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An Analysis of the Doctrine That "First in Time Is First in Right"

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Lawrence Berger*

An Analysis of the Doctrine That "First in Time is First in Right"

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I. INTRODUCTION

The notion that first in time is first in right is an ancient one. It determines the resolution of numerous human conflicts both in law and custom. The legal rules about finding, water rights, nuisance, prescription, patents, wild animals, creditors' rights, franchises, recording and priorities in realty, and scores of other issues are wholly or partially governed by it. People follow it as unwritten law in their social interaction. The line waiting in front of a movie theater obeys its commands. The notion seems to be grounded in something almost instinctual; yet there is much more to it than that. Different policies serve to justify its application in various legal disputes. We discuss here some of the many contexts in which the doctrine is used (or abused), as well as the various policies that serve to justify or undermine it.

In examining this axiom, it would be well to start out with a fundamental distinction in mind. The doctrine can be applied to two basic kinds of conflicts: (1) those between the first individual to use, occupy, or formulate a resource (hereinafter called the first occupant) on the one hand, and society (usually represented by government) on the other; and (2) those between two private parties, a first occupant and a person having a subsequent claim. We deal first briefly with conflicts between society and the first occupant. Those disputes, of course, in many ways raise more important questions than the second group above, for, in a sense, they really go to the fundamental issue of whether a private property system is more desirable than a socialist one. Needless to say, that is an issue that has been discussed many times before, and it is not the purpose of this Article to go, once again, into great detail over that well-trodden ground. It will be sufficient for our purposes just to point out some of the basic arguments as they apply to the first in time rule. Most of this Article is devoted to a policy discussion of the rule as it relates to disputes between private claimants. There we will see that a number of policies are applicable but that one principle—that of encouraging economic development and productivity—clearly predominate over the others.

II. FIRST OCCUPANCY VERSUS COMMON OWNERSHIP

In a recent article Epstein states that there are fundamentally two possible ways of allocating ownership of property reduced for the first time to the possession of an individual.[1] On the one hand society can be deemed the owner, this notwithstanding the fact that a particular person was responsible for first occupying and thus bringing the resource into social utility. On the other hand, the occupying person can himself be held to be the owner.[2]

1. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1238 (1979).
2. The simplicity of Epstein's dichotomy might be criticized on the ground that

Epstein argues strongly for a rule preferring the first occupant. He admits that that result is not philosophically indisputable, because the essence of any property right is that it is a claim good against the whole world, and certainly not everyone in the world would agree to a first occupancy standard. But he further points out that a rule of common ownership has exactly the same infirmity. Of course no legal standard that purports to bind the whole world—as a rule of property necessarily must—can command the assent of all. All property rules thus rest on the same shaky philosophical foundation.

Nevertheless, Epstein argues that we must have some property rules, if for no other reason than that persons must know the proper boundaries of their own conduct. As between the two competing rules he argues for first occupancy for several reasons. First, a system of common ownership would require much more pervasive government regulation and control, something that he fears. In addition, such a system might also imply the right of the state to control the talents and even the body of all persons. Certainly, the history of institutions based fundamentally upon the social ownership of property has shown the validity of these fears.

Lastly and most importantly, Epstein argues that the first occupancy rule has the sanction of usage:

> Within this viewpoint it is possible to show the unique place of first possession. It enjoyed in all past times the status of a legal rule, not only for the stock examples of wild animals and sea shells, but also for unoccupied land. In essence the first possession rule has been the organizing principle of most social institutions, and the heavy burden of persuasion lies upon those who wish to displace it.

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there are other conceivable ways to allocate unowned property than to a first occupant or to society in general. For example, one might also allocate it to an individual (1) by lot, or (2) according to his needs, or (3) according to his contributions toward bringing the property to society's use. *See* Fuller, *Irrigation and Tyranny*, 17 STAN. L. REV. 1021, 1039 (1965). However, in answer it might be said that it is *society* that becomes the allocator as soon as the property is taken away from the first occupant and given to another on any basis other than first occupancy. Therefore, it can be argued that these methods are just another form of the assertion of social ownership.

The justifications for using these other methods of allocation have often been explored. One might argue for the use of distribution by lot on the basis of some notion of equality of opportunity, everyone in society having the same chance to have the good fortune of a windfall increase in his wealth. Distribution according to need would be justified by arguments for equality of result between all human beings, who are all intrinsically entitled to the same treatment at the hands of society. Distribution according to contribution (or productivity) might in most cases result in award of the property to the first occupant. However, this would not necessarily be true. Others might conceivably be more responsible for its reduction to the use of society and they would thus be rewarded. The justification for this allocation would, of course, be its beneficial effect on incentives which would in turn, enhance economic efficiency by increasing the amount of resources available for the use of society.

> The size of the burden is, moreover, very considerable. A repudiation of the first possession rule as a matter of philosophical principle calls into question all titles. It calls into question those which exist in the hands of the original possessors; it calls into question those of their heirs; it calls into question the rights of those who have purchased the titles in question for good consideration, and those who have made improvements upon land acquired on the faith of the public representation that they could keep it for their own. It may be an unresolved intellectual mystery of how a mere assertion of right can, if often repeated and acknowledged, be sufficient to generate the right in question. As an institutional matter, however, it is difficult in the extreme to conceive of any other system. As between two systems, both of which are philosophically exposed to the same objection, the choice must go to that which has the sanction of past practices. The first possession rule represents the most general principle of this sort. The particular customs and practices in certain locales represent yet another expression of the same basic point.[3]

Epstein, of course, has a good point, but it has its limits. It is true that one would not want to upset all the titles to various assets that were based, mediately or immediately, upon reliance on the ownership of the first occupant. Retroactive abolition of the rule would indeed cause horrendous results. However, that says nothing about what the rule should be prospectively concerning assets newly reduced to human occupancy where title reliance is not a factor. There the sanction of past practice would have relatively little weight, and other policy considerations would necessarily be given much greater emphasis.

