INTRODUCTORY.

THE history of the Law of Prescription in England is a subject of no small complexity. It is desirable therefore to start upon our inquiry with notions as clear and definite as the nature of the case allows. First, then, as to the derivation and meaning of the word Prescription. A Praescriptio appears to have been the earliest kind of exceptio used in the Roman formulary system of actions[1]; or rather, strictly speaking, it was the parent form from one use of which the exceptio sprang. "Praescriptio, quae vox a Graecis hominibus in Latinae linguae consuetudinem inducta est—*παραγραφή* enim a Graecis dicitur quae a Latinis praescriptio, et *παραγράφειν* praescribere—id est excipere." Franc. Hotoman. *Quaest.* 2. 6. "Est ergo praescriptio omnis exceptio essentiam capiens ex tempore." Rogerus de Praescrip. *Tract.* XVII. p. 48. "Usucapio L. 12 Tab. inducta est, praescriptio jure Praetorio—illa directum dominium adjicit—haec non dominium quod a Praetore dari non potest sed exceptionem ex aequitate suppeditat." Perezii *Praelect.* in Lib. 7 C. tit. 33.

It was as the name denotes placed at the beginning of the formula to limit the scope of the inquiry. As used by the plaintiff its purpose was to restrict the action to claims already due, that the decision might be without prejudice to future claims; but its chief use was as a defence introduced by the Praetors to supply the deficiencies of usucapio. Usucapio was available only to those who had the Commercium[2] and did

[1] Sandars, *Just.* LXVII. seq.

[2] Code, 7. 39. 8. Dig. 8. 5. 10.

not apply to provincial lands. The Praetors, on the analogy of usucapio, introduced a praescriptio applying to provincial lands, wherein the plea of possessio longi or longissimi temporis was raised. The effect of a praescriptio of long possession was the same as that of usucapio, it was not a mere plea of a Statute of Limitation, but gave a right against third parties[1]. Justinian (*Inst.* II. 6, Sandars, p. 22, seq.) entirely altered the scope of usucapio and longi temporis praescriptio. Usucapio was, under his system, the name used in connexion with movables wherever situated; the old longi temporis praescriptio was made to apply to all lands wherever situated, and the name praescriptio no longer denoted merely a part of the formula, indeed it no longer existed as part of the formula, but attained the meaning it has in England at the present time. But to say that it attained its present meaning is to be anything but definite; for it is hard to ascertain if it has in English Law any one meaning, and if so what that is. The cause of this is that none of those who have written upon prescription have been at any pains to make clear at the outset what meaning they attach to the term, but have left that to be gathered here and there throughout their writings. It is true that Coke, *Inst.* 113 b, gives us the definition "praescriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis;" but this still leaves open the question whether negative prescription or limitation is in his view to be accounted prescription. For Prescription we are told[2] is of two kinds, positive or acquisitive, or negative, restrictive, or a limitation of actions.

But if negative prescription is included in prescription, then Coke and Blackstone are clearly wrong in saying that there cannot be prescription of land. And to take almost at haphazard a few passages out of well-known writers, we find the most apparently contradictory statements. Thus Williams on *Commons*, p. 2, says, "A title by prescription can only be made to incorporeal hereditaments. A man cannot by prescription make a title to land...." On the other hand Wharton

[1] Here Ortolan seems mistaken in saying usucapio is positive, prescriptio negative: Hunter, *Roman Law*, p. 143.

[2] Austin, *Jurisp.* Wharton, *L. Lex.* s. v. Digby, *Hist. R. P.* p. 149.

(*Law Lexicon*, 80) says, "There are two kinds of prescription, viz.:—(1) Negative, which relates to realty or corporeal hereditaments, whereby an uninterrupted possession for a given time gives the occupier a valid and unassailable title by defeating all claimants of every stale right and deferred litigation, now mainly governed by 3 and 4 Will. IV. c. 27 (The R. P. Limitation Act); and (2) positive, which relate to incorporeal hereditaments and originated at Common Law, from immemorial or long usage only."

