CHAPTER THE TWENTY SIXTH.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE are next to conſider the *title* to things perſonal, or the various means of *acquiring*, and of *loſing*, ſuch property as may be had therein: both which conſiderations of gain and loſs ſhall be blended together in one and the ſame view, as was done in our obſervations upon real property; ſince it is for the moſt part impoſſible to contemplate the one, without contemplating the other alſo. And theſe methods of acquiſition or loſs are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By cuſtom. 5. By ſucceſſion. 6. By marriage. 7. By judgment. 8. By gift. 9. By contract. 10. By bankruptcy. 11. By teſtament. 12. By adminiſtration.

AND, firſt, a property in goods and chattels may be acquired by *occupancy*: which, we have more than once [a] remarked, was the original and only primitive method of acquiring any property at all; but which has ſince been reſtrained and abridged, by the poſitive laws of ſociety, in order to maintain peace and harmony among mankind. For this purpoſe, by the laws of England, gifts, and contracts, teſtaments, legacies, and adminiſtrations have been introduced and countenanced, in order to transfer and continue that property and poſſeſſion in things perſonal, which

[a] See pag. 3. 8. 258.

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has once been acquired by the owner. And, where ſuch things are found without any other owner, they for the moſt part belong to the king by virtue of his prerogative; except in ſome few inſtances, wherein the original and natural right of occupancy is ſtill permitted to ſubſiſt, and which we are now to conſider.

I. THUS, in the firſt place, it hath been ſaid, that any body may ſeiſe to his own uſe ſuch goods as belong to an alien enemy[b]. For ſuch enemies, not being looked upon as members of our ſociety, are not entitled during their ſtate of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to ſeiſe upon their chattels, without being compelled as in other caſes to make reſtitution or ſatisfaction to the owner. But this, however generally laid down by ſome of our writers, muſt in reaſon and juſtice be reſtrained to ſuch captors as are authorized by the public authority of the ſtate, reſiding in the crown[c]; and to ſuch goods as are brought into this country by an alien enemy, after a declaration of war, without a ſafe-conduct or paſſport. And therefore it hath been held[d], that where a foreigner is reſident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be ſeiſed. It hath alſo been adjudged, that if an enemy take the goods of an Engliſhman, which are afterwards retaken by another ſubject of this kingdom, the former owner ſhall loſe his property therein, and it ſhall be indefeaſibly veſted in the ſecond taker; unleſs they were retaken the ſame day, and the owner before ſun-ſet puts in his claim of property[e]. Which is agreeable to the law of nations, as underſtood in the time of Grotius[f], even with regard to captures made at ſea; which were held to be the property of the captors after a poſſeſſion of twenty four hours: though the modern authorities[g] require, that before the property can be changed, the goods muſt have been brought into

[b] Finch. L. 178.
[c] Freem. 40.
[d] Bro. *Abr. tit. propertie.* 38. *forfeiture.* 57.
[e] *Ibid.*
[f] *de j. b. & p. l.* 3. *c.* 6. § 3.
[g] Bynkerſh. *quæſt. jur. publ. l.* 4. Rccc. *de. Aſſecur. not.* 66.

port, and have continued a night *intra praesidia*, in a place of safe custody, so that all hope of recovering them is lost.

AND, as in the *goods* of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war[h]; at least till his ransom be paid[j]. And this doctrine seems to have been extended to negro-servants[i], who are purchased, when captives, of the nations with whom they are at war, and continue therefore in some degree the property of their masters who buy them: though, accurately speaking, that property consists rather in the perpetual *service*, than in the *body* or *person*, of the captive[k].

2. THUS again, whatever moveables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen[l], are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. THUS too the benefit of the elements, the light, the air, and the water, can only be *appropriated* by occupancy. If I have an antient window overlooking my neighbour's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbour makes a tan-yard, so as to annoy

[h] Bro. *Abr. tit. propertie.* 18.

[i] We meet with a curious writ of trespass in the register (102.) for breaking a man's house, and setting such a prisoner at large. "*Quare domum ipsius A. apud W. (in* "*qua idem A. quendam H. Scotum per ipsum* "*A. de guerra captum tanquam prisonem suum,* "*quousque sibi de centum libris, per quas idem* "*H. redemptionem suam cum praefato A. pro* "*vita sua salvanda fecerat, satisfactum foret,* "*detinuit) fregit, et ipsum H. cepit et abduxit,* "*vel quo voluit abire permisit, &c.*"

[j] 2 Lev. 201.

[k] Carth. 396. Ld Raym. 147. Salk. 667.

[l] Book I. ch. 8.

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and render leſs ſalubrious the air of my houſe or gardens, the law will furniſh me with a remedy; but if he is firſt in poſſeſſion of the air, and I fix my habitation near him, the nuſance is of my own ſeeking, and muſt continue. If a ſtream be unoccupied, I may erect a mill thereon, and detain the water; yet not ſo as to injure my neighbour's prior mill, or his meadow: for he hath by the firſt occupancy acquired a property in the current.