The policy considerations that justify *prospective* application of the first occupancy rule are the same ones as support a system of private ownership in general, for once we concede that it is better for the state to be the owner of newly occupied or created property than the person whose efforts have given it value, we are undermining the whole basis of our present private property economy. The reason for this is clear. Much of the wealth of the world is newly created in the present generation. The fabrication of inventions and the formation of combinations of capital to create modern products are primary examples of this. If we were to say that these new societal resources belonged to the state rather than to their creators, then we would be switching slowly but inexorably to a system in which the state would become the primary property owner.

Of course, it is true that in this country much of the land in the west is owned by the federal government, and we do not presently follow a rule giving outright ownership thereof to the first occupant, as we did formerly under the Homestead Act.[4] However, exploitation of the resources contained in those properties is, for the most part, left

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3. Epstein, *supra* note 1, at 1241-2.

4. 43 U.S.C. §§ 161 to 302 (1982). The provisions of the law allowing new homesteads in the lower 48 states were repealed by the Act of Oct. 21, 1976, P.L. 94-579, Title VII, § 702, 90 Stat. 2787. The same act repeals those provisions with respect to Alaska effective Oct. 21, 1986. The Homestead Act is discussed in Section III-E, *infra*.

to private enterprise with[5] or without[6] payment of reasonable fees. If the federal government took the position that these resources should be exploited by it for its own account, this would represent, for better or worse, a drastic change in the direction of the common ownership view.

As said, the policies underlying the first occupant rule are the same as support the private property system in general. This is not the place for a long rehearsal of the justifications for that system. Locke justified it as a product of man's labor that should be encouraged to enrich all mankind.[7] Bentham seemed to think that the institution was necessary for happiness.[8] Among modern writers, Demsetz says property was created, at least partially, in order to avoid inefficient externalities,[9] and Friedman believes that it is necessary if man is to have political freedom.[10] Our purpose here is not so much to justify first occupancy as part of the private property system as to describe how it fits in with the general first in time instinct that seems to pervade the law.

III. CONFLICTS BETWEEN PRIOR AND SUBSEQUENT PRIVATE CLAIMANTS

We discuss below first in time controversies between private individuals. Only a few of these do not concern conflicts over the ownership of a particular resource—except in the broadest sense. For example, the problem of nuisance, considered later, involves the right of persons to use their own land as they see fit. The "resource" over which the litigants fight is in a sense intangible, viz., the right to emit externalities that somehow harm or limit a neighbor in the use of his property. In connection with this type of case I shall attempt to state

5. *See, e.g.*, the provisions of the Taylor Grazing Act, 43 U.S.C. §§ 315 to 315r (1976), which authorize the Secretary of Interior to grant grazing permits upon the annual payment of "reasonable fees." *Id.* at § 315b. *See also* the Mineral Lands Leasing Act of 1920, 30 U.S.C. §§ 181-287 (1976), which provides for leasing of public lands for oil, gas, potash, phosphates, sulphur, and sodium for royalties based on competitive bidding.

6. *See, e.g.*, the provisions of the General Mining Law of 1872, 30 U.S.C. §§ 21-54 (1976), which authorize the granting of a patent to miners for extraction of hard rock minerals for the nominal payment of five dollars per acre. *Id.* at § 29. For good discussions of the mining statutes, see Hagenstein, *Changing an Anachronism: Congress and the General Mining Law of 1872*, 13 NAT. RESOURCES J. 480 (1973); Strauss, *Mining Claims on Public Lands: A Study of Interior Department Procedures*, 1974 UTAH L. REV. 185.

7. 2 J. LOCKE, TWO TREATISES ON CIVIL GOVERNMENT §§ 25, 27-28, 30-41, 45-51 (2d ed. 1887).

8. J. BENTHAM, THEORY OF LEGISLATION 111-13 (1864).

9. Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (Papers and Proceedings) 347 (1967).

10. M. FRIEDMAN, CAPITALISM AND FREEDOM 7-21 (1962).

the relevant policies on the question of whether the first one there ought or ought not prevail.

However, the bulk of the disputes discussed below clearly concern conflicting claims to the same asset by private litigants whose rights, if any, stem from events occurring at different times. With respect to them it has been said rather cryptically in support of a first in time rule that "[t]he notion that being there first somehow justifies ownership rights is a venerable and persistent one."[11] In this Article I will attempt to state more concrete notions of policy that tend to support or justify that basic position. It will soon appear that quite a few different policies are involved, as the context, in which the first in time rule arises, changes.

