COMMENT

THE LAW ON OCCUPANCY REVISITED

I. THE LAW ON OCCUPATION: A PROLOGUE

> "For the cock swan is an emblem or representation of an affectionate and true husband to his wife above all other fowls; for the cock swan holdeth himself to one female only, and for this cause nature both conferred on him a gift beyond all others; that is, to die so joyously, that he sings sweetly when he dies; upon which the poet saith—
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> "Dulcia defecta modulatur carmina lingua,
> Cantator, cygnus, funeris ipse sui.
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> "And therefore this case of the swan doth differ from the case of Kine or other brute beasts."
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> —*The case of Swan*, 7 Co. 15b, 17a (1592).

Except for a few provisions of our Civil Code, Philippine jurisprudence on the law on *occupatio*, as an original mode of acquiring ownership, appears to be a desert, where none but the forlorn seeker of the lonely and the curious would dare pick his footsteps on its forbidding sands. Indeed, one is tempted to believe that in the Philippines there is either nothing to occupy or that in the inevitable conflict of claims Filipinos prefer to forego their interests in order to avoid litigations. At least, the very few cases which have found their way to our Supreme Court attest to this state of our law on *occupatio*.

It is, therefore, with some reckless daring that this work is here attemped. At least, if only to shed some light on its sketchy outlines, which seems to oscillate from shadow to shadow, this attempt at a better understanding of the law on occupancy appears justified.

But who knows but that the arrested development of this part of our law may have been due, precisely, to the absence of a clear and full understanding of occupation? Even on the assumption that, as one author puts it, ". . . most acquisitions of property by occupation take place only with respect to fishing . . .,"[1] at least, fishing is one of our chief industries. On this score, this attempt finds one of its bases.

Yet, the more weighty rationale for this work is rooted on the idea that the efforts of any one interested in the growth of the law should not be measured in terms of the material considerations which the law is expected to regulate; but rather on the far more intrinsic value of the right of the individual, irrespective of whether it be a right over millions of pesos or over a mere fishing industry or the pelt of a wild animal.

Thus, this attempt to wander on the desert sands of *occupatio*. If the attempt proved dry and lonely—as almost all deserts are—did

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[1] VICENTE ABAD SANTOS, STATUTORY PROVISIONS, CASES AND TEXT ON PROPERTY 365 (1951).

not Justice Holmes counsel that "the law is a jealous mistress to be wooed with sustained and lonely passion"?

II. NATURE AND SIGNIFICANCE OF OCCUPATION

Much has been said about the nature of occupation. Considerable significance has been attached to it in connection, especially, with the acquisition of ownership.[2] When one attempts to peek into the dim recesses of years that were and consider the appearance of the earliest ownership-conscious human beings, it is not difficult to understand the position of the legal commentator who foists the theory that occupation is the foundation or the origin of property. For as Sir Henry Summer Maine observes, "it was almost always assumed that the acquisition of ownership by occupancy was so simple, so obvious, and so universal, as to be deemed natural, and that it was, in fact, the original mode of acquiring all ownerships."[3] Indeed, no little amount of disagreement has arisen among jurists on the question of the role of occupation in the acquisition of ownership.

Thus, it is said that occupancy has supplied a theory of the origin of property, which is at once the popular belief, and the theory which, in one form or another, is acquiesced in by the great majority of speculative jurists.[4] Manresa, for one, informs us that there is some belief, until recently, that occupation may have been the historical origin of property, or of movable property at any rate, but it is not the foundation of property.[5] It is, however, admitted that the theory of occupancy as the origin or foundation of property has lost much of its former vigour.[6] One of the severest critics of this theory has expressed himself in this language:

> "He who first reduces into possession a piece of property has the best justification for remaining in control. But the acceptance of what has been flippantly termed 'the divine right of grab' is not so widespread today as it was once. . . . In a crowded world, *occupatio* applies only to a relatively unimportant degree—no longer does the vacant forest await the tiller. The theory of *occupatio* hardly provides a reasonable account of the origin of property, and it is even less satisfactory as a justification of property."[7]

Although the original theory of occupancy may have lost much of its persuasive appeal, it cannot be gainsaid that enough is still left to merit its consideration. "Occupancy and ownership are historically connected, and the history of that connection is not without its importance in modern controversies."[8] And while there may be heated controversy on whether it is the origin or foundation of property or not, all are about in perfect accord that it is an original mode

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[2] MAINE, ANCIENT LAW 260 (10th ed.).
[3] *Id.* at 238.
[4] Note 2, *supra*.
[5] 5 MANRESA Y NAVARRO, COMENTARIOS AL CODIGO CIVIL 47 (1951).
[6] MAINE, *op. cit. supra*, note 3.
[7] PATON, JURISPRUDENCE 407.
[8] MAINE, *op. cit., supra*.

of acquiring ownership. As such mode, the commentator Manresa y Navarro offers this significant observation:

> "Pero la occupación, como modo de adquirir, no es por eso menos importante." [9]

And when it is considered that the Civil Code of the Philippines has devoted Title I of Book III to occupation, it becomes obvious that *occupatio* as a mode of acquiring ownership may not be trivial after all.

In the consideration of the mode of occupation, references shall be made to the Roman law concept of *occupatio,* not only because under that body of law a high degree of refinement has been attained but also because, to paraphrase Justice José P. Laurel, the roots of our own positive rules on occupancy lie buried in the bedrock of the past.[10]

III. MEANING AND SCOPE OF OCCUPATION

Occupation is a mode [11] of acquiring ownership, as distinguished from title.[12] As such mode, term occupation has been variously defined.[13] It is said, for instance, that:

> "Occupation is a mode of acquiring ownership by the apprehension of a corporeal thing which has no owner, by a person having capacity for the purpose, with intent to appropriate it as his, and according to the rules established by law. It is the taking of possession which by itself confers ownership." [14]

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[9] 5 MANRESA Y NAVARRO, *op. cit. supra,* note 5, at 48.

[10] Laurel, Jose P., *What Lessons May Be Derived by the Philippine Islands from the Legal History of Louisiana,* 2 Phil. L.J. 1, 7 (1915).

[11] "Mode of acquiring ownership and other real rights 'is the specific cause which gives rise to them, as the result of the presence of a special condition of things, of the aptitude and intent of persons, and of compliance with the conditions established by law.'" 1 TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 387 (1954).

[12] "Title for acquiring ownership and other real rights is 'the juridical act which gives the name to the acquisition of the real rights, but which in itself is insufficient to produce it.' Title merely requires the intent manifested in the form of a juridical act, such as sale, barter, legacy, etc." *Ibid.*

[13] It (occupation) may also be defined "as a taking possession of corporeal things which have no owner at the time (*res nullius*) with the intention of making them one's property." GAIUS 2, 66-69; DIGEST 41, 1, 3; POTHIER, DE PROPRIETE 20; LA. CIVIL CODE Art. 3375; COOK ON LITTLETON 416; BURDICK, PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 334.

