

Tulsa Law Review

Volume 7 | Number 2

1971

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Recommended Citation

Marian P. Opala, *Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law*, 7 *Tulsa L. J.* 107 (1971).

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TULSA LAW JOURNAL

VOLUME 7

SEPTEMBER, 1971

NUMBER 2

PRAESCRIPTIO TEMPORIS AND ITS RELATION TO PRESCRIPTIVE EASEMENTS IN THE ANGLO-AMERICAN LAW

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Lapse of time, coupled with non-possession or inaction, may alter a man's legal position *vis-a-vis* his property, both corporeal and incorporeal, in several different ways. The law may (1) bar the owner from asserting his rights by a droitural action and thus leave these rights suspended in a state of unenforceability; (2) extinguish his legal right as well as his remedy; (3) transfer his rights to another who has exercised them by long-continued possession or use; and (4) impose a presumption that long-continued possession or use by another had its beginning in a lawful devolution of right. The legal concept embodied in the first example aims at destroying actionability only, while that in the second example also effects an extinguishment of rights. Both have an essentially negative or divestitive character. In the last two examples the effect is positive or investitive.

A closer look at these four concepts reveals distinct approaches to the effect which lapse of time is to produce. The approach described in the first example differs drastically from all others because it alone operates solely to bar actions. The dichotomy of right and remedy it creates is a phenomenon

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peculiar to the mediaeval common law in which it is known in legal parlance by the term "limitation of actions".¹ In the second and third example lapse of time affects primarily rights. In the former it operates to produce their extinguishment, in the latter it affords a mode of acquiring them. Both of these last mentioned examples represent an institution known in the language of modern civil law by the term "prescription". Prescription that destroys rights is called "extinctive", and prescription that creates new rights is termed "acquisitive".² The approach described in the fourth example, that of imposing a presumption, differs somewhat from an acquisitive prescription, though its effect is also investitive. A presumption does not afford a mode of acquiring new rights but rather provides a means of protecting a presumably lawful acquisition of presently existing rights, whose origin is lost in antiquity. It is a legal substitute for title supplied through an evidentiary device.³ Its employment is found both in the common and Roman law systems.

¹ "An immortal right to bring an eternally prohibited action is a metaphysical subtlety" produced by feudal jurists. The notion that a right may survive the extinction of all remedies for its enforcement is peculiar to the Anglo-American law. AMES, LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 199 (1913).

² MACKELDEY, HANDBOOK OF ROMAN LAW 226 (Dropsie transl. 1883); SHERMAN, 2 ROMAN LAW IN THE MODERN WORLD 216 (1922); the useful distinction between acquisition of rights by lapse of time and extinction of rights by lapse of time was first introduced by mediaeval writers. The terms "extinctive" and "acquisitive" do not appear in Roman texts and Savigny objected to their use. 4 SAVIGNY, SYSTEM DES HEUTIGEN ROEMISCHEN RECHTS 313 (1841); DE COLQUHOUN, 2 SUMMARY OF THE ROMAN CIVIL LAW 149 (1851); SCHUSTER, THE PRINCIPLES OF GERMAN CIVIL LAW 129 (1907). Modern civil codes have adopted these terms and follow the distinction. 2 SHERMAN, ROMAN LAW IN THE MODERN WORLD 217 (1922).

³ "*Non tam est praescriptio quam titulus*". 1 PLANIOL, CIVIL LAW TREATISE, Pt. 2, § 2946, p. 736 (Louisiana State Law

Acquisitive prescription as a mode of creating title to land was unknown to the mediaeval common law.⁴ Neither was extinctive prescription recognized. The feudal law of England simply did not allow tenurial rights ever to be destroyed.⁵ The limitation of actions could bar only the dis-seisee's remedy but never his right.⁶ This basic approach is reflected in the ancient maxims which, in a somewhat more restrictive sense, still have currency in American law: "Mere lapse of time may serve as a shield for the tenant, but it cannot serve as a sword for the demandant",⁷ "A right cannot

Institute transl. 1959). In a presumption the right is treated as "*altbegründet*" (anciently founded), in prescription as now created. DERNEBURG, ROEMISCHES RECHT, MUELLER VERLAG, 381 (1911); also, SAVIGNY, *supra* note 2 at 528.

⁴ 2 POLLOCK AND MATTLAND, HISTORY OF ENGLISH COMMON LAW 81 (1911); also, 3 HOLDSWORTH, A HISTORY OF ENGLISH COMMON LAW 166 (1926).

⁵ POLLOCK AND MATTLAND, *supra* note 4 at 141. The annihilation of an estate of a feudal tenant was inconceivable; if this were allowed either of three results would come about: (1) forfeiture to the Crown; (2) Escheat to the lord; and (3) ownership would become allodial. Meredith, *A Paradox of Sugden's*, 34 L.Q.R. 253, 259.

⁶ "The man who cannot allege a seisin on this side of Henry II's day [coronation of Henry II in 1154, fixed by Statute of Merton, 1235, 20 Hen. 3, c.8, as a limitation on the writ of right] has lost every action for the land; but it does not follow that *his right is extinct*. Hereafter it may prove its vitality, if this man, having obtained seisin under some new or defeasible title, is 'remitted' to the oldest title that he has." POLLOCK AND MATTLAND, *supra* note 4 at 141. This is so because an English feudal tenant always retains his *ius maius*, also called by its Norman French name of *mere dreit* (*droit majeur*). HOLDSWORTH, *supra* note 4 at 89; also, GUETERBOCK, BRACON AND HIS RELATION TO THE ROMAN LAW 120 (Cox transl. 1866); and also, POLLOCK AND MATTLAND, *supra* note 4 at 77, note 1.