A. A Reward for Efforts — Encouraging Productivity

1. The Animal Cases

Many of the first in time rules can be justified as offering the claimant a reward for efforts or productivity. It is thought that when society gives such incentives more overall production will take place, thus increasing the store of goods available for all persons. This notion clearly underlies the wild animal cases. Thus in the classic *Pierson v. Post*,[12] the court held that a person, who, on uninhabited land, first reduces a wild and formerly unowned animal to manucaption or who mortally wounds it and continues the chase with the intent to recover it, becomes its owner. The dissent argued that to acquire ownership it should be enough for the first pursuer to be within reach or have a reasonable prospect of taking the animal. Both judges were reaching for a first in time result, the question being first in time to do what? Each argued that his particular first in time version was the sounder in policy. The judge in majority thought his rule provided a more certain rule, less productive of disorder, and less likely to end up in litigation. One could have argued that, to the contrary, it was the dissenter's rule that served those policies, for if the first merely to chase the animal were held to be owner this would deter others (presumably knowing the law) from entering the contest and it would thus be less likely to result in a physical confrontation or an ensuing lawsuit.

The dissenter in arguing for his rule declared the policy to be that the wild animal (in this case a fox) was an enemy of the human race and the governing rule should be one that would more likely result in its capture and destruction. Of course, one could have argued in opposition that it was the majority rule that encouraged capture, because it encouraged a contest between to competing hunters by requiring more

11. L. BECKER, PROPERTY RIGHTS PHILOSOPHIC FOUNDATION 24 (1977).
12. 3 Caines 175 (Sup. Ct. N.Y. 1805).

in the way of manucaption or rendering the prey helpless, before one of them was deemed to have become owner.

It should be emphasized that the argument in *Pierson v. Post* was over exactly what acts a first in timer had to perform before he would be deemed the owner. The premise of both opinions was that some first in time rule applied and that the animal was subject to being appropriated by an act that would make it an object of private ownership. But why should that be the premise? It is because the animal was perceived (rightly or wrongly) as a resource available for man's use and enrichment, and society felt the taking of such should be encouraged. And what would more encourage such things than a rule that would reward the efforts of a first occupant (however defined) by giving him ownership of his quarry. Thus would the hunter and society both be served, the former by being enriched and the latter by having more resources available for all mankind.

The courts tend to state expressly the productivity rationale in cases that involve commercial hunters. For example, in *Ghen v. Rich*,[13] plaintiff claimed ownership of a finback whale that he shot with a bomb-lance. The whale sank immediately thereafter and a few days later it was found on the beach seventeen miles away. Defendant bought it at auction from the finder. Since finbacks immediately sank when hit and could not be recovered by harpoon and line, it was the trade usage in the area that the person who shot and killed the whale was the owner, and further that a subsequent finder was obligated to send word of his finding to Provincetown. Thereafter it was expected the owner would come to recover the blubber and pay a small salvage fee to the finder. In holding for the plaintiff the court made it clear that preservation of economic incentive was the primary governing policy:

> I see no reason why the usage proved in this case is not as reasonable as that sustained in the cases cited. Its application must necessarily be extremely limited, and can affect but a few persons. It has been recognized and acquiesced in for many years. It requires in the first taker the only act of appropriation that is possible in the nature of the case. Unless it is sustained, this branch of industry must necessarily cease, for no person would engage in it if the fruits of his labor could be appropriated by any chance finder. It gives reasonable salvage for securing or reporting the property. That the rule works well in practice is shown by the extent of the industry which has grown up under it, and the general acquiescence of a whole community interested to dispute it. It is by no means clear that without regard to usage the common law would not reach the same result. That seems to be the effect of the decisions in *Taber v. Jenny* and *Bartlett v. Budd*. If the fisherman does all that it is possible to do to make the animal his own, that would seem to be sufficient. Such a rule might well be applied in the interest of trade, there being no usage or custom to the contrary. Holmes, Com. Law, 217. But be that as it may, I hold the usage to be valid, and that the property in the whale was in the

13. 8 Fed. 159 (D. Mass. 1881)

libellant.[14]

2. The Protection of Ideas

The policy of rewarding efforts and productivity also justifies the first in time rules found in the laws protecting the discoverer, inventor, or creator of certain kinds of ideas. These rules are found in the law of patents, copyrights, trade marks, trade secrets, and unfair competition.

For example, under United States patent law, a person who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof may obtain a patent"[15] for it, if the advance was not "obvious at the time the invention was made to a person having ordinary skill in the art"[16] involved. With such a grant the patentee has a seventeen year "right to exclude others from making, using, or selling the invention throughout the United States . . . ."[17]

It is the intangible nature of the information that militates toward the special protections that the law affords. Unlike tangible property, which, when appropriated from its owner, is not available for his use, intangible property in the form of information can be used by an appropriator and the owner (and indeed the entire world) all at the same time. Therefore, it is argued, if persons are to have incentives to invent new devices useful to society, they must be granted not only freedom from interferences with their own use of the idea but also some control over the subsequent economic exploitation of it by others. This is especially true in view of the fact that invention is an expensive and risky endeavor where failure is often the result. Very few would undertake such activities if others, having borne no comparable development expense, were free immediately to copy and market the new device, unless research and development became a governmentally subsidized activity (as it is now in certain areas of state interest).

Of course there are arguments that can be made against such protection of the inventor. It is said that the patent system, since it grants a monopoly permitting higher than normal profits, will encourage an overinvestment in discovery of ideas and an underinvestment in other productive activities.[18] It is also argued that a patent system will encourage other unproductive activities as well. The loser in the race for a new development will have an incentive to invent an alternative so that he can compete in the same market rather than using the first

14. *Id.* at 162.
15. 35 U.S.C. § 101 (1976).
16. 35 U.S.C. § 103 (1976).
17. 35 U.S.C. § 154 (1976).
18. R. POSNER, ECONOMIC ANALYSIS OF LAW 32-33 (1973).

inventor's ideas.[19] And the latter will have an incentive to try to block competition by finding and patenting all the alternatives.[20] Whether these arguments in opposition are correct or incorrect is not the point here. Society has chosen to protect the inventor of certain ideas on the supposition that by so doing productivity will be increased and thus many (if not all) other persons may benefit.