"Occupancy is the advisedly taking possession of that which at the moment is the property of no man, with the view of acquiring property in it for yourself." MAINE, *op. cit. supra,* note 2, at 259.

"*Occupatio* is the most primitive of all modes of acquisition. It consists in the taking possession of a thing which belongs to nobody, with the intention of becoming owner of it. *Res nullius occupanti cedit* . . ." SOHM, INSTITUTES OF ROMAN LAW 335-336 (J. C. Ledlie's trans.).

"If a thing be without an owner, and be at the same time not in the possession of any one, it becomes the property of any one who takes possession of it, if he chooses that it should so become. This method of acquisition is called 'occupancy.'" WILLIAM MARKBY, ELEMENTS OF LAW 125 (3rd ed.).

"Occupation is a mode of acquiring dominion by the seizure of things corporeal which have no owner, with the intention of acquiring them, and according to the rules laid down by law." 3 SANCHEZ ROMAN, DERECHO CIVIL 210.

Occupancy, as a method of acquiring property, is the taking possession of those things corporeal, which are without an owner, with the intention of appropriating them to one's own use. 73 C.J.S. 207.

Occupancy is defined by Blackstone as the taking possession of those things which before belonged to nobody, and movables found on the surface of the earth or in the sea, and unclaimed by any owner, are supposed to be abandoned by the last proprietor, and, as such, are returned into common stock and mass of things, and, therefore, they belong, as in a state of nature, to the first occupant or founder. 29 WORDS AND PHRASES 126.

[14] I TOLENTINO, *op. cit. supra,* note 11, at 423.

It is obvious, then, that occupation is an original mode of acquiring ownership.[15] From the foregoing definition, it is, also, clear that the subject must have the intention to acquire ownership, and therefore, he must have the necessary capacity to consent. The object must be appropriable by nature and without an owner; and there must be an act of taking possession of the thing, which does not necessarily mean material holding, it being sufficient that the thing is considered subjected to the disposition of the possessor.[16] It should, furthermore, be noted that occupation is valid and effective if it is exercised "according to the rules established by law."[17] Thus it has been held that the act of reducing a wild animal to possession, as affecting the question of ownership, must not be wrongful and that such animals captured in violation of law do not become the property of the capturer, such as will give him the right to maintain an action against a game warden, who seizes or releases the animal.[18] The case of *James V. Metcalf* [19] is authority on the question of the need for compliance with special laws and regulations as a condition *sine qua non* to the validity of ownership acquired through occupation. The issue in this case revolves on the ownership of a bear captured in a manner forbidden by law.[20] The Vermont Court which decided this case, after expounding on the reasons behind the law involved and the necessity of strict compliance therewith, concluded:

> "The fact being established that the trap was not properly fenced, and so maintained in violation of law, the means taken to reduce the bear to possession would be wrongful, and the unlawful capture would give the plaintiff no title to the animal that would support this action. The unlawful means of capture would prevent its becoming his property while yet alive. It is immaterial to this case to inquire whose property it became after it was killed. If it then became the absolute property of anyone, it was clearly not the plaintiff's." [21]

And in the case of *James v. Wood,*[22] an action was filed against the defendant for committing an act of trespass upon the plaintiff's land

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[15] *Ibid.*

[16] *See* CIVIL CODE OF THE PHILIPPINES Art. 713; 1 TOLENTINO, *op. cit. supra* note 11, at 423-434; 2 PADILLA, CIVIL CODE ANNOTATED 376 (1956) citing Sanchez Roman and Manresa y Navarro; MARKBY, *op. cit. supra*, note 13, at 237.

[17] CIVIL CODE OF THE PHILIPPINES Art. 715; *see* Act No. 2590 (Feb. 4, 1916) which provides for the protection of game and fish in the Philippines; ADMINISTRATIVE CODE sec. 882 on special hunting permits to temporary sojourners, sec. 2156 on the regulation of the edible bird nest industry, secs. 2351-2824 which confers on municipal councils the power to grant fishing privileges in municipal waters; Act No. 1499, as amended by Acts Nos. 1685 and 3012, which prohibits the use of explosives and poisons for catching fish in the Philippines; Act No. 4003, as amended by Com. Acts Nos. 116 (Nov. 19, 1936) and 471 (June 16, 1939); Rep. Act No. 659 (June 16, 1951), otherwise known as the Fisheries Act; 2 PADILLA, *op. cit. supra*, note 16. *See also* Acts Nos. 2584 (Feb. 4, 1916) and 2604 (Feb. 4, 1916); U.S. v. Hernandez, 31 Phil. 342 (1915); Liangko v. Mun. of Tabaco, 43 Phil. 381 (1922); Mun. of Lemery v. Mendoza, et al., 48 Phil. 415 (1925); Mun. of Muncada v. Cajuigan, 21 Phil. 184 (1912); SINCO, CIVIL CODE OF THE PHILIPPINES ANNOTATED 259 (1950).

[18] State v. Ripp, 104 Iowa 305, 73 N.W. 829, 40 L.R.A. 687, 65 Am. St. Rep. 463; Rexroth v. Coon, 15 R.I. 35, 23 A. 37, 2 Am. Dec. 553.

[19] 96 Vt. 327, 119 A. 430 (1923).

[20] The provision of law violated is worded as follows: "A person who sets or causes to be set a bear trap shall build in a substantial manner and maintain three-fourths around the same a railing or guard not less than three feet high, and shall protect the entrance of such enclosure against domestic animals by placing a pole horizontally across such entrance at a distance of three feet from the ground. A person who violates a provision of this section shall be fined twenty dollars." (G.L. 6431.) The bear trapper in this case did not build the required enclosure around his bear trap.

[21] *See* Danson v. Daly, 257 Mass. 195, 153 N.E. 454, 49 A.L.R. 1496 (1926) where it was again emphasized that a hunter's license must first be secured before the right to hunt deer exists, which can be exercised only in accordance therewith.

[22] 82 Me. 173, 19 A. 160, 8 L.R.A. 448 (1889).

and liberating a moose and a deer confined there. The plaintiff had captured the moose and purchased the deer during the closed season. The defendant justified his conduct by alleging that it was demanded by his official duty as game warden. His act, it should be observed, was not authorized by any provision of statute. The court held that the defendant had not justified the taking of the deer, as he failed to show that it had been captured in violation of law. But as to the moose it was held that the plaintiff's illegal act of capture out of season gave him no title to support the action and the law protects the title or claim of no one that arises from its violation.

IV. PROPER OBJECTS OF OCCUPATION

Generally, it may be said that the fit objects of occupation are limited to personalty. Accepting with reservations the reasoning of the Code Commission [23] that ownership to land cannot be acquired by occupation because

> "When the land is without an owner, it pertains to the State," [24]

it becomes rather difficult to imagine a case when any other form of realty may be acquired by *occupatio*. In fact, if the reason advanced is carried to its logical extreme, there would seem to be no situation where personalty, itself, may be acquired by occupancy, considering that under the rules of accession, whatever personalty stands on a piece of land is generally deemed owned by the owner of such land.[25] This exemplifies the rule of *ratione soli*.

