),—"Ductus aquae cujus origo memoriam excessit, jure constituti loco habetur". See also *Digest* 8, 5, 10; *Digest* 39, 3, 2, 1—8; *Digest* 39, 3, 26. Other expressions are "nec memoriam extare", "quorum memoriam vetustas excedat", "contrarii memoria non extat". See on this subject Savigny, *Système*, vol. 4, p. 481; Mackeldy, *Civil Law*, §283.

⁸⁹ "Vel ex antiquo consuetudine a tempore, cujus non extat memoria, introducta",—cap. 26, X, 5, 40.

⁹⁰ 1 Stephen, *Comm.*, Book II, pt. 1, ch. 33; Williams, *Inst. of Justinian*, 99.

⁹¹ Hopkins, *Real Property*, p. 352, Notes 23 and 24.