Similar policy considerations are involved in the law of copyright. It was Macaulay who argued in the House of Commons that either copyright or patronage was necessary to remunerate and provide incentives to writers of high quality works.[21] Modern authors have disputed that. For example, Breyer argues that the first publisher's lead time advantage and the copying publisher's fear of retaliation would most likely deter the latter from actually copying, so that the first publisher's need for copyright is questionable.[22] And if the first publisher can make a profit without need for copyright then the author can bargain with him for compensation just as any other laborer can sell services in the market; the author would thereby be protected. Tyerman argues on the other hand that with modern technology the first publisher's lead time would be but a few hours and that fear of retaliation would not deter a subsequent appropriator in a milieu where there was no copyright protection at all,[23] and therefore the protection should be retained. Again, though there may be substantial arguments contrary to the theory stated in support of its use, a first in time rule has been adopted by society on the ground that it will serve as an economic incentive toward the creation of works deemed desirable by the polity.

B. The Policy of Security of Title

1. Herein of Larceny, Finding, Adverse Possession and Prescription

One of the policies of our legal system is that of encouraging certainty, finality, or repose with respect to who has a right to a given resource. Such security is required so that persons can order their af-

19. *Senate Committee on the Judiciary, Subcommittee on Patents, Trademarks and Copyrights, An Economic Review of the Patent System, Study No.* 15, 85th Cong, 2d Sess., 44-45, 50-52, 54-55 (1958), *reprinted in* P. GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK AND RELATED STATE DOCTRINES, CASES AND MATERIALS ON THE LAW OF INTELLECTUAL PROPERTY 16-19 (2d ed. 1981).

20. *Id.*

21. T. Macaulay, Speech Delivered in the House of Commons, (Feb. 5, 1841), *reprinted in* P. GOLDSTEIN, *supra* note 19, at 9-11.

22. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 299-308 (1970).

23. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100, 1108-15 (1971).

fairs upon certain assumptions concerning their rights and the rights of others. No one wants to buy a house from a seller who might or might not own it. The buyer wants to be able to rely that indeed his seller can give him rights that are both stable and predictable. Likewise, an owner with doubtful title will himself have little incentive to use the resource productively if he doubts that he can keep the fruits of his labor. A person will more likely build upon land he knows he can keep than upon land whose title is not secure. In that sense, then, the policy in favor of security of title may be said to be just another aspect of the previously discussed policy encouraging productivity. Security also serves to prevent unlawful incursions and physical confrontations as well. If the law decrees that a person in possession has a right to a resource this may deter another from attempting forcibly to take it from him.

How do first in time rules serve or frustrate the security policy? A simple hypothetical will illustrate: O owns a watch. A steals it from O's dresser. Later B steals it from A's dresser. A, the first thief, sues B, the second thief, to recover the watch or its value. The law on this point is quite clear. The first thief prevails because as one court said in a famous case "[a]ny other rule would lead to an endless series of unlawful seizures and reprisals in every case where property had once passed out of the possession of the rightful owner."[24] In other words, if the law were that the subsequent thief could defend against the prior possessor's claim on the theory that the property was owned by a third person, this would encourage still further taking of the asset without permission. The law does not want this result for at least two reasons. First, there is an increased likelihood of violence accompanying such acts. Second, the question of who has a right to possess the chattel involved would be forever in limbo as any new taking would confer a new right. Such uncertainty would inhibit a possessor from utilizing the asset in its most efficient role. There is thus very little disagreement about what rule must apply to this case.

Some variations of the above two-thief hypothetical pose interesting problems. These include conflicts between the following: (1) a prior finder against a subsequent thief; (2) a prior finder against a subsequent finder; and (3) a prior thief against a subsequent finder. With respect to all of these, it has always been assumed that the first in timer will prevail.[25] The first of these obviously involve the very same policy considerations as the two-thief case. Certainly a person stealing

24. Anderson v. Gouldberg, 51 Minn. 294, 296, 53 N.W. 636, 637 (1892).

25. *See* R. BROWN, THE LAW OF PERSONAL PROPERTY 393 (2d ed. 1955); J. DUKEMINIER & J. KRIER, PROPERTY 3-8 (1981). As to a dispute between a first and second finder it has been held that the earlier will prevail. Clark v. Maloney, 3 Har. 68 (Del. Super. Ct. 1840). I have found no case involving a dispute between a prior thief and a subsequent finder.

from a finder should be in no better legal position than if he were to steal from a thief.

But the last two fact patterns, involving suits by prior possessors with less than full title brought against subsequent finders, involve different considerations that arguably could militate toward a preference for the second possessor. First of all, the problem of violence does not arise where the subsequent actor is merely a finder rather than a thief; the potential for confrontation just is not there. In addition, the policy against leaving the title forever in limbo is not applicable to the case of the subsequent finder either. The act of finding is not a deliberately wrongful act that would create the same problem of title uncertainty as giving a second thief rights against the first.

Indeed there is just not the same moral obloquy attached to the later party's act of finding as there is to an act of thievery. In fact, finding is arguably an activity that should be strongly encouraged as a means of bringing lost resources back to societal use. The subsequent finder cases thus present the pure question of what policy underlies a rule protecting prior against subsequent possession. Particularly is this true where the prior person is a thief who lost the property that was then found by another, this for the obvious reason that the relative morality of their acts would normally call for the second possessor to prevail over the first.