Indeed, the question of whether ownership is acquired under the rule of *ratione soli* or *occupatio* has been warmly contested in France and Germany.[26] The problem becomes real when one captures wild animals on the land of another. It has been held that fish in a river and wild animals on land are considered to be in the possession of the person upon whose land they happen to be, and when killed or captured they belong to the landowner and not to the captor.[27] This illustrates, of course, the application of the rule of *ratione soli*.

A. Objects under the Civil Code

The Civil Code of the Philippines gives us an idea of objects over which occupation may be exercised. It provides:

> "Art. 713. Things appropriable by nature which are without an owner, such as animals that are the object of hunting and fish-

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[23] REPORT OF THE CODE COMMISSION 100.

[24] Professor Tolentino strongly disagrees with the Code Commission in this respect. He says: "We believe, therefore, that the present article must be construed in the light of the reason for its formulaion in our law. Since the Code Commission inserted this article (Art. 714) in the Code on the supposition it pertains to the State, it should be limited to land belonging to the State." Citing Ennecurus, Kipp and Wolff, Ruggiero, and the identical views of Simoncelli and Pacifici, as well as that of Bruge, he continues: "Abandoned land does not belong to the State under our law; hence, this article should not be applied to it. Such abandoned land may thus be acquired by occupation. This is also the conclusion reached by writers in Germany and Italy, where the principle that all things without an owner belong to the State does not apply." *Op. cit. supra* note 11, at 426-427.

[25] It has been held, for instance that "an aerolite falling upon land cannot be acquired by occupancy, but becomes part of the soil." 29 WORDS AND PHRASES 126.

[26] MARKBY, *op. cit. supra*, n. 2 at 2379.

[27] *Ibid.*

ing, hidden treasure and abandoned movables are acquired by occupation." [28]

The provision just quoted gives us a clue to what the fit objects of occupation generally may be. It may be roughly said, however, that such objects are either animate or inanimate.

With respect to animate objects, the Civil Code speaks of animals susceptible of occupation in Article 716, to wit, swarm of bees, domesticated animals,[29] pigeons, and fish.[30]

And as regards inanimate objects, the Code, also, declares what such objects may be, viz., hidden treasure [31] or abandoned movables.[32]

B. Other Objects

That the enumeration in the Civil Code of the proper objects of occupation is not exclusive but merely illustrative, the following commentary of Manresa y Navarro is highly in point:

> "Menciona el artículo 610 [33] solamente la caza y pesca, el tesoro y las cosas muebles abandonadas, y solo de estas especies se ocupan los artículos 611 al 610. Sin embrago, la enumeración fue se hace es demonstrativa y no taxativa. Asi es que, a pesar de uno expresarse por dichos artículos el derecho a ocupar las conchas, mariscos, plantas, perlas, etc., que se crían en el mar o sus orillas, nadie duda que pertenecer al primer ocupante en virtud de la regla general del artículo 610, confirmada en esa parte por el artículo 12 de la ley de Puertas de 19 de enero de 1928." [34]

It is interesting to note that under the Roman law, other objects are enumerated which are not expressly included in the Philippine Civil Code. Such objects are as follows: things taken from the enemy, precious stones, gems, etc. found on the seashore, and unoccupied lands in the sea.[35] It was, also, the rule in Roman law that hostile property admitted of *occupatio,* as soon as it came within

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[28] SPANISH CIVIL CODE Art. 610; see FISHER, CIVIL CODE OF SPAIN WITH PHILIPPINE NOTES 222 *et seq.* (4th ed.).

[29] CIVIL CODE OF THE PHILIPPINES Art. 716. The owner of a swarm of bees shall have a right to pursue them to another's land, indemnifying the possessor of the latter for the damage. If the owner has not pursued the swarm, or ceases to do so within two consecutive days, the possessor of the land may occupy or return the same. The owner of domesticated animals may also claim them within twenty days to be counted from their occupation by another person. This period having expired, they shall pertain to him who has caught and kept them.

[30] *Id.* Art. 717. Pigeons and fish which from their respective breeding places pass to another pertaining to a different owner shall belong to the latter, provided they have not been enticed by some artifice or fraud. "The law does not treat of pigeons and fish in a state of liberty; their occupation is regulated by the special laws on hunting and fishing. What is treated here are pigeons and fish conceived as domesticated or tamed animals, subject to the control of man in private breeding places." 5 MANRESA Y NAVARRO, *op. cit. supra* note 5, at 44.

[31] CIVIL CODE OF THE PHILIPPINES Art. 718. He who by chance discovers hidden treasure in another's property shall have the right granted him in article 438 of this Code.

[32] *Id.* Art. 719. Whoever finds a movable, which is not treasure, must return it to its previous possessor. If the latter is unknown, the finder shall immediately deposit it with the mayor of the city or municipality where the finding has taken place.

The finding shall be publicly announced by the mayor for two consecutive weeks in the way he deems best.

If the movable cannot be kept without deterioration, or without expenses which considerably diminish its value, it shall be sold at public auction eight days after the publication.

Six months from the publication having elapsed without the owner having appeared, the thing found, or its value, shall be awarded to the finder and the owner shall be obliged, as the case may be, to reimburse the expenses.

[33] Now article 713 of the new Civil Code.

[34] 5 MANRESA Y NAVARRO, *op. cit. supra* note 5, at 51.

[35] R. W. LEE, THE ELEMENTS OF ROMAN LAW 125 (3rd ed.).

Roman Territory, but that, when it returned to the enemy's country, it reverted at once by the *jus postliminii* to its former owner. And, conversely, Roman property which returned from the hands of the enemy to Roman territory reverted at once to its Roman owner.[36]

However, stolen property cannot be acquired by occupation. The possession of those who steal from a dead man's purse is far less respectable than those who find property on a street. No title can be acquired to the stolen property, as whatever may be bought with that money, not even by prescription.[37] Furthermore, a thing that has been lost or taken by force is not *ipso facto* converted into *res nullius* which would belong to the first person who may occupy it without proof of a mode of acquisition which would extinguish the right of the original owner.[38] Finally, things lost, [39] which are those which are without a possessor, are not *res nullius*.[40]

It may, therefore, be briefly stated that as to inanimate personalty, the objects of occupation must be *res nullius ab initio* or that their owner has abandoned them. With respect to animate objects, an expanded discussion is called for.