Again, Austin does not quite agree with either of the foregoing. After dividing prescription into positive or acquisitive and negative or restrictive, he says (*Jurisp.* Vol. I. pp. 509 to 516), "In other words acquisitive prescription is unknown to the English Law in its direct form. Directly and avowedly length of enjoyment is not a mode of acquisition or (in the language of our own law) a title. But a grant is a title directly and avowedly: and by feigning a grant from length of enjoyment, length of enjoyment becomes a title in effect, or that mode of acquisition which is styled acquisitive prescription is introduced indirectly."

It is true that he afterwards (p. 526) modifies this. "I also stated this too roundly that acquisitive prescription in its direct form is unknown to the English Law. A prescription in a que estate as it is called, or a prescription of an easement appurtenant is recognised directly by the English Law. But I think this is the only instance. Easements in gross are not acquired by prescription in that direct way, but in the oblique mode before explained. Rights amounting to proprietas or dominium are never acquired by direct prescription. The operation of the different Statutes of Limitation is purely negative or extinctive."

Perhaps we may find some explanation of the use of the word in English Law by again looking to the Roman Law. The term Praescriptio is a term of Roman Law, and it must have been introduced into English Law with some reference to its use in that Law. Now we find that in Roman Law, according to the history of the word before explained, praescriptio had no application to movables—so in English Law

there is not a single instance of the term being applied to movables. But if Limitation is prescription then it would seem that movables ought to have been prescribable for. And the real explanation may be here—the plea of prescription was in Roman Law *in form* a plea of a Statute of Limitation—prescriptio est exceptio temporis ratione—but in *fact* it gave a title against third parties—differing therefore from a Statute of Limitation, which in general, though the Act now in force in England is somewhat different, may bar the remedy of one person after a certain time; but in itself gives no further right to the person setting it up.

Markby, in his *Elements of Law*, has some interesting remarks upon the effect of time in various systems of Law in fortifying titles. "Sometimes it is laid down, plainly and simply, that a person, who has been for a certain time in possession, shall be considered as owner. Sometimes without professing in express terms to recognise the person in possession, as owner, all means of asserting his ownership are taken away from any other claimant who has been for a certain time out of possession." § 381.

"It is a remarkable instance of the shifting use of language that the word 'prescription' has been used, sometimes exclusively in reference to one of these distinct forms; sometimes exclusively in reference to the other; sometimes in reference to both." He distinguishes Limitation from Prescription; but he makes prescription apply to Land. In this, I think, he is mistaken, as will appear later. § 382.

Again, the inclusion of Limitation in Prescription may easily have arisen in the minds of the less clear thinkers from the treatment of both in 'that profitable and necessary statute' 32 Hen. VIII. c. 2.—That statute, which will be treated of a little later on, in its application to writs of right is a Statute of Limitations—in its application to prescription, merely has the effect of shortening the time for which prescription must be proved—but the different effect in the two cases is very easily lost sight of.

So then Prescription proper as treated by Coke and Blackstone is distinct from Limitation and does not apply to corporeal

hereditaments. This, I think, is undoubtedly the correct view, and though it has sometimes been contended that 3 and 4 Will. IV. c. 27 (the Real Property Limitation Act) has the effect of a positive prescription, yet this is now determined not to be so. Dart. *V. and P.* 6th Ed. p. 463: see *Wilkes v. Greenway, Times*, May 30th, 1890. Accordingly though the subject of Limitation is one of much intricacy and interest I do not deal with it further, as I do not consider that it comes properly within the scope of my subject.

Another point must be noted here for the sake of clearness, though it will be treated more in detail later on; and that is the nature of the right of prescription. In the first place a prescription which is a personal must be distinguished from a custom which is a local or general usage. It is personal in the sense that it can only be claimed by a man as having belonged to himself and his ancestors, or to a man and those whose estate he has; which is called a prescription in a que estate.

Again, not every enjoyment would support a prescription. It must have been an actual user, without interruption or license from those against whom it was sought to be maintained. It must have been such a right as could be granted, since every prescription presumed a grant; and it must have been such an user as was reasonable at the time when the grant was alleged to have been made. Suffice it to mention these matters here since convenience requires that I should first examine the length of time required to establish a right, assuming it to be of a kind that could properly be prescribed for.

CHAPTER I.

For what time Prescription must run.