Nevertheless, there are several arguments that have been posited for the first possessor in these cases.[26] First, it is said that proof of ownership of chattels is difficult as compared with that of realty, where deeds are passed and recorded. Therefore, mere possession should be vindicated as a means of protecting owners who have no ready means of proving their title. In addition, because of the proof problems, prior possessors would be encouraged to lie and say they have ownership if that were required for them to prevail. Along the same lines, a subsequent thief would be motivated to lie and say he merely found the chattel, if he could thus prevail against an earlier possessor. Finally it is said that the prior possessor rule has the virtue of simplicity and ease of administration.

All of these arguments go not to matters of fundamental fairness but rather to problems of proof and the practical administration of law. But are those grounds good enough? When in these circumstances the law allows a prior thief to prevail, it is simply throwing up its hands and saying that in this case we should dispense with the usual modes of proof, admit that we cannot tell a liar from a truthful witness, and apply a mechanical rule that will not be subject to manipulation by perjury, even though by doing so we may be preferring the

26. These arguments are suggested by J. DUKEMINIER & J. KRIER, *supra* note 25, at 3-8.

wrongdoer to the innocent. This really doesn't make sense for a number of reasons: First of all every rule of law can be twisted to the advantage of a person who is willing to commit perjury. Thus under a rule preferring the first possessor, a person who is not one can claim that he was, and thereby get effective title if the trier of fact chooses to believe him. Also, it should be noted that the law ordinarily tries to look to the relative innocence or blameworthiness of the parties in determining who shall prevail. Thus in a conflict between the owner of property and a purchaser of it from a third party wrongdoer, the law looks to the difficult questions of whether the purchaser had "notice" of the owner's claim, whether he was in "good faith" at the time of purchase, and whether he paid value for it.[27] These issues are obviously ones about which the purchaser can perjure himself if he wishes. Nevertheless, the law does not say that because that is possible, there will be an inflexible rule protecting either the original owner or the purchaser. Indeed, the law on this subject is complex and intricate, where many variables about the type of property[28] and the circumstances under which the seller got possession of it from the owner[29] play an important part.

There is one additional reason not to have an automatic prior possessor rule. In a lawsuit the plaintiff, as the person asking the court to change the status quo ante to a more favorable position for him, ordinarily has the duty of demonstrating that there is a compelling reason to do so; otherwise the court tends to leave the parties where they were at the beginning of the case. A prior thief suing a subsequent finder certainly is not in a position to assert such a reason. All things considered, the justifications posed for an across the board first possessor rule do not stand up under analysis. Rather, a comparison of the propriety or impropriety of the two possessor's acts should help to determine which of the two should prevail. Under such an analysis it is reasonably clear that a prior finder or thief should recover against a later thief, but that a prior thief should not be able to recover against a later finder.

The case of first finder versus second finder is, of course, more difficult. There is no obvious equity in either party. The second can claim he has returned the chattel to productive use, but so can the first, though perhaps not so convincingly. After all it is the second

27. R. BROWN, *supra* note 25, at §§ 9.3-9.8 (3d ed. 1975); U.C.C. §§ 1-201(9) & 2-403 (1972).

28. The law distinguishes, for example, between the bona fide purchase of a stolen chattel where the owner can recover his property back and a similar purchase of a stolen bearer instrument where the purchaser (holder in due course) prevails. U.C.C. §§ 2-403 & 3-305 (1972).

29. The law distinguishes, for example, between the case in which the purchaser bought from a thief and that in which he bought from a dealer who was entrusted with possession of it by the owner. U.C.C. § 2-403 (1972).

finder who is the procuring cause of its continuing utility. On the other hand, the first finder can claim that the chattel ought to be returned to him, as he is the one more likely to be found by a true owner who seeks to reclaim it—a weak argument indeed. Perhaps the best that can be said about such a case is that no answer is terribly compelling and under the circumstances the law ought to leave the parties as it finds them, in this case with possession in the second finder.

a. Prescription as a Last in Time Rule

In the case of the two succeeding thefts, the first in time rule serves the fundamental purpose of promoting security of title by refusing to reward the second thief with title. But what happens if the law doesn't work and the second theft occurs? The answer is that the first in time rule operates only for a while, and then after the passage of a statutory prescriptive period, a last in time rule applies and the second thief becomes entitled to keep the property as against the prior (or even as against the original) owner. The statutes of limitation on causes of action for trover, replevin, and the like are interpreted to vest title in the second thief by adverse possession provided that certain requirements, that the possession be open, notorious, continuous, and hostile, are met.

The policy underlying the adverse possession statute paradoxically is the same as supports the opposite first in time rule, viz. security or finality. As Professor Brown said in commenting on adverse possession of chattels:

> Where an individual has for the years prescribed by the statute openly exercised the rights of an owner, thus giving rise to interests in the property affected on the part of vendees, licensees, and creditors, a strong public policy forbids adverse claimants from disturbing the existing situation by the presentation of ancient rights, concerning which proof may be difficult because of faulty recollection and the absence of essential witnesses.[30]

The law thus in effect says that finality initially requires that the first thief have a possessory right superior to the second, but if that right is not legally asserted, and if the physical possession continues in the second thief for a long enough period of time, finality requires that eventually the law recognize the new state of facts and allow the world to deal in reliance upon that reality. Again it may be said that the policy in favor of security of title (in this case in the hands of the second possessor) serves the purpose of promoting the more fundamental policy encouraging the productive use of the property.