Animate objects may be divided into animals *naturae ferae* and domestic animals.[41] The latter kind are, generally, not susceptible of occupation because they are those born and ordinarily raised under the care of people. They are subject to the rules of law on ordinary movable property. However, even this group of animals may become a proper object of occupation when they are abandoned by their owners.[42]

But as to the former type, namely, animals *naturae ferae* or animals wild by nature, a different set of rules applies. It is believed that these animals may be acquired only by occupation. Under this group are animals which are still in their natural state of liberty and those which have been tamed or domesticated. Domesticated animals are those which were originally wild, but have been captured, tamed, and accustomed to people. They belong to those who capture and tame them; but if they escape and regain their original state of freedom, they will cease to belong to their former owner. However, if they have been caught by another, the former may still recover them within twenty days.[43]

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[36] SOHM, *op. cit. supra* note 13, at 536; LEE, *op. cit. supra*.
[37] CIVIL CODE OF THE PHILIPPINES Art. 559; Pirtle v. Price, 31 La. Ann. 357.
[38] Narciso v. Ortiz, (C.A.) 45 O.G. 1, 162 (1949).
[39] See note 93 *infra* for an illuminating discussion on the meaning of the term "lost".
[40] 1 TOLENTINO, *op. cit. supra* note 11, at 428.
[41] Under the Roman law, beasts .and birds are distinguished as naturally wild (*ferae naturae*) and naturally tame (*mansuetae naturae*). This is a question of the species to which they belong. Thus there are wild geese and tame geese. Creatures wild by nature may in individual cases be more or less tamed or domesticated. Wild beasts and birds become yours when you take them, and remain yours as long as they are under your control. Tamed beasts and birds are those which, though naturally wild, have acquired a habit of going away and coming back. They remain the possessor's so long as the habit continues. Tame animals are owned like anything else and remain yours, however far afield they may chance to wander or stay away. LEE, *op. cit. supra* note 35. The striking similarity of these Roman law definitions and rules with the Philippine rule on the same subject is too apparent to be left unnoticed.
[42] 1 TOLENTINO, *op. cit. supra* note 40. It is not altogether clear if *caraballas* fall within the term "tamed or domestic (amansados)." Professor Padilla observes, however, that the term "amansados" is not the equivalent of domestic but of domesticated animals. *Op. cit. supra* note 16, at 381. *But see* Catabian v. Tungcul, 11 Phil. 49 (1908).
[43] CIVIL CODE OF THE PHILIPPINES Art. 560; Mullett v. Bradley, 24 Misc. 695, 53 N.Y.S. 781; 1 TOLENTINO, *op. cit. supra*.

C. Legal Status of Objects before Occupation

Objects of occupation must necessarily be those which are without any owner [44] at the time when they are sought to be occupied; if they are owned, ownership may be acquired by some other mode, i.e., by prescription.[45] By *res nullius*, things need not be without any owner from the very beginning. It is enough if at the time of occupation they are without an owner in contemplation of law. Thus a thing may have a previous owner, but because of abandonment, it becomes *res nullius*. Or it may have no owner from the beginning. In either case, occupation may be properly asserted.

It is sometimes asked whether objects of occupation, though without an individual owner or co-owners, may, nevertheless, be owned by someone else. To ask the question would seem absurd, considering that the phrase *res nullius* means precisely that the thing is not owned by anybody.

The rule is, however, everywhere recognized that animals *naturae ferae* at large in the State belong to the people of the State in their collective and sovereign capacity, and not in their individual and private capacity, except so far as private ownership may be acquired therein under the Constitution, subject always to such proper regulations as the Legislature may make. From this common property an inhabitant of the State has the right to appropriate to his own use such as he may capture and retain in conformity with reasonable regulations established by law for the common good. In such manner, and such only, can he acquire a qualified ownership in the animal which the law recognizes as private property.[46] In England, the Crown has, by an ancient statute called Prerogative Regis of uncertain date, claimed the ownership of whales and sturgeon taken in the sea or within the realm. The right is still sometimes claimed in respect of whales by the grantees of the Crown.[47]

Under the common law, treasure trove is not strictly speaking a *res nullius*. It is property which once had an owner, and which has been hidden (not being abandoned or lost) by him; and on its being discovered it will be considered as treasure trove if all hope of tracing the owner is lost.[48] Under the Roman law, treasure trove (thesaurus) is treated as a *res nullius*. "Thesaurus" is there defined, in the legal sense, as an object of value, which has been hidden for a very long time, so that the owner is at present unknown. Half of the treasure goes to the finder, the other half to the owner of the land in which it was found.[49]

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[44] Villanueva v. Claustro, 23 Phil. 54 (1912). When we say that the thing is without an owner, we mean that the thing may never have had an owner or it had an owner who has abandoned it. 1 TOLENTINO, *op. cit. supra*, at 424.

[45] MARKBY, *op. cit. supra* note 13, at 238.

[46] State v. Norton, 45 Vt. 258; Payne v. Shets, 75 Vt. 335, 55 A. 656; State v. Niles, 78 Vt. 266, 62 A. 795, 112 Am. St. Rep. 917; Zanetta v. Balles, 80 Vt. 345, 67 A. 818; Bondi v. Mackay, 87 Vt. 271, 89 A. 228, Ann. Cas. 1916C, 130; Villa v. Thayer, 92 Vt. 81, 101 A. 1009, L.R.A. 1918A, 887; *accord*, New England Trout Club v. Mather, 68 Vt. 338, 35 A. 323, 33 L.R.A. 569; State v. Theriault, 70 Vt. 617, 41 A. 1030, 45 L.R.A. 290, 67 Am. St. Rep. 695; State v. Haskell, 84 Vt. 429, 79 A. 852, 34 L.R.A. (N.S.) 286.

[47] MARKBY, *op. cit. supra*.

[48] *Ibid.*; *cf.* CIVIL CODE OF THE PHILIPPINES Art 439. Some writers believe that hidden treasure has been erroneously included among those that can be acquired by occupation. Certainly, when hidden treasure is found in another's property, it cannot be acquired by occupation. Thus, when a person, without authorization of the owner of a piece of land, sets out to look for hidden treasure therein, he has no right to any part thereof if he discovers such treasure. It seems, therefore, that hidden treasure can be acquired only when found in things which do not belong to anyone, because it is only in this case that the treasure will be without an owner. 1 TOLENTINO, *op. cit. supra*, at 425.

[49] SOHM, *op. cit. supra* note 13, at 536.

V. ACQUISITION OF OWNERSHIP BY OCCUPATION

A. Inanimate Objects

There once prevailed a rule in England which, though a bit humorous, illustrates the contemporary idea on when a ship wrecked in a storm might become *res nullius* and, therefore, a proper object of occupation. It was then the rule that in order that a ship may not be legally occupied, there must have been one man, a dog, or a cat, at least, which was able to survive the storm. In case no one survived, the ship was considered a wreck and belonged to the inhabitants residing on the vicinity of the seashore where the wreck was found. Lord Mansfield dealt at length on this rule in the case of *Hamilton v. Davis*.[50]

In another instance, Wilkins, writing from the *Chronicle of the Monastery de Bello*, records this following account: In a very great storm, a certain ship loaded with a variety of goods from Rummel was cast in a broken condition on land of the Church of Bello. The question of the ownership of the wreck arose when the men of the place laid claim over the battered ship. It was, however, the custom that when a ship was broken by the waves, if those who escape shall not have repaired her, within the required term, the ship and whatever shall come to shore belonged without suit to that land and was held a wreck. It was held that the claimants of the ship here in question, "according to the custom of the sea and the royal dignities," took by force the aforesaid wreck.[51]

Under the Civil Code of the Philippines, the procedure for the acquisition of ownership over hidden treasure and abandoned movables are expressly provided for. As for hidden treasure, the Code declares:

> "Art. 718. He who by chance discovers hidden treasure in another's property shall have the right granted him in article 438 of this Code."