⁷ *Id.* at 141; As late as 1899 the Kansas Supreme Court held that a statute of limitation which bars recovery of land is a "weapon of resistance, not of attack". *Corlett v. Insurance Co.*, 60 Kan. 134, 55 P. 844 (1899). This rule was later changed

die",⁸ "The statute of limitation operates merely upon the remedy and does not bar the right".⁹

Easements and profits comprise the only branch of the common law which escaped the imposition of the right-remedy dichotomy regime of limitations.¹⁰ In the common law system easements include those accessorial rights to one's soil which confer merely a convenience to be exercised over the neighboring land, without any participation in the profits of it;¹¹

in *Freeman v. Funk*, 85 Kan. 473, 117 P. 1024 (1911). The latter holding was followed by the Oklahoma Supreme Court in *Stolfa v. Gaines*, 140 Okla. 292, 283 P. 563, 567-70 (1930). In *Stolfa* the court recognized the provisions of OKLA. STAT. tit. 60, §333 as abrogating the common law and effectively investing with title the adverse occupant for the period that is prescribed as sufficient to bar recovery of the property. "When that bar became effective, it resulted in the acquisition of title to the property by the plaintiff by prescription" (283 P. at 570). A few American courts made an early departure from the right-remedy dichotomy of the common law. The Wisconsin Supreme Court held in *Eingartner v. Illinois Steel Co.*, 103 Wisc. 373, 376, that "The law deals only with enforceable rights, and if such a right be changed into a mere moral obligation, in a legal sense it no longer exists at all."

⁸ COKE ON LITTLETON, INSTITUTES OF THE LAW OF ENGLAND §§ 279 and 478 (1853). The maxim was expressed in Latin as *dormit aliquando ius, moritur numquam*. POLLOCK AND MATTLAND, *supra* note 4 at 141.

⁹ WOOD, LIMITATIONS OF ACTIONS 18 (1882). The right-remedy dichotomy may have far-reaching practical consequences. NICHOLAS, ROMAN LAW 120 (1962); SALMOND, JURISPRUDENCE 614-15 (9th ed. 1936); POLLOCK AND MATTLAND, *supra* note 4 at 123, 414-5. Salmond calls the English limitations an "imperfect negative prescription." SALMOND, JURISPRUDENCE 618 (9th ed. 1936).

¹⁰ HOLDSWORTH, *supra* note 4 at 166; POLLOCK AND MATTLAND, *supra* note 4 at 141-2.

¹¹ The word "easement" comes from Norman French "*aise*" and "*aisance*", meaning neighborhood, neighborliness, comfort, opportunity and convenience. It is derived from Latin *adiacens* (adjacent). In Latin manuscripts the word ap-

those accessorial rights which are accompanied with a participation in the profits of the neighboring soil are called profits *a prendre* (such as rights of pasture or of digging sand). Both classes of these accessorial rights are comprehended under the servitudes of the civil law.¹² The English law since the time of Bracton (1200-1268), if not since a century earlier, has allowed easements to be acquired through immemorial user termed "prescription". This was the only form of acquisitive prescription known to the common law. Its application has been firmly restricted to easements and profits.¹³

Though much has been written about the history of prescriptive easements in the Anglo-American law, little insight can be gained from the existing literature into the non-English antecedents of immemorial prescription and their course of evolution. This study will endeavor to trace immemorial prescription through the canon law into the Roman texts whence it came; to show that prescriptive easements in the English law evolved along a pattern very similar to that of

pears as *aisiamenta*. In its original Norman French meaning the term may have been broad enough to comprise all servitudes. GUETERBOCK, *supra* note 6 at 174.

¹² GAYLE, EASEMENTS 1-2 (5th ed. 1876).

¹³ HOLDSWORTH, *supra* note 4 at 166. Early common law may have recognized that social status was subject to change by prescription. Under some royal charters, not uncommon in the Middle Ages, it was possible for anyone who had lived in the town for a year and a day to acquire the status of a burgher. Thus, an escaped villein, fortunate to evade detection during the requisite period while living in such chartered town, would acquire burgher status by lapse of time. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 162 (1942). A family of freemen could probably be reduced to villeinage status by proof that they have performed unfree services for four to five generations. Chief Justice Hengham's statement that "*praescriptio temporis non redigit sanguinem liberum in servitutem*", appears to be of doubtful historicity. 8 GRAVESON, STATUS IN THE COMMON LAW (1953).

the *longa possessio* developed by the praetors as a foundation for the acquisition of servitudes; and that both of these institutions ultimately gave way to a fixed period of prescription, though each underwent a different process of transition in the Roman, English and American law.