4. WITH regard likewiſe to animals *ferae naturae*, all mankind had by the original grant of the creator a right to purſue and take any fowl or inſect of the air, any fiſh or inhabitant of the waters, and any beaſt or reptile of the field: and this natural right ſtill continues in every individual, unleſs where it is reſtrained by the civil laws of the country. And when a man has once ſo ſeiſed them, they become while living his *qualified* property, or, if dead, are *abſolutely* his own: ſo that to ſteal them, or otherwiſe invade this property, is, according to the reſpective values, ſometimes a criminal offence, ſometimes only a civil injury. The reſtrictions which are laid upon this right, by the laws of England, relate principally to royal fiſh, as whale and ſturgeon, and ſuch terreſtrial, aërial, or aquatic animals as go under the denomination of *game*; the taking of which is made the excluſive right of the prince, and ſuch of his ſubjects to whom he has granted the ſame royal privilege. But thoſe animals, which are not expreſſly ſo reſerved, are ſtill liable to be taken and appropriated by any of the king's ſubjects, upon their own territories; in the ſame manner as they might have taken even game itſelf, till theſe civil prohibitions were iſſued: there being in nature no diſtinction between one ſpecies of wild animals and another, between the right of acquiring property in a hare or a ſquirrel, in a partridge or a butterfly; but the difference, at preſent made, ariſes merely from the poſitive municipal law.

5. To this principle of occupancy alſo muſt be referred the method of acquiring a ſpecial perſonal property in corn growing on the ground, or other *emblements*, by any *poſſeſſor* of the land

who hath ſown or planted it, whether he be owner of the inheritance in fee or in tail, or be tenant for life, for years, or at will: which emblements are diſtinct from the real eſtate in the land, and ſubject to many, though not all, the incidents attending perſonal chattels. They were deviſable by teſtament before the ſtatute of wills [m], and at the death of the owner ſhall veſt in his executor and not his heir: they are forfeitable by outlawry in a perſonal action [n]: and by the ſtatute 11 Geo. II. c. 19. though not by the common law [o], they may be diſtreined for rent arrere. The reaſon for admitting the acquiſition of this ſpecial property, by tenants who have temporary intereſts, was formerly given [p]; and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are aſſets in the hands of the executor, are forfeitable upon outlawry, and diſtreinable for rent, they are not in other reſpects conſidered as perſonal chattels; and, particularly, they are not the object of larciny, before they are ſevered from the ground [q].

6. THE doctrine of property ariſing from *acceſſion* is alſo grounded on the right of occupancy. By the Roman law, if any given corporeal ſubſtance received afterwards an acceſſion by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the converſion of wood or metal into veſſels and utenſils, the original owner of the thing was intitled by his right of poſſeſſion to the property of it under ſuch it's ſtate of improvement [r]: but if the thing itſelf, by ſuch operation, was changed into a different ſpecies, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a ſatisfaction to the former proprietor for the materials, which he had ſo converted [s]. And theſe doctrines are implicitly copied and adopted by our Bracton [t], in the reign of king Henry III; and have ſince been confirmed by many reſolutions of the courts [u].

[m] Perk. §. 512.
[n] Bro. *Abr. tit. emblements.* 21. 5 Rep. 116.
[o] 1 Roll. Abr. 666.
[p] pag. 122. 146.
[q] 3 Inſt. 109.
[r] *Inſt.* 2. 1. 25, 26, 31. *Ff.* 6. 1. 5.
[s] *Inſt.* 2. 1. 25, 34.
[t] *l.* 2. *c.* 2 & 3.

courts[u]. It hath even been held, that if one takes away another's wife or ſon, and cloaths them, and afterwards the huſband or father retakes them back, the garments ſhall ceaſe to be the property of him who provided them, being now annexed to the perſon of the child or woman[w].

7. BUT in the caſe of *confuſion* of goods, where thoſe of two perſons are ſo intermixed, that the ſeveral portions can be no longer diſtinguiſhed, the Engliſh law partly agrees with, and partly differs from, the civil. If the intermixture be by conſent, I apprehend that in both laws the proprietors have an intereſt in common, in proportion to their reſpective ſhares[x]. But, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowlege, or caſts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the ſole property of the whole to him who has not interfered in the mixture, yet allows a ſatisfaction to the other for what he has ſo improvidently loſt[y]. But our law, to guard againſt fraud, allows no remedy in ſuch a caſe; but gives the intire property, without any account, to him, whoſe original dominion is invaded, and endeavoured to be rendered uncertain, without his own conſent[z].