And article 438 provides:

> "Art. 438. Hidden treasure belongs to the owner of the land, building, or other property on which it is found.
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> "Nevertheless, when the discovery is made on the property of another, or of the State or any of its subdivisions, and by chance, one-half thereof shall be allowed to the finder. If the finder is a trespasser, he shall not be entitled to any share of the treasure.
>
> "If the things found be of interest to science or the arts, the State may acquire them at their just price, which shall be divided in conformity with the rule stated."

If the finder is married and the regime of conjugal partnership of gains governs, his share in the treasure belongs to the conjugal partnership as provided in Art. 154, of the Civil Code. Said article, provides: "That share of the hidden treasure which the law awards to the finder or the proprietor belongs to the conjugal partnership."

[50] 5 Burr. 2732 (1771).
[51] LEG. ANG.-SAX. 305.

As for abandoned movable, the rule is expressed thus:

> "Art. 719. Whoever finds a movable, which is not treasure, must return it to its previous possessor. If the latter is unknown, the finder shall immediately deposit it with the mayor of the city or municipality where the finding has taken place.
>
> "The finding shall be publicly announced by the mayor for two consecutive weeks in the way he deems best.
>
> "If the movable cannot be kept without deterioration, or without expenses which considerably diminish its value, it shall be sold at public auction eight days after the publication.
>
> "Six months from the publication having elapsed without the owner having appeared, the thing found, or its value, shall be awarded to the finder. The finder and the owner shall be obliged, as the case may be, to reimburse the expenses."

Furthermore:

> "Art. 720. If the owner should appear in time, he shall be obliged to pay, as a reward to the finder, one-tenth of the sum or of the price of the thing found."

Manresa y Navarro, commenting on article 719, gives this instructive observation:

> "Nuestro Código, sin embargo al proclamar de nuevo el antiguo principio *res nullius cedit occupanti* y al generalizar la doctrina referente al hallazgo en el artículo 615, devuelva a la doctrina de la ocupación algo de su esplendor pasado, y limita el derecho absorbente del Estado." [52]

Aside from these inanimate objects which are enumerated by our Civil Code, there are other things which can be acquired by occupation. In this jurisdiction, for example, marine products and non-marine products can also be acquired by occupation. However, a set of rules is applied as regards marine products, and another set of rules is applied as regards non-marine products.

In marine products, like shells and plants, the rule is that they belong to the first occupant, when cast ashore. Otherwise, the fishing laws will be applied. As regards non-marine products, which are cast into the sea, the rule is different as to whether they are found resting at the bottom of the sea (*ligan*), floating on the surface, or as to whether they are cast ashore. If they are found resting at the bottom of the sea, i.e., *ligan*, and they are found lying under the open sea, they will belong to the finder or salvor. However, if they are found lying under territorial waters, the rules on sharing will be governed by the Salvage Law. Now, if the non-marine products belong to the category of *flotsam*, i.e., floating on the surface, they belong to the State, but without prejudice to the salvage rights. Lastly, if the non-marine products consist of wreck which are cast

[52] 5 MANRESA Y NAVARRO, *op. cit. supra.*

ashore, the rule is that they have to be deposited with the authorities in accordance with Article 719 of the Civil Code.[53]

It has been held that occupation is synonymous with the expression "subjection to the will and control and with possession *pedis*," and signifies "actual possession." [54] Undoubtedly, however, possession, in order to fulfill this requisite, must be one asserted in the concept of owner. When one acquires possession, therefore, of animals delivered to him by the person in lawful custody of them, no occupation as a mode of acquiring ownership can arise in legal contemplation.[55] Nevertheless, if a person finds property which is comparatively worthless, owing to its scattered condition on the highway, and greatly increases its value by his labor and expense in gathering it together, he does not lose his right if he leaves it a seasonable time to procure the means to take away, when such means are necessary for its removal.[56]

B. *Animate Objects: Animals Naturae Ferae*

Concerning this class of objects, ownership may be acquired over abandoned domestic or tame animals or over animals *naturae ferae*. Not much can be said as regards domestic or tame animals because ordinarily they are not proper objects of occupation until after they are abandoned.

The storm of controversy has centered on animals *naturae ferae*. The root of the controversy has revolved on the degree of control required over the animal which is sufficient to give birth to ownership by *occupatio*. In fine, the question may be reduced into the following: What is the standard of control which must be satisfied before ownership can be said to have been acquired over an animal by means of occupation?

The mass of authorities and jurisprudence on the subject clearly indicate a departure from the old Roman law standard of actual physical control.[57] Under this law, the inflexible rule was corporeal control. The justification offered for this rule was that many things can happen which would prevent the consummation of ownership, from the start of the pursuit until it is ended. According, only actual bodily control satisfied the requirement under the Roman law.[58]

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[53] 2 REYES, AN OUTLINE OF PHILIPPINE CIVIL LAW, 217. See also Act No. 2616 and Arts. 6 and 7 of the Law of Waters.

[54] Lawrence v. Fulton, 19 Calif. 683, 690; United States v. Rogers, 23 F. 658, 666; McKenzie v. Brandon, 12 P. 428, 429, 71 Calif. 209.

[55] See Catabian v. Tungcul, *supra*.

[56] Haslem v. Lockwood, 37 Conn. 500, 9 Am. Rep. 350.

[57] This rule was followed in certain cases where it was held that "even in case of animals or birds not of a base nature, a conviction cannot be sustained unless they have been reclaimed or reduced to possession." Rex c. Rough, 2 East, P.C. (Eng.) 607 (1779); State v. Krider, 78 N.C. 481 (1878); Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348 (1829).

[58] It is, for instance, the rule adhered to that wild beasts, birds, and fishes become the property of the captor, whether taken on public or private land, one's own or someone else's. If you go on some one else's land for the purpose of hunting or fowling, he may warn you off, if he sees you coming. If you persist in spite of the prohibition, your action assumes a contumelious character, and exposes you to an *action injuriarum*, but nonetheless, you are owner of what you take. R. W. LEE, *op. cit. supra* note 35. A similar rule was laid down in Goff v. Kilts, 15 Wend. (N.Y.) 550 (1836), where it was declared that the property of an owner of a swarm of bees continued but that he cannot enter the other's land where the bees moved without committing trespass. This, in the opinion of the authors, is rather a ticklish problem, and to the owner of the bees this question may have posed a puzzle as thought-provoking as the legendary enigma of the Gordian knot. *Accord*, Sutton v. Moody, 1 Ld. Rayn. 250 (1697).