Much the same rules and policies also govern acquisition of title to land by adverse possession. The reasons there are even more compelling because adverse possession is used so often as a means of clearing land titles and making the system of land transfer workable. In addi-

30. R. BROWN, *supra* note 25, at 35.

tion, similar rules apply to the acquisition of non-possessory interests in land. Thus if A, B's neighbor, crosses B's land to get to the public highway without permission and he continues to do this for the statutory period, he will get an easement by "prescription."[31] Though there are generally no statutes in the United States providing for the creation of such prescriptive easements, the courts have reached that result by analogy to the statutes of limitation creating title by adverse possession. B's cause of action against A for trespass will be barred by the passage of time. The same policy of security of title (thereby securing productivity) is served by this rule. After long continued adverse use, all persons dealing with the parcels affected should be able to rely upon continuance of the new state of facts and go about their business of using the property effectively.

Certain prescriptive rights have historically been created in England in quite a different way. In that country those rights have arisen through long-continued, though *non-adverse* use. For example, if C, as owner of a house received light in his windows from across D's adjacent unimproved land for more than 20 years, C got a prescriptive negative easement that D not build on his land in such a way as to prevent C from getting sufficient light to have "the comfortable use and enjoyment of his house . . . ."[32] This was to be judged upon a standard of the "ordinary notions of mankind."[33] C got the easement even though obviously D had no cause of action to be barred against C for receiving the light. Allowing the acquisition of such a prescriptive right without this requirement of hostility was a very significant approach, for this meant that important limitations upon another's use of his own property were imposed without his ever being in a position to suspect that they might be. The mere receipt of light is not the kind of hostile act that calls a person's attention to the fact that he had best use or lose his right to erect a building that will cast a shadow. The negative easement for light was, however, a well-established fixture of English law known as the doctrine of ancient lights. It was never received into the United States except in a few jurisdictions, and in those the doctrine was later repudiated.[34] The doctrine represented another illustration of prescription as a last in time rule. It was last in time in the same sense as the previously described rules of prescription were; viz., that a subsequent actor could, by doing a particular act that was in some sense inconsistent with the rights of a neighbor, eventually preclude that neighbor from doing something that he previously had a perfect right to do.

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31. 2 AMERICAN LAW OF PROPERTY §§ 8.44-8.63 (A. Casner 1952).
32. Colls v. Home and Colonial Stores, Ltd., 29 Appeal Cases 179, 208 (1904). *See also* C. GALE, EASEMENTS 277-294 (12th ed. 1950).
33. Colls v. Home and Colonial Stores, Ltd., 29 Appeals Cases 179, 208 (1904).
34. *See* P. GOLDSTEIN, REAL PROPERTY 706 (1984).

However, it should be noted that it is much more difficult to justify non-adverse rules of prescription than adverse ones because of the above mentioned lack of notice to the party sought to be barred that is implicit in the non-adverse case. In addition, it is not the crucial interest in security of title that is involved, but the less significant right that others not use their land in a certain way. The rule is thus clearly anti-developmental in that it prevents an owner from using his land in a way that he might ordinarily wish to do. Perhaps it is for this reason that in American law it has clearly been decided that non-adverse rules of prescription are not sound in policy. The English now appear to have reached a similar conclusion with their passage of the Rights of Light Act of 1959,[35] which provides that a prescriptive negative easement for light can be prevented by merely filing a simple notice in the appropriate place.

b. Prescription as a First in Time Rule

Certain other kinds of rights could be acquired in England by long-continued but non-adverse use. For example, mere long-standing operation of a market[36] or a ferry,[37] which were ordinarily monopoly rights granted by the crown, gave the operator the same right to exclude all competitors as would a royal charter.[38] These last English cases permitting the acquisition of a prescriptive right *against the world*, unlike the usual prescriptive rules earlier described, really embody a first in time or first occupant rule quite similar to that concerning acquisition of title to wild animals. They are first in time in the sense that the person acquiring the right does not adversely affect a previous right of another person in something or to do something.

There are, however, important differences between the wild animal cases and the prescriptive market cases. The latter represent claims to be permitted to continue doing or using something without fear of competitive or inconsistent acts by others. The wild animal cases represent more: a claim to a physical asset that completely excludes the access of the rest of the world. As we have seen, the animal cases favoring the first occupant rest upon a policy of rewarding efforts in order to encourage productivity. A similar first in time argument superficially buttresses the rules protecting markets from competition. Thus, it can be argued that the English courts protected an established market or ferry in order to give persons incentives to set up those activities initially where needed. However, that does not

35. 7 & 8 Eliz. II, Ch. 56 (1959). *See* G. CHESHIRE & E. BURN, MODERN LAW OF REAL PROPERTY 524 (1982).
36. Mosley v. Chadwick, 7 Barn. & Cres. 47 n.(a), 108 Eng. Rep. 642 n.(a) (K.B. 1782).
37. Tripp v. Frank, 4 T.R. 666, 100 Eng. Rep. 1234 (1792).
38. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, 43-47 (1977).

really stand up under analysis. A prescriptive right to a market was not instantaneously acquired, as was ownership in a wild animal. Rather, long-standing activity was required. Thus there was no guarantee that just being first was enough to exclude others. These first in time prescriptive rules against competition were probably supportable in their day, if at all, as a means of reaching finality in disputes between two claimants in cases where monopolies were customarily granted by the king. They seem anomalous today when government granted monopolies are usually limited to activities that are natural monopolies. The modern policy in favor of competition has completely eliminated first in time prescriptive rights to a market.