Prescription is a term of Roman law with a telling etymology. It is a derivative of Latin "*praescriptio*", meaning something written first, above or before. The word made its debut in the Roman law of the late republic and the early empire as a term of art used in the formulary procedure before the praetors. In its early form it consisted of a statement "written above" plaintiff's claim in the regular part (*declaratio*) of the formula directed by the praetor to the trier of facts variously designated as *iudex*, *arbiter*, or *recuperator*.¹⁴ The object of the *praescriptio* was to direct the trier of facts to dispose of a preliminary objection before proceeding to the main issue. Among the more important objections available to the defendant was *praescriptio temporis*—a plea based on the effect of lapse of time.¹⁵ When a proprietor claimed a thing or right from one who had been in possession of it for a long time, the formula sent to the trier of facts recited: *Ea res agatur, cuius non est longi temporis possessio* (proceed to determine the main issue if you find that the defendant has not been in long-continued possession).¹⁶ After the formulary procedure fell into disuse in the days of the late empire *praescriptio*, by process of metonymy and abbreviation, acquired its present day meaning.¹⁷ In modern civil

¹⁴ "*Praescriptiones sic appellatas esse ab eo quod ante formulas praescribuntur plus quam manifestum est*". *Gaius* IV. 132.

¹⁵ *Gaius* IV. 133; Sherman, *Acquisitive Prescription—Its Existing World-Wide Uniformity*, 21 *YALE L. J.* 147-8 (1912); see also, 1 *UNTERHOLZNER, VERJAEHRUNGSLEHRE* 9 (1928).

¹⁶ SANDARS, *THE INSTITUTES OF JUSTINIAN* 208 (1876).

¹⁷ SALMOND, *supra* note 9 at 613; BURDICK, *PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 528 (1938); SHERMAN *supra* note 15 at 215.

and canon law prescription is universally used as a term denoting the manner "of acquiring and losing the right of property in a thing, and all other rights, by the effect of time."¹⁸

Prescription was a stranger to the ancient Anglo-Saxon law.¹⁹ The precise time of its entry into post-Conquest England cannot be fixed with any degree of accuracy. The best estimate is that the judges began to apply it in the twelfth or thirteenth century.²⁰ Glanville, whose *Tractatus de Legibus et Consuetudinibus Regni Angliae* is believed to have been written between 1180 and 1189, makes no mention of prescription.²¹ What is certain is that various limitations of time for recovery of land had already gained a firm foothold when the rudimentary notion of lapse of time as a mode of acquiring rights by operation of law made its first recorded appearance in Bracton's *De Legibus Angliae*.²² It is not certain when Bracton wrote his treatise. The time is variously estimated at between 1256 and 1259, between 1250 and 1258²³ (when he served as a judge of King Henry III), or simply at "before 1239" (when he was the clerk of Judge William Raleigh).²⁴ This entire period (and, indeed, the entire century between 1150 and 1250) is marked by the strongest direct influence of the civil and canon law upon the development

¹⁸ 1 DOMAT, CIVIL LAW 872 (1824). CASTEL, THE CIVIL LAW SYSTEM IN THE PROVINCE OF QUEBEC 145 (1962); CICOGNANI, CANON LAW 651 (1932).

¹⁹ SHERMAN, *supra* note 15 at 149.

²⁰ SALMOND, *supra* note 9 at 268.

²¹ GUETERBOCK, *supra* note 6 at 118.

²² Pre-Bractonian limitations of time on the writ of right are: Henry I's accession on August 5, 1100 (GLANVILLE, LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND 237, 240 (1890); the death of Henry I in 1135 (3 Selden Society, Selected Civil Pleas, Baildon ed. 1889); and by Statute of Merton, 1235, 20 Hen. 3, c.8, the limitation was fixed at the accession of Henry II in 1154.

²³ AMES, *supra* note 1 at 31.

²⁴ KANTOROWICZ, BRACTONIAN PROBLEMS 24, 26, 36 (1941).

of English institutions then in a formative stage.²⁵ Bracton's use of Roman law texts and terms, as well as his plagiarism from Azo,²⁶ have been the subject of much discussion in the last one hundred years or even longer.²⁷ While the writers vary widely in their views about the accuracy, extent, quality and impact of Bracton's "borrowings" from the civilians, all seem to agree upon the presence of some "Romanesque" content linking Bracton, through Azo, to the *Corpus Juris Civilis* and to the canonists.²⁸

Aside from explaining the rudimentary concept²⁹ of lapse of time as capable of creating rights, Bracton made two other lasting contributions to the developments of prescriptive easements. Firstly, Bracton's idea that the prescriptive user must

²⁵ Woodbine, *Origins of the Action of Trespass*, 33 YALE L.J. 799, 813 (1924).

²⁶ Azo, referred to as one of the most distinguished of all glossators, died in 1230. He was a student of Rogerius, who in turn was a disciple of Bulgarus, one of the *quattuor doctores* who followed Irnerius. Besides glosses, Azo also wrote *distinctiones* and *brocarda*. By far the most influential of his writings are his two *summae*. Sass, *Medieval Roman Law: A Guide to the Sources and Literature*, 58 LAW LIB. J. 130, 143. GUETERBOCK, *supra* note 6 at 51.

²⁷ Houard, a Frenchman, who published in 1776 his *Traites sur Les Coutumes Anglo-Normandes*, was so struck with Bracton's Romanizing tendencies that he excluded him entirely from his collection of Anglo-Norman legal sources, though he listed Glanville and Fleta. Scrutton, *Roman Law in Bracton*, 1 L.Q.R. 425. Some writers look upon Bracton's *De Legibus* as a corruption of the English Law, others claim that he has in general reproduced only those Roman elements which were actually received in England as valid law, though in some instances he has made additions to them. KANTOROWICZ, *supra* note 24 at 80; MAINE, *ANCIENT LAW* 82 (1864).