The case of *Pierson v. Post* [59] is the leading authority on this departure from the ancient rule under the Roman law. The Court here reviewed the pertinent authorities on the subject. Puffendorf and Bynkershock are cited as supporting the original rule of actual physical control. The Court adopted, however, the contrary view of Barbeyrac. On this point, the court said:

> "Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but, on the contrary, affirms that actual bodily seizure is not in all cases necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use so as to exclude the claims of all other persons by title or occupancy to the same animals, and he is far from averring that pursuit alone is sufficient for that purpose. Actual bodily seizure is not indispensable to acquire a right to, or possession of, wild beasts. On the contrary, the mortal wounding of such beast by one not abandoning his pursuit may with the utmost propriety be deemed in possession of him, since thereby the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So, also, encompassing and securing such animals with nets and toils, or otherwise intercepting them so as to deprive them of their natural liberty and render escape impossible, may justly be deemed to give possession of them to those persons who by their industry and labor have used such means of apprehending them."

In the *Pierson case*, however, the plaintiff lost the ownership of the fox to the defendant because in the words of the Court:

> "The mere pursuit of a fox by a hunter with his dogs is not such possession or occupancy as gives such hunter a right to the fox as against another which killed it and took it away." [60]

The case of *Buster v. Newkirk* [61] reiterates the doctrine laid down in the *pierson case*. It appears here that one Newkirk brought an action of trover [62] against Buster for a deerskin. The records

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[59] 3 Caines 175, 2 Am. Dec. 264 (1805).

[60] *Id.;* Dapson v. Daly, *supra*. In a vigorous dissenting opinion, Justice Linington, arguing from the standpoint of public policy, declared the fox in the Pierson case, *supra*, should have been adjudicated in favor of the plaintiff who organized the pursuit with dogs and horses. He reasons thus:

"It is admitted that a fox is a 'wild and noxious beast.' Both parties have regarded him, as the law of nations does a pirate, a *hostem humani generis*,' and although *'de morteris nil nisi bonum'* be a maxim of our profession, the memory of the deceased has not been spared. His depredation on farmers and on barnyards, have not been forgotten; and to put him to death wherever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career. But who would keep a pack of hounds, or what gentleman, at the sound of the horn, and at peep of day, would mount his stead, and for hours together, *'sub jove frigido,'* or a vertical sun, pursue the windings of this wily quadruped, if, just as night came on, and his strategems and strength were nearly exhausted, a saucy intruder, who had not shared in the honors or labours of the chase, were permitted to come in at the death, and bear away in triumph the object of pursuit Whatever Justinian may have thought of the matter. it must be recollected that his code was compiled nearly hundred years ago, and it would be very hard indeed, at the distance of so many centuries, not to have a right to establish a rule for ourselves."

[61] 20 Johns 75 (1882).

[62] "A remedy for any wrongful interference with or detention of the goods of another." BLACK'S LAW DICTIONARY 1679 (4th ed.).

showed that Newkirk was hunting deer on the 31st of December, 1819 and had wounded one, about six miles from Buster's house, which Newkirk pursued with his dogs. He followed the track of the deer, occasionally discovering blood, until night; and on the next morning resumed the pusuit, until he came to Buster's house, where the deer had been killed the evening before. The deer had been fired at by another person, just before he was killed by Buster, and fell, but rose again, and ran on, the dogs being in pursuit, and the plaintiff's dogs laid hold of the deer about the same time, when Buster cut the deer's throat. Newkirk demanded the vension and skin of the deer from Buster, who gave him the venison but refused to let him have the skin. The jury found a verdict for the plaintiff. On appeal, the Court reversed the judgment and, reaffirming the rule announced in the *Pierson case,* held:

> ". . .Property can be acquired in animals *ferae naturae* by occupancy only, and that in order to constitute such an occupancy it is sufficient if the animal is deprived of his natural liberty, by wounding or otherwise, so that he is brought within the power and control of the pursuer. In the present case, the deer, though wounded, ran six miles; and the defendant in error had abandoned the pursuit that day, and the deer was not deprived of his natural liberty, so as to be in the power or under the control of Newkirk. He therefore cannot be said to have had a property in the animal so as to maintain the action." [63]

The test, therefore, appears to be such degree of control, physical or constructive, as is sufficient to bring the animal within the power of the pusuer and to deprive it, in fact or in effect, of its natural liberty. Thus it was held that "the instant a wild animal is brought under the control of a person so that actual possession is practically inevitable, a vested property interest in it accrues which cannot be divested by another's intervening and killing it." [64]

This test acquires significance in cases of prosecutions for crimes against property. What degree of control is necessary for one to acquire such interest in the object as is sufficient to require the protection of the law and the maintenance of an action against the wrongdoer?

In *Atkinson v. City and County of Denver,*[65] plaintiff claimed that he had partially domesticated certain squirrels and had a property interest in them, although they continued to run freely around the neighborhood. He contended that the City of Denver violated that property right when policemen were ordered to shoot the squirrels as they were becoming a menace. There were no identification marks on the squirrels to identify them as belonging to the plaintiff. The Court ruled that the plaintiff had not established his pretended property right over the animals. From the decision of the Court, it would seem that there must be not only partial but total domestication; and that even assuming that the animal is fully domesti-

[63] *Accord,* "Los codigos americanos, por regla general, seguien la doctrina de las Partidas: el animal amansado no se pierde mientras se le persigue. Abandonada la persecucion, es libre y pertenece a la persona que le ocupa." 5MANRESA Y NAVARRO, *op. cit. supra* note 5, at 69.

[64] Liesner v. Wanie, 156 Wis. 16, 145 N.W. 374, 50 L.R.A. (N.S.) 703 (1914).

[65] 118 Colo. 332, 195 P. 2d 977 (1948).

cated, it must bear some identification marks before a person can claim ownership over it.[66]

However, although it is possible for the fish to escape from one's pound in the ocean but they are not likely to escape and resume their natural liberty, an action lies against another who takes fish from such pound without license from the owner.[67] And when the defendant prevented the plaintiff from taking the fish alleged to be enclosed in his possession and drove the said fish on the supposition that the fish were not plaintiff's and that he was not possessed of them because plaintiff used an open net, an action for trespass was in order.[68]

The test of effective occupation laid down in the preceding discussion may, however, be qualified by established usage. In *Swift v. Gifford*[69] the bone of contention was a whale which appeared to have been harpooned first by one named Rainbow. The harpoon might not have been driven deep enough because the whale outrun the pursuers. It was subsequently killed by the defendant Hercules, with the plaintiff's harpoon still struck on the whale. There was no reasonable hope of physical possession or success on the part of the plaintiff. Ordinarily, therefore, the whale would have been awarded to the defendant even under the liberal doctrine laid down in the *Pierson case*. But the Court took judicial notice of the existence of a usage among whalers that the whaler whose iron first struck the animal and which harpoon remained on it, is the owner before cut in by others. "The general rule of occupancy," the Court ruled "may be modified by usage."[70] And in *Ghen v. Rich*,[71] libellant shot and killed a fin-back whale. It drifted seventeen miles and was found by respondent on the shore. Respondent advertised it for sale at public auction. But there was an existing usage in the place that he who has killed a whale with a lance is the owner, and that the finder should notify the owner identified by the mark on the lance, for which service he gets a commission. Respondent, however, did not follow this customary rule, although he could have known the owner by the sign on the lance. Respondent claimed this usage was invalid. In overruling this contention, the Court held:

> ". . . The usage for the first iron, whether attached to the boat or not, to hold the whale was fully established; and be added that, although local usages of a particular port ought not to be allowed to set aside the general maritime law, the objection did not apply to a custom which embraced an entire business, and had been concurred in for a long time by every one in the trade."

