ACQUISITIVE PRESCRIPTION

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

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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 praescriptiones\(^6\) 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 \textit{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 prescription\(^4\) 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.

\textit{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" (\textit{i. e.}, the suit ought not to have been brought at all—\textit{Gaius}, 4, 133), and the "praescriptio fori" (\textit{i. e.}, the suit is not within the jurisdiction of the Court—\textit{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 \textit{Civil Code} of \textit{Chile} very sharply draws the distinction between these two kinds of prescription,—see articles 2492, 2498, 2514.

\(^9\) "Praescriptio acquisitiva",—see Mackeldy, \textit{Civil Law}, (Kauffman’s Edition) §202 (Kauffman’s note); \textit{Civil Code} of \textit{Chile}, 2492, 2498.

\(^10\) "Praescriptio extinctiva",—see Mackeldy, \textit{Civil Law}, §202 and 276

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

\(^12\) "Ut aliquis litium finis esset"—\textit{Digest} 41, 10, 5. See Broom, \textit{Legal Maximus}, p. *695 note 3.

\(^13\) \textit{Anglo-American Law}, 2 Blackstone. \textit{Comm.} p. 195-196, 263-266; \textit{Civil Code} of \textit{France} 221\(q\) et seq; \textit{Spain} 1940 et seq; \textit{Germany} 937 et seq; \textit{Italy} 2105 et seq; \textit{Portugal} 517 et seq; \textit{Austria} 1451 et seq; \textit{Mexico} 1079 et seq; \textit{Chile} 2498 et seq; \textit{Argentina} 3999 et seq; \textit{Louisiana} 3472 et seq; \textit{California} 1000; \textit{Switzerland} 661 et seq., 728; \textit{Japan} 162 et seq.; \textit{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 "usucapiio" (in the ante-Justinian law: usucapiio 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."28 "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

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28 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.\textsuperscript{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.\textsuperscript{36} A third party obtaining the property
in good faith from the thief or wrongful ejector is not disqualified
from acquiring it by prescription.\textsuperscript{37} And the law of England also
favors a bona fide purchaser of stolen goods,\textsuperscript{38} who buys them
prior to the thief's conviction.\textsuperscript{39}

2. Continuous Uninterrupted Possession.—Another requisite
of every prescription in both Roman and Modern law is a con-
tinuous uninterrupted possession of the property for the period of
time fixed by law.\textsuperscript{40} There are two ways of interrupting a pre-
scription: natural interruption,\textsuperscript{41} or actual loss of the possession,
and legal interruption,\textsuperscript{42} or the bringing of a suit against the pos-
sessor's right. Both ways of interruption are recognized in mod-
ern as well as in Roman law.\textsuperscript{43}

In both Roman and Modern law the person intending to pre-
scribe 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.\textsuperscript{44} The period of prescription is

\textsuperscript{35} "Vitium rei inhaerens",—Mackeldy, Civil Law, §277.

\textsuperscript{36} Digest 41, 3, 4, 6; Digest 50. 16, 215; Inst. of Justinian 2, 6, 8.

\textsuperscript{37} See Sohm, Roman Law, §64, p. 340.

\textsuperscript{38} Purchased in “market overt”.

\textsuperscript{39} See 24 and 25 Vict. ch. 96 §100; Williams. Inst. of Justinian, p. 103.

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

\textsuperscript{41} "Usurpatio naturalis",—Mackeldy, Civil Law, §277.

\textsuperscript{42} "Usurpatio civilis",—Mackeldy, Civil Law, §277.

\textsuperscript{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.

\textsuperscript{44} ROMAN LAW:—Inst. of Justinian 2, 6, 12-14; Digest 44, 3. MOD-
ERN 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 postremum 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 orpetet, ut qui prae Scribit, 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.
ACQUISITIVE PRESCRIPTION

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 “usuacpio” (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 movables 71 and of ten or twenty years for immovable property. 72 Incorporeal things seem to have been considered as immovables. 78

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.
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,—

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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.


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. 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, 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 Stephen and other authorities, 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.