8. THERE is ſtill another ſpecies of property, which, being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; ſince the right of occupancy itſelf is ſuppoſed by Mr Locke[a], and many others[b], to be founded on the perſonal labour of the occupant. And this is the right, which an author may be ſuppoſed to have in his own original literary compoſitions: ſo that no other perſon without his leave may publiſh or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he has clearly a right to diſpoſe of that identical work as

[u] Bro. *Abr. tit. propertie.* 23. Moor. 20. Poph. 38.
[w] Moor. 214.
[x] *Inſt.* 2. 1. 27, 28. 1 Vern. 217.
[y] *Inſt.* 2. 1. 28.
[z] Poph. 38. 2 Bulſtr. 325. 2 Vern. 516.
[a] on Gov. part 2. ch. 5.
[b] See pag. 8.

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he pleaſes, and any attempt to take it from him, or vary the diſpoſition he has made of it, is an invaſion of his right of property. Now the identity of a literary compoſition conſiſts intirely in the *ſentiment* and the *language*; the ſame conceptions, cloathed in the ſame words, muſt neceſſarily be the ſame compoſition: and whatever method be taken of conveying that compoſition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is ſo conveyed; and no other man can have a right to convey or transfer it without his conſent, either tacitly or expreſſly given. This conſent may perhaps be tacitly given, when an author permits his work to be publiſhed, without any reſerve of right, and without ſtamping on it any marks of ownerſhip: it is then a preſent to the public, like the building of a church, or the laying out a new highway: but, in caſe of a bargain for a ſingle impreſſion, or a ſale or gift of the copyright, the reverſion is plainly continued in the original proprietor, or the whole property transferred to another.

THE Roman law adjudged, that if one man wrote any thing, though never ſo elegantly, on the paper or parchment of another, the writing ſhould belong to the original owner of the materials on which it was written [c]: meaning certainly nothing more thereby, than the mere mechanical operation of writing, for which it directed the ſcribe to receive a ſatisfaction; eſpecially as, in works of genius and invention, ſuch as a picture painted on another man's canvas, the ſame law [d] gave the canvas to the painter. We find no other mention in the civil law of any property in the works of the underſtanding, though the ſale of literary copies, for the purpoſes of recital or multiplication, is certainly as antient as the times of Terence [e], Martial [f], and Statius [g]. Neither with us in England hath there been any direct determination upon the right of authors at the common law.

[c] *Si in chartis membraniſve tuis carmen vel hiſtoriam vel orationem Titius ſcripſerit, hujus corporis non Titius ſed tu dominus eſſe videris. Inſt.* 2. 1. 33.

[d] *Ibid.* §. 34.

[e] *Prol. in Eunuch.* 20.

[f] *Epigr.* i. 67. iv. 72. xiii. 3. xiv. 194.

[g] *Juv.* vii. 83.

But

But much may be gathered from the frequent injunctions of the court of chancery, prohibiting the invaſion of this property: eſpecially where either the injunctions have been *perpetual*[h], or have related to unpubliſhed manuſcripts[i], or to ſuch antient books, as were not within the proviſions of the ſtatute of queen Anne[k]. Much may alſo be collected from the ſeveral legiſlative recognitions of copyrights[l]; and from thoſe adjudged caſes at common law, wherein the crown hath been conſidered as inveſted with certain prerogative copyrights[m]; for, if the crown is capable of an excluſive right in any one book, the ſubject ſeems alſo capable of having the ſame right in another.

BUT, excluſive of ſuch copyright as may ſubſiſt by the rules of the common law, the ſtatute 8 Ann. c. 19. hath protected by additional penalties the property of authors and their aſſigns for the term of fourteen years; and hath directed that if, at the end of that term, the author himſelf be living, the right ſhall then return to him for another term of the ſame duration: and a ſimilar privilege is extended to the inventors of prints and engravings, for the term of fourteen years, by the ſtatute 8 Geo. II. c. 13. Both which appear to have been copied from the exception in the ſtatute of monopolies, 21 Jac. I. c. 3. which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the ſole working or making of the ſame; by virtue whereof a temporary property becomes veſted in the patentee[n].

[h] Knaplock v. Curl. 9 Nov. 1722. Viner Abr. *tit. Books.* pl. 3. — Baller v. Watſon, 6 Dec. 1737.

[i] Webb v. Roſe. 24 May 1732. — Pope v. Curl. 5 Jun. 1741.—Forreſter v. Waller. 13 Jun 1741. — Duke of Queenſberry v. Shebbeare. 31 July 1758.

[k] Knaplock v. Curl. before cited.—Eyre v. Walker. 9 Jun. 1735.— Motte v. Faulkner. 28 Nov. 1735. —Walthoe v. Walker. 27 Jan. 1736.—Tonſon v. Walker. 12 May 1739. and 30 Apr. 1752.

[l] *A. D.* 1649. c. 60. Scobell. 92. 13 & 14 Car. II. c. 33. 10 Ann. c. 19. §. 112. 5 Geo. III. c. 12. §. 26.

[m] Cart. 89. 1 Mod. 257. 4 Burr. 661.

[n] 1 Vern. 62.