The Civil Code of the Philippines lays down the requirements preparatory to acquiring ownership over swarms of bees, domesticated animals, pigeons, and fish.[72] It is said that "pigeons and fish must pass from their breeding place to another breeding place belonging to a different owner. Since the law considers such animals

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[66] *E.g.* Resler v. Jones, 50 Idaho 405, 296 P. 773 (1931).
[67] Miller et al. v. United States, 242 F. 907, L.R.A. 1918A 545 (1917).
[68] Young v. Kichens, 6 Q.B. 606 (1844).
[69] 2 Lowell 110 (1872).
[70] *Accord*, Fennings v. Grenville, 1 Taunt. 241; Bartlett v. Budd, 1 Lowell 233; Bourne v. Ashley, unreported (1863).
[71] 8 F. 159 (1881).
[72] CIVIL CODE OF THE PHILIPPINES Arts. 716 and 717.

as part of the immovable,[73] they become property of the owner of the breeding places to which they have been transferred. The Italian Code considers this as acquisition through accession, not occupation. Where the artifice that has enticed the animals is one freely consented to by neighbors, the ownership will still pass."[74]

Article 715 of the Civil Code provides, in this connection, that "the right [75] to hunt and to fish is regulated by special laws." Manresa defines the scope of the terms "hunting" and "fishing" appearing under this article. "La caza es la ocupación de los animales fieros que hay en la tierra o en el aire. La pesca es esa misma ocupación aplicable a los animales del mar." As regards fishing, he says: "La pesca puede ser fluvial o marítima." [76]

Court decisions involving animals *naturae ferae* draw a distinction between those which are "base or noxious" by nature and those which are "generous" or harmless. This distinction between wild animals of noxious or base nature, for which the State offers a bounty, and those of a generous nature has been made when involving larceny but not when the right of the owner to be protected by a civil action is involved.[77]

C. *Legal Effects of Acquisition of Ownership by Occupation*

Once ownership over objects is acquired by occupation, the occupier is thereby entitled to the protection of the law against any invasion of his property right. The protection that the law affords him is, however, coextensive with the ownership he has acquired. There must be a showing, therefore, of a *prima facie* title, as with all other chattels, and sufficient to support an action concerning them against any wrongdoer.[78] Accordingly, where one lost the qualified ownership he secured over an animal *naturae ferae* because it had gone back to its former state of natural liberty, he cannot expect that the law will still protect the ownership which he already lost. Respecting abandoned movables and hidden treasure, the same amount of legal protection is also given to the treasure finder or to the occupier of the abandoned movable.

Thus, "any person who shall enter an enclosed estate or field when trespass is forbidden or which belongs to another and without the consent of its owner, shall hunt or fish upon the same or shall gather fruits, cereals, or other forest or farm products" is liable for the crime of theft.[79] Theft is, also, committed if "any person who, having found lost property, shall fail to deliver the same to the local

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[73] *Id.* Art. 415, par. 6.

[74] 1 TOLENTINO, *op. cit. supra* note 11, at 429.

[75] Dean Vicente Abad Santos disagrees with the Code Commission in the use of the term "right". He says: "The act of hunting and fishing is not the exercise of a right as the Civil Code mistakenly says but it is the exercise of a privilege or liberty since no correlative duty is imposed on anybody (not even the animals the object thereof) to insure the exercise of the act of hunting or fishing. . . ." VICENTE ABAD SANTOS, *op. cit. supra* note 1, at 369.

[76] *Op. cit. supra* note 5, at 54, 61.

[77] Warren v. State, 1 Green (Iowa) 106; Norton v. Ladd, 5 N.H. 203, 20 Am. Dec. 537; 1 Hawk. P.C. 33, sec. 23; 4 BLACKSTONE'S COMMENTARIES 234, 235. *Contra*: State v. House, 65 N.C. 315, 6 Am. Rep. 744 (1871).

[78] Slate Co. v. Tilton, 69 Me. 244; Adams. McGlinchy, 66 Me. 474; Craig v. Gilbreth, 47 Me. 416; Brown v. Ware, 25 Me. 411; Bruke v. Savage, 13 Allen 408; Magee v. Scott, 9 Cush. 148; Armory v. Delamirie, 1 Strange 504.

[79] REVISED PENAL CODE Art. 308, par. 3.

authorities or to its owner." [80] It should be noted at this point that the knowledge by the finder of personal property of the ownership of the thing found is not essential to warrant his conviction.[81]

In *Punsalan v. Boon Liat*,[82] a co-ownership resulted from the finding of ambergis by several fishermen. As such, one of them cannot dispose of the thing without the agreement of the other members of the group.

The distinction, previously mentioned, respecting base or noxious animals and those which are of the "generous" type, as regards animals *naturae ferae*, has been rendered significant in view of decisions of American courts that one who takes an animal of the generous type is generally liable for such act. Another distinction indulged in by American courts is that between animals *naturae ferae* which are dead, reclaimed, or possessed of some intrinsic value, i.e., valuable for their commercial worth or for food, on the one hand; and those which have not been reclaimed, or even if so reclaimed, are good only as objects of curiosity and pleasure.[83] However, where the animal is not of the class of *naturae ferae*, it is not necessary to allege that the animal was dead, confined or reclaimed, in order that an action may be maintained.[84] And when birds have already been sufficiently tamed, an action against a wrongdoer will, also, lie.[85]

With respect to clams and oysters, it has been held that, although they are in the nature of *ferae naturae*, when they are reclaimed and transplanted to a bed in which none grew by nature, and the bed is so marked as to show that they are in the possession of a private owner, they are personal property and may become the subject of an action in court.[86] But a statute, declaring natural beds reserve oyster lands of the State, is not such a reclaiming of the oysters as takes them out of the operation of the rule that oysters on tide lands belonging to the State are so far *naturae ferae* that one cannot be convicted of larcency.[87]

Public policy may, however, creep into the decisions of courts over cases where under the ordinary rule of occupancy ownership over certain animals is not considered acquired. In the case of *Stephens and Co. v. Albers*,[88] a fox escaped from the farm of the plaintiff, who was raising foxes on a commercial scale for the valuable fur of the animals. Plaintiff pursued the fox but pursuit was abandoned when night came. The animal was later on killed by the defendant who sold its pelt. The Court, in disopsing of the case, emphasized the fact that considerable amount of labor, money, and

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[80] *Id.* Art. 308, par. 1.

[81] People v. Panotes, (C.A.) 86 O.G. 6, 1008 (1947); People v. Silverio, (C.A.) 43 O.G. 8, 2205 (1951). *Contra*: U.S. v. Cerna, 21 Phil. 144 (1912).