²⁸ 2 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 267-82 (1926); Woodbine, *Roman Element in Bracton*, 31 YALE L.J. 827, 828, 840; and *A Bracton Symposium*, 42 TULANE L.R. 455-602 (1968).

²⁹ Gueterbock doubts whether Bracton really understood the

be *nec vi nec clam nec precario*,³⁰ which he had doubtless copied from the Digest, either directly or through Azo,³¹ became firmly settled in the common law;³² secondly, Bracton's requirement that the *longum tempus*³³ (he also mentions *diuturnus usus*) necessary to bound precriptive title to an easement be one which "*excedit memoriam hominum*,"³⁴ was adopted by the common law as its immemorial prescription—the only acquisitive prescription then known to that system.³⁵ The immemorial period of prescription Bracton appears to have borrowed from a passage in Azo: *Nam constituuntur servitutes per consuetudinem temporis, cujus non exstat memoria*.³⁶ Soon after Bracton's time, his simple description of a long user extending beyond human memory became known to the English jurists by the turgid, and far less intelligible, Norman French phrase "*de temps dont memorie des homes ne curt a le contrarie*,"³⁷ from which it was translated into English as "time whereof the memory of man runneth or knoweth not to the contrary",³⁸ or, more simply, as "time out

meaning of acquisitive prescription. He quotes a passage in which Bracton speaks of prescription, not as a means of acquiring the right of property, but only rights of possession (*modus acquirendi possessionis; acquiritur possessio ex tempore*) GUETERBOCK, *supra* note 6 at 119.

³⁰ BRACTON, DE LEGIBUS ANGLIAE 221, 222b (Woodbine ed. 1932).

³¹ D. 8, 5, 10 *pr.*; C. 3, 34, 2; C. 3, 34, 1; D. 39, 3, 1. (All citations to the *Corpus Juris Civilis* of Justinian when referring to the *Digest* are prefixed by the letter *D.*; those referring to the *Novellae* by *N.*; those referring to the *Institutes* by *I.*; and those referring to the *Code* by *C.*).

³² 7 HOLDSWORTH, A HISTORY OF ENGLISH LAW 343 (1926).

³³ BRACTON, *supra* note 30 at 51b, 52.

³⁴ *Id.* at 221, 222b, 230; also, COKE ON LITTLETON, *supra* note 8 at 115a.

³⁵ 2 BLACKSTONE, COMMENTARIES 264 (Hammond ed. 1889).

³⁶ GUETERBOCK, *supra* note 6 at 124.

³⁷ COKE ON LITTLETON, *supra* note 8 at § 170.

³⁸ *Id.* at § 1115a; SIMPSON, AN INTRODUCTION TO THE HISTORY OF LAND LAW 103 (1961).

of minde".³⁹ The variance between Bracton's and Azo's Latin on the one hand, and the law French description of immemorial time on the other, appears too significant to go unnoticed or be dismissed as purely accidental. The language of Bracton and Azo bear a remarkably close resemblance to the phrases found in the Roman texts: "*cuius origo memoriam excessit*",⁴⁰ "*quorum memoriam vetustas excedit*"⁴¹ and "*si memoria eius non extat*";⁴² the law French formulation of immemorial time, and its literal English translation, bear the unmistakable imprint of mediaeval Latin usage of the canonists who often referred to immemorial antiquity in terms of "*tempus, cujus contrarii hodie non existit memoria*".⁴³ This alone affords a rather strong basis for suspicion that the common law definition of immemorial time may have been taken directly from canonist manuscripts either before or after Bracton. Maine⁴⁴ suggests that two influential groups in post-Conquest England combined forces to impose the adoption of immemorial prescription and to reject Roman law's definite prescriptive periods;⁴⁵ one

³⁹ COKE ON LITTLETON, *supra* note 8 at § 114b.

⁴⁰ D. 43, 20, 3, 4.

⁴¹ D. 39, 3, 2, 3.

⁴² D. 39, 3, 2, 5. There are only three places in the Roman law sources in which immemorial time is mentioned. These are: D. 43, 20, 3, 4; D. 39, 3, 2 and D. 22, 3, 28. UNTERHOLZNER, *supra* note 15 at 502; SAVIGNY, *supra* note 2 at 485. Savigny takes the position that faulty exposition has brought immemorial prescription into the Roman Law. "*Die Immemorialpraescription ist ueberhaupt blas durch exegetische Missverstaendnisse in das Roemische Recht hineingetragen worden.*" SAVIGNY, DAS RECHT DES BESITZES 53 (1837).

⁴³ UNTERHOLZNER, *supra* note 15 at 515-18; SAVIGNY, *supra* note 2 at 506, 508, 509.

⁴⁴ MAINE, *supra* note 27 at 276-7.