2. Presumption of Validity of Second Marriage

As noted earlier, last in time rules sometimes, as in the case of prescription, serve to further important legal interests in security and finality. Such a situation also exists with respect to questions of the validity of a marriage, where important personal and property interests are often at stake. Under the law, there is generally a rebuttable presumption that a purported marriage is valid. However, when a person has entered into two or more marriages, the presumption is that the latest of them is valid.[39] The latter rule obviously tends to limit or collide with the principle that the marriage of a person already wed is void. As Professor Clark has noted:

> A careful reading of the numerous cases applying this presumption leaves a very strong impression that in all probability the prior marriage had not ended, but that the courts were holding that it must be presumed to have ended for the purpose of protecting the legitimacy of children or honoring the financial or property claims of women who had assumed for many years that they were married and had performed the obligations of marriage.[40]

Both the prescription and successive marriage rules serve the policy of finality, promoting reliance upon an existing state of circumstances, which, if involuntarily changed by the law, would likely cause great hardship to the relying parties. They are both examples of the fact that the law must on occasion take into account the status quo to protect individuals from unexpected and unanticipatable impositions.

3. Priorities and Recording in Realty Transactions

Generally if a person has absolutely no interest in a parcel of land, he can convey none to anyone else. If A owns Blackacre in fee simple, B's purported deed conveying it to C would pass no interest. If the rule were otherwise there would be no property security at all, as a complete stranger to title could divest an owner's interest merely by conveying to a third party. The purpose of the rule thus is to promote

39. H. CLARK, DOMESTIC RELATIONS 67 (1968).
40. *Id.* at 68.

security of titles by preventing theft and fostering reliance upon a consensual system of transfer. The same rule and policy would apply to a conveyance by a person who holds under a forged deed. Having no interest, he can convey none.

Now suppose the following facts: O owns Whiteacre. He conveys it to P for full consideration and thereafter conveys it to Q, also for full consideration. Q has no notice of the O to P deed. At the common law, in a conflict as to ownership between P and Q, P, the first grantee, prevailed. First in time was first in right. The case was regarded by the authorities[41] as just another illustration of the principle already discussed; *nemo plus juris transferre potest quam ipse habet*—no one can transfer a better title than he himself has.

The rule of prior in time is prior in right applied at common law to conflicts between (1) two legal interests (e.g. two grantees from a common grantor), and (2) two equitable interests (e.g. two buyers of the same land by executory contract). Where the conflict was between a legal interest and an equitable one the same rule applied, except that a prior equitable interest was cut off by a subsequent legal interest acquired by a bona fide purchaser for value without notice.[42] The same policies—against theft and for property security—apply to the O, Q, P hypothetical as well. However, another consideration is also applicable. If P, the first purchaser, does not go into immediate possession of the land, this clothes O with continuing apparent ownership. Under those circumstances, Q, the second purchaser, has a strong argument that since he was unaware of P's rights and had no reasonable means of discovering them, he should cut off P's prior interest.

The recording acts are designed to take care of this problem. Unless the first purchaser goes into possession or records his deed so that the interest may be discovered, the innocent second purchaser for value is generally protected.[43] The statute thus modifies the common law absolute first in time priority and substitutes for it a limited one: the prior grantee prevails if he does acts sufficient to put others on notice of his claim. Placing these modifying limits on the first in time rule serves to strengthen the policies underlying the absolute common law rule. With a public recording system comes a much more secure system for determining and protecting title to lands.

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41. *See* 5 H. TIFFANY, THE LAW OF REAL PROPERTY § 1257 (3d ed. 1939).

42. *Id.* at § 1258.

43. Of course there are variations in the rules in the different states. The statutes are of three major types: (1) notice statutes that protect a subsequent bona fide purchaser for value against a prior unrecorded interest; (2) race statutes that protect a subsequent purchaser if he records first regardless of notice; and (3) notice-race statutes that protect a subsequent bona fide purchaser for value who records first as against a prior unrecorded interest. *See* 4 AMERICAN LAW OF PROPERTY, *supra* note 31, at § 17.5.

4. More Than One Assignment of the Same Right

Though superficially similar to the multiple deeds to realty case, a considerably different development marked the problem of an obligee's successive assignments of the same contract right. Assume the following: A owes B $1,000 under a sales contract. B for consideration assigns the right to collect to C and thereafter for consideration also assigns it to D, who has no notice of the prior assignment. In a conflict between C and D as to who has the superior right to collect the $1000 C would have obviously prevailed under a standard first in time approach. The English rule was quite at variance, however. In *Dearle v. Hall*,[44] the court held that where C (the first assignee) fails to notify A (the obligor) of the assignment, and D (the second assignee) inquires of A, who informs D that there has been no assignment, and D then notifies A and advances funds to B (the assignor) and then takes an assignment and later collects the funds, D is protected as against the prior assignment. The court reasoned that C was negligent in not informing A of the assignment. Thus when D inquired of A, A was not in a position to inform D of the prior assignment to C, and C should therefore bear the loss. The case has been taken to hold that the first assignee to notify the obligor prevails. But it obviously could be read more narrowly to protect the second assignee only where he asks for and relies upon the faulty information supplied by the obligor as well as notifies first. Indeed, since the second assignee had actually been paid by the obligor the decision could be interpreted as requiring that element as well.