[82] 44 Phil. 320 (1923).

[83] Norton v. Ladd, *supra*; Miller et al. v. United States, *supra*.

[84] State v. Turner, 66 N.C. 618 (1872).

[85] Rex v. Brooks, 4 Car. & P. 131 (1829); Reg. v. Cheafar, 5 Cox. C.C. 367, 2 Den. C.C. 361, Temple & M. 621, 21 L.g. Mag. Cas. N.S. 43, 15 Jur. 1065 (1829); *accord*, Reg. v. Head, 1 Fost. & F. 350 (1857); Reg. v. Garnham, 8 Cox. C.C. 451 (1861); Reg. v. Cory, 10 Cox. C.C. 23 (1864); Reg. v. Shickle, L.R. 1 C.C. 158, 38 L.J. Mag. Cas. N.S. 21, 19 L.T.N,S, 327, 17 Week. Rep. 144, 11 Cox. C.C. 189 (1868); Com. v. Beaman, 8 Gray 497 (1857).

[86] People v. Wanger, 43 Misc. 136, 8 N.Y. Supp. 281 (1904); People v. Morrison, 194 N.Y. 175, 128 Am. St. Rep. 552, 86 N.E. 1120 (1909), motion for reargument denied on other grounds in 195 N.Y. 116, 133 Am. St. Rep. 780, 88 N.E. 21, 16 Ann. Cas. 871 (1909); State v. Taylor, 27 N.J.L. 117, 72 Am. Dec. 347 (1858).

[87] State v. Hohnson, 80 Wash. 522, 141 P. 1040 (1914).

[88] 81 Cal. 488, 256 P. 15, 52 A.L.R. 1056 (1927).

efforts were invested in the fox-raising industry of the plaintiff. Furthermore, the Court said:

> "The rule is that wild animals are susceptible of qualified ownership if reclaimed; but if they return to their wild state, ownership is lost. In a state of captivity, an action will lie against one who destroys them or detains the same. It is also as much a felony by common law to steal tame animals; but not so, if they are only kept for pleasure, curiosity, or whim . . . because their value is not intrinsic."

The Court here adjudicated the case in favor of the plaintiff in spite of the absence of intrinsic value of the object involved. Undoubtedly, it gave weight to the requirements of public policy.[89] In another case,[90] the Court held that the plaintiff, in shooting a fox which was destroying her chickens, "did no more than a reasonably prudent person has a right to do, under reasonably apparent necessity, in the protection of his own property or his own premises against trespassing wild animals," and hence was not liable for damages.

D. *Duration of Ownership Acquired by Occupation*

After discussing the legal effects of the acquisition of ownership by occupation, it is worthwhile to touch, even in passing, on the duration of such ownership. It was hitherto stated that the protection which the law affords to an individual is only to the extent that he continues to enjoy the full or qualified ownership of those things which are proper objects of occupation.

The Civil Code announces the basic principle that

> "Art. 560. Wild animals are possessed only while they are under one's control. . . ."

This provision is said to have been derived from the Institutes of Justinian.[91] It is now, therefore, well-settled that "when the right by occupation exists, it exists no longer than the party retains the actual possession of the property, or till he appropriates it to his own use by removing it to some other place. If he leaves the property where it was discovered, and does nothing whatsoever to enhance its value or change its nature, his right by occupancy is unquestionably gone." [92] It is, also, on good authority that no property exists in wild animals so long as they remain in a state of nature, but when killed or reclaimed they become property—absolutely when killed, and qualifiedly when reclaimed.[93]

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[89] *Cf.* Mullett v. Bradley, 24 Misc. Rep. 695, 53 N.Y.S. 781.
[90] Kesler v. Jones, 50 Idaho 405, 296 P. 773 (1931).
[91] VICENTE ABAD SANTOS, *op. cit. supra* note 1.
[92] 42 AM. JUR. Property, sec. 34.
[93] Case of Swan, 7 Coke 16; FINCH, COMMON LAW 176; KENT, COMMENTARIES pt. 5, lect. 35, sec. 2; Blades v. Higgs, H.A.L. Cas. 621.

IV. EXTINGUISHMENT OF OWNERSHIP

Ledlie offers a highly illuminating comment on the distinction between "derelictio" and "occupatio"; and between "derelictio" and lost property. He says:

> "*Derelictio* is the opposite of *occupatio*. It occurs when a person abandons the possession of a thing with the intention of abandoning the ownership of it, as when he throws away the peel of an orange after eating the orange. The effect is to make the thing a *res nullius* the moment the abandonment of possession is physically complete. Any one may therefore 'occupy', and acquire ownership in, *res derelictae*.
>
> "There is, of course, a difference between derelict property and lost property. When we lose property, we part with it involuntarily. It is only the actual control of the thing that we lose, not the ownership of it. The thing is not a *res nullius*, but a *res alicujus*, and does not therefore admit of *occupatio*. The finder, so far from becoming owner of the thing, is bound, not only to keep and preserve it, but also to do what in him lies (e.g. by reporting his find to the police) to have the thing restored to its owner." [94]

Manresa affirms the opinion expressed in the above-quoted passage that "abandonment, to be effective, must be voluntary and intentional." [95] Accordingly, where, for instance, a seaside tradesman completely shuts up his shop during non-season and clears out the stock but (having the legal possession and *animus revertendi*) leaves in the shop his trade fittings and utensils, the shop is not "occupied" although it is vacant.[96]

It is, therefore, clear that a thing is considered abandoned when the *spes recuperandi* is gone and the *animo revertendi* has been given up by the owner.[97] And with respect to wild animals, which have never been captured, they are considered *res nullius;* but if captured, they become *res nullius* again when they regain their liberty,[98] except when the owner pursues them without delay. The pursuit is not considered abandoned by the temporary cessation of the owner in his search for the whereabouts of the animals. The pursuit need not be physical; it may be through public advertisements of the loss.[99]

VIII. CONCLUSION

It is not here possible to assess how far the attempt to formulate a comprehensible law on occupation has succeeded. At any rate, it should be emphasized, again, that Philippine law on the subject is, decidedly, in a barren state. Consequently, while taking some occasional flashbacks to the recesses of the Roman law, considerable materials have been drawn from the vast reservoir of the common law. It is under this jurisdiction that the law on occupation appears to have attained a high stage of refinement and growth.

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[94] SOHM, *op. cit. supra* note 13, at 335-336.
[95] MANRESA Y NAVARRO, *op. cit. supra* note 5, at 48.
[96] 3 STROUD'S JUDICIAL DICTIONARY 1954 (3rd ed.).
[97] U.S. v. Rey, 8 Phil. 500 (1907).
[98] Case of Swan, *supra*.
[99] 1 TOLENTINO, *op. cit. supra* note 11, at 424.

It should be frankly confessed that the subject is rather a difficult one. But whatever difficulties the collaborating authors encountered and desires remain unsatisfied are, it is earnestly hoped, compensated for by the seriousness of purpose and the honesty of the attempt.

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