⁴⁵ The Roman law, in its final stage of development, produced several definite periods of prescription. These were carried into the Corpus Juris Civilis as *longi temporis praescriptio*, I. 2, 5 *pr.*; C. 7, 31, 1, which provided a period of three years for moveables and, in case of immovables, ten years, if the parties resided in the same province, and 20

was composed of canonists and the other of scholastically-minded feudal jurists. The former regarded the privileges of the church as incapable of being lost through disuse, the latter "taught that whatever turn actual legislation might take, a right howsoever long neglected, was in point of fact indestructible." The canonists recognized time immemorial not merely as a period of prescription, but also as a condition of the validity of customary law over *ius commune ecclesiae* (the general law of the church). According to the canon law, custom could not derogate from the church law unless established from immemorial time. This was expressed by the Latin maxims "*consuetudo praescripta praejudicat juri communi*,"⁴⁶ "*consuetudo a tempore, cujus non extat memoria, introducta*,"⁴⁷ and "*illa consuetudo praejudicat juri, quae excedit hominum memoriam*."⁴⁸ At a later time this period was reduced to forty years of continuous and uninterrupted usage, but as "against an ecclesiastical law which contains a clause forbidding contrary customs in the future, only a reasonable custom that is either immemorial or centenary can obtain the force of law."⁴⁹ The change, when made, came too late to alter the common law in which the earlier canonical principle requiring immemorial antiquity for recognition of customs and rights had already made a secure place for itself through the influence of ecclesiastical judiciary.⁵⁰ It had also passed into the law of France, Germany and Spain, where it was received in a

years if they resided in different provinces; if they lived in the same province a part of the time, and in different provinces a part, two years of absence counted as one year of presence. N. 119, 8; and as *longissimi temporis praescriptio*, C. 7, 39, 8, of 30 and 40 years applicable to cases in which the prescribing claimant had no *iustus titulus*.

⁴⁶ SALMOND, *supra* note 9 at 268.

⁴⁷ SHERMAN, *supra* note 15 at 225.

⁴⁸ SALMOND, *supra* note 9 at 269, note (g).

⁴⁹ CICOGNANI, *supra* note 18 at 649-52.

⁵⁰ SALMOND, *supra* note 9 at 270.

much more limited degree.⁵¹

The origin of immemorial time as a prescriptive period is often attributable to Roman texts. It is said that in Roman law servitudes could be acquired by immemorial user.⁵² That thesis is highly questionable. As Savigny points out, no *private* rights in servitudes could be established in Roman law by user extending beyond the span of human memory. The three passages in the Digest which make mention of immemorial time apply exclusively to acquisition of *public* rights in common ways, protective installations against rainwater and in waterways.⁵³ The mediaeval *praescriptio immemorialis* is rather to be regarded as an ecclesiastical invention brought about through an extended exposition of Roman sources to meet canonical predilections.⁵⁴ Its manifest purpose was to protect the church against loss of property and encroachment of customs upon the *commune jus ecclesiae*. And since this goal happened partly to coincide with the interests of feudal barons,

⁵¹ Immemorial prescription in France required possession for 100 years. Its application to servitudes was abolished in France as well as in Louisiana. C. Civ. art. 691 (Napoleonic Code); LA. CIV. CODE art. 766. These articles define immemorial possession as "that of which no man living has seen the beginning, and the existence of which he has learned from his elders." Planiol, *supra* note 3 at 735. Under the *Las Siete Partidas* compilation of Spain, promulgated in 1348, but prepared between 1256-1263 (the time of Bracton), discontinuous easements could be acquired by immemorial prescription. *Las Siete Partidas, Partida 3, Title XXXI, l. 15*; immemorial user is still recognized as an "extra-ordinary" basis for acquisitive prescription of servitudes by the uncodified Roman-Dutch law of South Africa. LEE, INTRODUCTION TO ROMAN-DUTCH LAW 173 (1953). In international law, as expounded by Grotius, "a possession going beyond memory absolutely transfers ownership." GROTIUS, DE IURE BELLI AC PACIS, 1. II, *cap.* IV, v(2).

⁵² SALMOND, *supra* note 9 at 269.

⁵³ SAVIGNY, *supra* note 2 at 481-505; see also note 42.

⁵⁴ SAVIGNY, *supra* note 42 at 53; SALMOND, *supra* note 9 at 269.

who deemed their tenurial rights to be perpetual, the church had no difficulty in imposing its will upon post-Conquest England.⁵⁵

The weight of textual authority strongly inclines to the view that recognition of rights, when extended on the basis of immemoriality, should be treated not as a prescription but rather as an evidentiary presumption. By operation of prescription title is added at a fixed point of time to long-continued possession or use, and the effect is to create new rights, though in some instances a previously completed acquisition, whose proof cannot be made due to lost muniments of title, may also fall within the ambit of protection. In contrast to this, immemorial time is not a definite period at the end of which rights change. Its primary aim is not to create new rights by operation of law but to afford protection to rights already existing, which were presumably lawfully acquired, and to safeguard them from attack.⁵⁶ Prescription is complete when its fixed period has elapsed, and no proof may be admitted to show that the prescriber's right, if any he had, was defective or fraught with infirmity before the passage of time. Not so when immemoriality is relied upon for recognition of rights. Even if the user exceed the memory of living men, written proof to the contrary may be admitted to refute the existence of the right, because *Litera scripta manet*, and when by record or other writing human memory is "committed to posterity", it is said to "*tradere memoriae*".⁵⁷ This was the

⁵⁵ MAINE, *supra* note 27 at 276-7; Post-Conquest England received "the most perfect form of feudal organization" and its land law reflects that it became the most thoroughly feudal of all the European states. Franklin, *Bracton, Para-Bracton (s), and the Vicarage of the Roman Law*, 42 TULANE L.R. 455, 505 (1968).