By the Common Law a man might show his title to what he claimed by proving that he and his ancestors, or that he and those whose estate he has, enjoyed it from time[1] immemorial. As Littleton saith 170, "And note that no custom is to bee allowed but such custom as hath bin used by title of prescription, which is all one in the law. For some have said that time out of minde should be said from time of limitation in a writ of right, that is to say from the time of King Rich. I. after the conquest as is given by the Stat. of West. I.....And insomuch that it is given by the said estatute that in a writ of right none shall be heard to demand of the seisin of his ancestors of longer time than of the time of King Rich[d]. aforesaid, therefore this is proved that continuance of possession or other customs and usages used after the same time is the title of prescription. And this is certain, and others have said that well and truth it is that seisin and continuance after the limitation is a title of prescription as is aforesaid and by the cause aforesaid. But they have sayd that there is also another title of prescription that was at the Common Law before any estatute of limitation of writs, and that it was where a custom or usage or other thing hath been used for time whereof mind of man runneth not to the contrary.....and insomuch that such title of prescription

[1] Bracton, lib. 2, c. 22. 10, 51 b. 'Qualiter acquiritur possessio per usucaptionem. Usucaptio i.e. sine titulo et traditione per longam continuam et pacificam possessionem ex diuturno tempore.' So again 'per longam et pacificam seisinam, habitam per patientiam et negligentiam veri domini.' So 'omnes actiones in mundo infra certa tempora habent limitationem."

was at the Common Law and not put out by an estatute, ergo it abideth as it was at the Common Law."

Littleton here says that the time of prescription is the time of legal memory which had finally been fixed at the first year of Richard I.; but that some alleged that there was also the other time of memory which had existed at the Common Law prior to the imposition of any limitation in writs of right, and that a prescription might be pleaded for this longer period. It is possible that the longer prescription arising by the Common Law may have continued, but it is to be observed that the prescription going back to the time of legal memory was the construction of the Courts of the old time of prescription, *i.e.* the mind of man was irrebuttably presumed not to run to the contrary after the time of legal memory; and one fails to see what advantages anyone could have got by claiming under the longer prescription. It is not like claiming a thing by Common Law prescription in addition to the Prescription Act which gives additional advantages; but nobody could have gained by a claim of user for time whereof the mind of man did not run to the contrary anything that he could not have gained by a like claim under the construction that the mind of man did not run to the contrary after the time of legal memory. It is certainly impossible to find an instance of any such claim, and it is safe to conclude that although it may have theoretically existed, yet that being of no practical use it fell into desuetude.

Now the time of legal memory was no doubt originally the same as the time of actual memory; but it was found convenient to have some time fixed beyond which memory could be presumed not to go. This period was made to depend on the period fixed for limiting the bringing a writ of right. This was a fluctuating period dating from some historical event. Thus "in ancient time the limitation in a writ of right was from the time of Henry I. whereof it was said a tempore regis Henrici senioris[1]. After that by the Statute of Merton the limitation was from the time of Henry II.; and by the Statute of Westminster I. the limitation was from the time of Rich. I.,

[1] Co. Litt. 144 b. *Regist.* 158. Bracton, fo. 373. 5. *Ass.* p. 2. 34 Hen. VIII. 40.

and this is that limitation that Littleton speaketh of, whereof in the *Mirror*[1] in reproof of the law it is thus said, "Abusion est de counter cy longe temps, dount nul ne poet testmoigner de vieu et de oyer, que ne dure my generalement ouster 40 ans."

And the time of limitation was at other times[2] fixed at other periods. But the beginning of the reign of Rich. I. was the final period, and still remains the limit of the period of legal memory.

As to this in the specimen of the writ in Glanvil I. 13, ca. 3 (Beames), "The King to the Sheriff health. If G. the son of J. shall make you secure of prosecuting his claim then summon by good summoners twelve free and lawful men of the neighbourhood of such a vill, that they be before me or my justices on such a day prepared on their oath to return if J. the father of the aforesaid G. was seised in his demesne as of fee of one yardland in that vill on the day of his death if he died after my first coronation (20th Oct. 1154, Co. 2 *Inst.* 94), and if the said E. be his nearer heir. And in the mean time let them view the land and cause their names to be imbreviated; and summon by good summoners R. who holds that land that he be then there to hear such recognition and have there the summoners, &c. witness, &c." But if the ancestor was seised in the manner before mentioned and had begun a voyage then the writ will be in a somewhat different form. *Ibid.* ca. 4.