⁵⁶ SAVIGNY, *supra* note 2 at 527-30; DERNBURG, *supra* note 3 at 381; UNTERHOLZNER, *supra* note 15 at 532; 2 UNTERHOLZNER, *supra* note 15 at 162; see also note 3.

⁵⁷ COKE ON LITTLETON, *supra* note 8 at §115a.

rule both at common law and on the Continent.⁵⁸ In its actual application the English immemorial user of easements functioned merely to supply a rebuttable presumption of a lawful origin of right.⁵⁹

In Roman law prescriptive servitudes had a like beginning. There is a marked similarity in the evolution of prescriptive easements at common law and the prescriptive servitudes of the Roman law. To begin with, neither system allowed rights *in solo alieno* to be created by long-continued use. Post-Conquest England started out with a pre-existing absence of prescription in the Anglo-Saxon law; in Rome, an old statute of uncertain date, known as Lex Scribonia, abrogated or forbade the acquisition of easements by lapse of time.⁶⁰ Neither system required bona fides⁶¹ and *iustus titulus*⁶² of the prescribing claimant. It was sufficient if the use sought to be prescribed was enjoyed *non vi non clam non precario* (peacefully, openly and without the servient owner's request or permission). Both systems recognized tacking of possession (*accessio temporis*).⁶³ In the formative stage of development there was no definite prescriptive period either in the English or Roman law but both systems ultimately passed to the stage of a fixed time span. The law of Rome made this transition fairly smoothly,

⁵⁸ *Id.*

⁵⁹ SAVIGNY, *supra* note 2 at 531-3; UNTERHOLZNER, *supra* note 15 at 532.

⁶⁰ D. 41, 2, 4, 28 (29); D. 8, 1, 14 pr.

⁶¹ There is some controversy concerning the bona fides, but the weight of authority indicates that it was not required. UNTERHOLZNER, *supra* note 15 at 179; RADIN, ROMAN LAW 378 (1927); The common law does not require bona fides for prescriptive acquisition. RADIN, ROMAN LAW 366 (1927).

⁶² RADIN, *supra* note 61 at 378; UNTERHOLZNER, *supra* note 15 at 177-8; RADIN, *supra* note 61 at 366; *Iustus titulus* is "an event or dealing which is normally the basis of acquisition", e.g. purchase, gift, legacy, finding an apparently abandoned thing, etc. JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 153 (1952); RADIN, *supra* note 61 at 365.

⁶³ I. 2, 6, 13; D. 41, 4, 2, 20; C. 7, 31, 3; TIFFANY, REAL PROPERTY 799, (New Abridged Edition 1940).

the common law underwent a truly contortive evolution before reaching that plateau. In the United States, as will be shown later, the final stage is yet to be reached. Lastly, both in England and in Rome prescriptive acquisition of rights in the land of another passed from one stage to another in a process of evolution separate from, though not entirely independent of, the law governing prescriptive acquisition of title to land.

The Roman story is rather simple. In the old *ius civile* there were apparently juristic objections to applying *usucapio* to servitudes.⁶⁴ The usucapion, an institution of the quiritary law, afforded a means of acquiring *dominium* (ownership) of immovable property by possession of two years' duration, but this institution was available only to Roman citizens and did not apply to land lying outside of Italy.⁶⁵ Since in the Twelve Tables no mention was made that incorporeal things could also be acquired by usucapion, and servitudes were regarded as incapable of corporeal possession, it was thought illogical and inconsistent to bring these rights *in re aliena* within the benefit of usucapion. This is generally given as the reason for enacting Lex Scribonia, of which mention was made earlier.⁶⁶ But despite the prohibition of this law, praetorian practice began to recognize the dominant use as having the quality of *quasi possessio* or even *possessio servitutis* and proceeded to extend protection to those claimants whose user was characterized as *longa possessio*, *diuturnus usus*, *vetustas*, *longae possessionis praerogativa*, *longa consuetudo*, *consuetudo longi temporis*. This was done not only by allowing an *exceptio* founded upon it, but also by a *utilis in rem actio*.⁶⁷ At first, the length of time necessary to establish the right of long user was left in the discretion of the trier of facts whose decision had to be based on enjoyment *non vi non clam non*

⁶⁴ DE COLQUOHOUN, *supra* note 2 at 143.

⁶⁵ LEAGUE, ROMAN PRIVATE LAW 134 (1906).

⁶⁶ DE COLQUOHOUN, *supra* note 2 at 143.

⁶⁷ PARTSCH, DIE LONGI TEMPORIS PRAESCRIPTIO IM KLASSISCHEN RECHTE 96-100 (1906).

precario. As early as 212 or 217 AD the rescript of Caracalla established, by analogy to the previously introduced *longi temporis praescriptio* (general prescription), that 10 years *inter praesentes* (between residents of the same province) and 20 years *inter absentes* (between parties residing in different districts) shall be applied as a time limit for the *longa possessio* of servitudes.⁶⁸ Thus the official recognition of the *longa possessio* of servitudes happened but a short time after the rescript of Severus and Antoninus of December 29, 199 AD had enacted the *longi temporis praescriptio* as the ordinary acquisitive prescription of Rome. Justinian finally abolished Lex Scribonia and formally brought the servitudes (and all incorporeal things) within the operation of laws governing prescriptive acquisition of property.⁶⁹

The recurrent reference found in the early Roman texts to *longa consuetudo* suggests that the *exceptio* granted by the praetor may have been predicated originally on a presumption of a lawful beginning of the use which was drawn from an openly practiced personal custom (*consuetudo inter partes*) of a long duration, or on a presumption that a use openly practiced has matured into a personal custom which should be accepted, at least *prima facie*.⁷⁰ If this was so, then there is here a definite parallel to the early common law approach in applying immemorial prescription. Easements could have an origin either in grant (which was viewed as "special law"); in a "special" custom of the district which entitled certain persons to rights *in solo alieno*; or in enjoyment of right from time immemorial.⁷¹ Prescription was originally regarded as a personal custom, namely, one limited to a particular claimant. It differed from a local custom which was limited to a particular place. Local and personal customs were classed as two species of particular customs, while the general customary

⁶⁸ C. 3, 34, 2; PARTSCH, *supra* note 67 at 99.

⁶⁹ PARTSCH, *supra* note 67 at 109; C. 7, 33, 12.

⁷⁰ 2 UNTERHOLZNER, *supra* note 15 at 158-64.

⁷¹ 3 HOLDSWORTH, *supra* note 4 at 166-9.

(feudal) law of the realm constituted general custom.⁷² This theory prevailed in the English law until easements by grant became common before the end of the middle ages.⁷³ After that prescription came to be thought of as founded, not so much upon personal law or custom, as on a presumption that immemorial user was conclusive evidence of a grant made before the time of legal memory.⁷⁴ This development, as one writer suggests, may have been occasioned by the mistaken view that since prescription means literally "a prior writing" it can have no application except through a presumption that written indicia of title had been lost.⁷⁵ When this presumption took hold it led to decisions excluding from the benefit of prescription all those persons who at common law were deemed incapable of taking by grant.⁷⁶

After prescription had passed from the stage of a presumption of lawful origin drawn from immemorial user to a presumption of lawful creation drawn from a lost immemorial grant, its further development became arrested in 1313. It was then laid down in the case of *The King v. Breaux*⁷⁷ that the time of human memory required for founding immemorial user reached as far back as September 3, 1189, the date of Richard I's coronation. This date was selected by analogy to the limitation period fixed in 1275, by the Statute of West-

⁷² SALMOND, *supra* note 9 at 267; COKE ON LITTLETON, *supra* note 8 at § 113b.

⁷³ 3 HOLDSWORTH, *supra* note 4 at 98.

⁷⁴ *Id.* at 170.

⁷⁵ RADIN, *supra* note 61 at 364. This misconception appears to be widely held. As late as 1964 an intermediate appellate court in Louisiana used considerable space to explain that acquisitive prescription in that state need not be based on any "writing" at all. *Lincoln Parrish School Board v. Ruston College*, 162 So. 2d 419 (La. App. 2d Cir. 1964); *writ denied*, 246 La. 355, 164 So. 2d 354 (1964).

⁷⁶ 3 HOLDSWORTH, *supra* note 4 at 170; SIMPSON, *supra* note 38 at 103.

⁷⁷ 29 *Selden Society*, 180.

minster I., for bringing a writ of right to recover seisin.⁷⁸ As a result of this decision no claimant could prevail any longer without showing that the user sought to be prescribed had extended uninterruptedly *nec vi nec clam nec precario* back to 1189. Conversely, the claimant was doomed to fail if his opponent succeeded in proving that the user could not have been enjoyed at some point of time after 1189. Since the date of legal memory stood fixed, it was continually receding as the time went on so that no one was able to prove any fact reaching all the way back to such ancient date. Although in 1540⁷⁹ the limitation time for bringing the writ of right was reduced to 60 years, and in 1623⁸⁰ the action of ejectment was limited to twenty years, the courts refused to "readjust" the time of legal memory to make it coincide with the new limitations on recovery of land. This situation led to the development by equity courts of the so-called "lost grant" or "presumed grant" device. The initial trace of its employment in the post-1313 period (which may be characterized as the "legal memory straitjacket"), is found in a case decided in 1607,⁸¹ though the full development of the device did not come about until the latter half of the eighteenth century when the common law courts began to relax the rule requiring "proferre" (production) of deeds on which title was sought to be rested.⁸² In its actual application the lost-grant device is somewhat akin to the praetorian practice in pre-Caracalla days of inferring the lawful beginning of a servitude from its long-continued enjoyment in a peaceful, open and non-permissive manner (*longa possessio*). The new English approach, as ultimately evolved, simply armed the claimant with a presumption that his long-continued user of rights *in solo alieno ex-*

⁷⁸ 7 HOLDSWORTH, *supra* note 4 at 343; POLLOCK AND MATTLAND, *supra* note 4 at 168.

⁷⁹ 32 Hen. 8, c. 2, § 1 (1540); Stoebuck, *The Fiction of Presumed Grant*, 15 KAN. L.R. 17, 26.

⁸⁰ 21 Jac. 1, c. 16, § 1. (1623).