The first year of the reign of Rich. I. remained without change the time of limitation in writs and the time from which prescription had to run until the alteration made by "a profitable and necessary Statute made anno 32 Hen. VIII. (c. 2)[3]. By that Act the former limitation of time in a writ of right is changed and reduced to threescore years next before the teste of the writ, and so of other actions as by the Statute at law appeareth."

The Statute after reciting the evils that arise from want of some period of limitation provides that no manner of person or persons shall from henceforth sue, have or maintain any writ of right, or make any *prescription*, Title or Claim of to or for any

[1] *Mirror*, ca. 5. 11. [2] Blackst. 31 n.
[3] Co. Litt. 115 a.

Manors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corrodies, or other hereditaments of the possession of his or their ancestor or predecessor and declare and allege any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his ancestor or predecessor which hath been or now is or shall be seised of the said Manors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corrodies or other hereditaments within threescore years next before the teste of the same writ or next before the said *prescription*, Title or Claim so hereafter to be sued, commenced, brought, made or had.

Sec. II. Limits a period of 50 years next preceding the teste of the writ in any action possessory.

Sec. III. Limits a period of 30 years preceding the teste of the writ in any action upon a man's own seisin.

Sec. IV. Limits a period of 50 years in any avowry or cognisance for any rent, suit or service.

Sec. V. Enacts that all formedons in Reverter, formedons in remainder, and scire facias as on fines shall be sued within 50 years next after the title and cause of action fallen.

Sec. VI. Enacts that if any person suing in any of the said actions or suits or making avowry, cognisance, *prescription* or claim, cannot prove that he or his ancestors or predecessors were in actual seisin or possession within the times limited, if the same be traversed, they and their heirs shall be utterly barred.

Sec. VII. A saving for all suits depending in 1546.

Sec. VIII. Provides for all the disabilities of infancy, coverture, imprisonment, absence out of the realm giving a further period of six years from the removal of the disability.

Sec. IX. Extends to the heirs of any person under the above disabilities the six years' grace, to begin from the death of the ancestor under such disability.

Sec. X. Provides that in case any suit depending in 1546 shall abate by the death of any of the parties, the other parties or the heir of the deceased party may for one year have the same privilege of pursuing their remedy as was granted to suits actually depending.

Sec. XI. Provides that if any false verdict be given in any

of the above proceedings the party grieved may bring his attaint, and upon succeeding therein may recover, anything to the contrary in the Act notwithstanding.

Now upon this Act it is to be observed "that it extendeth not to a formedon in the discenders." This appears to be a casus omissus: for Sec. V. refers to a formedon in remainder and reverter. And *in Fitzwilliam's case* (Dyer 278) where it was argued that a formedon in the discender was included in the clause of the Statute relative to writs of right, it was held by three judges, one doubting, that a formedon was not strictly a writ of right, and that it was not therefore anywhere hit by the Statute.

This defect was not remedied until 21 Jac. I. c. 16, which requires formedons of every kind to be brought within 20 years after the descent of the title.

Nor to pursue Coke does the Statute extend (Co. Litt. 115 a) "to the services of escuage homage or fealty for a man may live above the time limited by the Act. Neither doth it extend to any other service which by common possibility may not happen or become due within 60 years as to cover the hall of the lord or to attend on his lord when he goeth to warre or the like: nor when the seisin is not traversable or issuable, because the statute refers entirely to seisin and therefore cannot extend to a case where seisin does not become the subject of trial[1]. Neither doth it extend to a rent created by deed nor to a rent reserved upon any particular estate, for in the one case the deed is the title and in the other the reservation; nor to any writ of right of advowson, quare impedit, or assise of darrein presentment (for there was a parson of one of my churches that had been incumbent there above 50 yeares and dyed but lately) or any writ of right of ward or ravishment of ward, &c., but they are left as they were before the Statute 32 Hen. VIII. c. 2." Until Mar. Parl. 2, cap. 5, it was doubtful whether the several writs here mentioned in respect to advowsons and wardships were within the Statute, but the late Statute declared that 32 Hen. VIII. c. 2 did not extend to them. But by 7 Anne, c. 18, it is enacted with regard to advowsons that no usurpation shall

[1] Co. 10 and 11. *Bevil's Case.* *Sir W. Foster's Case*, 8 Co. 65.