⁸¹ *Bedle v. Beard*, 12 Co. Rep. 4, 77 Eng. Rep. 1288 (K.B. 1607).

⁸² 7 HOLDSWORTH, *supra* note 4 at 347.

exercised *non vi non clam non precario* for a period of years equal to that fixed by law for bringing an action of ejectment to recover possession of land had its beginning in an ancient grant which had been lost and was incapable of production in court. Although at first there was considerable difference of opinion as to the conclusiveness of this presumption, it is now generally agreed that it was one *juris et de jure* and hence irrebuttable.⁸³ Until 1832 prescriptive acquisition of easements in England was governed solely by the presumed grant doctrine. The Prescription Act of that year⁸⁴ supplied the English law, for the first time, with several fixed periods for acquisition of easements by user. Its enactment was doubtless influenced by the *Code Civil* and by the absurdity of the presumed grant fiction.⁸⁵ The act was defectively worded in that it left quite uncertain what easements and profits came within its scope and failed properly to define the term "prescription". Because of these defects the act was held not to repeal but to supplement the common law mode of prescriptive acquisition of easements.⁸⁶ In other words, the presumption of a lost grant was allowed to survive the statute as a fundamental method of acquiring easement rights by prescription.⁸⁷

In the United States the developments must be regarded as even more chaotic. A few American cases have rejected

⁸³ Stoebeck, *supra* note 79 at 21.

⁸⁴ 1 & 3 Will. 4, c. 71 (1832), known as Lord Tenterden's Act.

⁸⁵ *Angus v. Dalton*, 3 Q.B. Div. 35, 118; *Dalton v. Angus*, 6 App. Cas. 740, *aff'g* 4 Q.B. Div. 162.

⁸⁶ 7 HOLDSWORTH, *supra* note 4 at 352; *Angus v. Dalton*, 6 A.C. 740.

⁸⁷ Stoebeck, *supra* note 79 at 22. STEPHENS, COMMENTARIES ON THE LAWS OF ENGLAND 342 (1950); The survival of the old presumption led Holdsworth to remark: "What is required is a total repeal of existing common and statute law, and the substitution of an entirely new set of rules, based upon an understanding of the meaning of the doctrine of prescription, and of the results at which it should aim." 7 HOLDSWORTH, *supra* note 4 at 352.

the fiction of a presumed grant. In these cases prescription of easements is treated as governed by statutes fixing the time for acquisition of title to land by "adverse possession". In this manner the time span for prescriptive acquisition of corporeal and incorporeal rights in land is brought into parity in a fashion similar to that accomplished by the Roman law in its final development.⁸⁸ Some courts cling to the traditional doctrine, applying to the presumption of lost grant the time limitations fixed in the old English statutes.⁸⁹ In most jurisdictions, where the presumed grant theory is followed, the presumption of grant is drawn from that period which coincides with the local statutory provision for acquisition of title to land by adverse possession.⁹⁰ The effect given to the presumption is not uniform; in some states the presumption is conclusive, in others rebuttable.⁹¹ Although every state has a statute fixing a definite period for acquisition of title to land by adverse possession, and the concept of acquisitive prescription, as applied to corporeal interests, is now generally accepted in the United States,⁹² there is a marked absence of statutory provisions regulating prescriptive acquisition of incorporeal rights in land. If a single modern tendency can be divined it is to treat the characteristics of "adverse possession" and "prescriptive user" as identical so as to require open, peaceful and non-permissive attributes in both cases,⁹³ and to apply the same periods for corporeal and incorporeal interests. In some instances the English lost-grant doctrine is also applied to corporeal interests. This is a purely American development.

It is difficult to compare the present state of the English law of prescriptive easements with that in America as there

⁸⁸ Stoebeck, *supra* note 79 at 23.

⁸⁹ *Id.* at 24.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 27.

⁹³ *Id.* at 23.

⁹⁴ *Id.* at 28.

is no uniformity on this side of the Atlantic. The only meaningful comment that can be ventured is that at least in England an attempt was made to bring prescriptive acquisition of easements under statutory periods of definite duration, while in America the evolution has been left almost entirely to the decisional law.

Conclusion

In both the Roman and the English law the earliest application of prescriptive acquisition of incorporeal rights in land is associated with personal custom, openly indulged in for a long period, and with a presumption of lawful beginning drawn from the continued, peaceful, manifest and non-permissive nature of the use. Neither system started with a definite period of prescription but both eventually passed to that stage, though in a different way and by a dissimilar process. The most interesting feature of resemblance is that neither in the Roman nor in the English law did prescriptive acquisition of incorporeal interests become fully fused or merged with prescriptive acquisition of corporeal rights. Although the Roman law, as it finally evolved, did apply the same basic periods of prescription to corporeal and incorporeal rights, the acquisition of the latter did not require either *bona fides* or *iustus titulus*. In the English system the acquisition of corporeal and incorporeal rights is still governed by different prescriptive periods. In the United States there is perhaps a rather unique judicial tendency to achieve complete uniformity in rules applicable to acquisitive prescription of corporeal and incorporeal interests, but this salutary trend could be accomplished much faster and better with the aid of specific legislation. Only statutes can purge the American law of the lost-grant fiction and unveil the true essence of prescription as a mode of acquiring property.

HABENT SUA FATA . . . LEGES.