In any case, the interesting question is what motivated the court to hold the first in time rule inapplicable. There is, of course, an obvious difference between successive deeds of realty and successive assignments of choses in action that accounts for the English courts' opposite approaches to the two problems. In the assignment situation the obligor is an obvious "neutral" party who, since he is going to have to pay the obligation, would be expected to be informed of and know to whom payment is to be made. An assignee would naturally inform the obligor redirecting payment to himself. Therefore if a second assignee makes inquiry he should be able to rely upon the first assignee's failure to do what it would be ordinary prudence to do. In the deed case on the other hand, there was no neutral repository of information to whom inquiry could be made, at least before there was a recording statute. There therefore was nothing a first grantee could do to inform a possible second grantee (other than to take possession, not always a feasible act), and so security of title demanded a first in time rule.

Although the English rule made a great deal of policy sense it was

44. 3 Russ. 1, 38 Eng. Rep. 475 (1828).

not universally accepted. Indeed in the United States a number of states,[45] led by New York,[46] followed a first in time rule, usually on the formalistic ground that having assigned his rights once the obligee had nothing left to assign.[47] Still other states followed the Restatement rule or a variant that gave priority to the first assignee over the second with four exceptions. Under that rule, if the second assignee gave value without notice of the prior assignment he prevailed if he first obtained: (1) payment by the obligor; (2) judgment against the obligor; (3) a new contract with the obligor by novation; or (4) delivery of a tangible token or writing, surrender of which was required for enforcement of the obligor's contract.[48]

At the time the above rules were devised, assignments of contract rights were not the everyday transactions they later became. They were occasionally used where an obligee sought to use the right to payment as collateral for a loan or to gain early enjoyment of the right. In the twentieth century, however, lending against accounts receivable became an important and commonly used device in the short term financing of business enterprises in this country. It was inevitable then that the law concerning assignments of accounts be standardized and made uniform. Impetus was given to this movement by a United States Supreme Court case[49] that held that accounts receivable financing arrangements in states following the English common law were void as preferential transfers where the assignor went bankrupt and the obligor had not been notified of the assignment. The reasoning of the case is not important to recount here, but its effect was to provide a thrust toward changing the law in such a way that these assignments were not vulnerable in a bankruptcy proceeding. To accomplish that the assignment had to be valid under state law as against subsequent assignees. Thus under the New York first in time rule the assignments were valid in bankruptcy, but in the states following the English rule or the Restatement rule they were vulnerable.

Many state legislatures responded to the problem by enacting the New York first in time rule, while others enacted a statute providing for a filing system. Later the Uniform Commercial Code (UCC) was promulgated and passed in 49 states. In its latest form the UCC provides for a filing system that incorporates a first to file or perfect rule.[50] With respect to accounts, this rule basically protects the first assignee only if he files before the second assignee. Indeed, the UCC

45. *See* 4 A. CORBIN, CONTRACTS § 902 n.59 and cases cited therein (1951); 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 25.6 (1965).
46. Fairbanks v. Sargent, 117 N.Y. 320, 22 N.E. 1039 (1889).
47. *See, e.g., id.* at 333, 22 N.E. at 1041-42.
48. RESTATEMENT (FIRST) OF CONTRACTS § 173 (1932).
49. Corn Exchange National Bank & Trust Co. v. Klauder, 318 U.S. 434 (1943).
50. U.C.C. § 9-312(5) (1972).

protects the second assignee who files first even if he has complete knowledge of the prior unfiled assignment. In this aspect it differs markedly from typical realty recording statutes of the notice or notice-race type, which protect only those subsequent parties who are without notice of the prior unrecorded instrument. It also differs from the pre-UCC personal property security statutes involving chattel mortgages, conditional sales, and accounts receivable in the same way, for under those laws, subsequent parties with notice of prior unfiled interests were generally subordinated to those interests.

One would think that such an important change in the law would have been carefully considered and justified before it was introduced. However, it appears that the change was almost inadvertent because earlier drafts of the UCC preserved the old rule about notice, and the new race to the record rule was first introduced into the 1956 draft of the UCC without acknowledgment or explanation.[51] In support of the UCC race to the record rule it can be argued that it encourages a person to file promptly—in itself a good thing. Further, it provides a rule susceptible to no factual dispute, unlike a rule resting on the question of whether a party had "knowledge" or "notice." On the other hand, against the UCC's dispensing with the question of notice it can be argued that the purpose of a filing system is to give a person a means of discovering the existence of a prior interest so that he can protect himself against it. If the person already has knowledge of the interest, the purpose of filing has been served and he should not prevail just by winning a race to the record.

As in the wild animal cases, the above debate centers on the question of the form that the first in time rule should take: whether to protect a non-filing prior party against a subsequent party with notice of the earlier claim or to require that prior party to file before he can be considered a first in timer at all. A first in time rule in some form was found to be necessary to have a workable personal property security system.

C. Conflicts Between Security of Title and Productivity

1. The Purchase Money Priority

As we have noted above, the two policies fostering security of title on the one hand and productivity on the other most often militate toward the same legal rule. A person who is secure in his ownership of a

51. 2 G. GILMORE, *supra* note 45, at § 34.2. It is interesting to note that in § 9-301(1)(b) of the 1956 and 1962 editions of the UCC, lien creditors had to be without knowledge of a prior unperfected security interest to be protected against it. In the 1972 revision the "without knowledge" proviso was eliminated, thus making the Code internally consistent as a "race" statute. Thus what crept into a section of the statute almost by accident became the governing rule for other sections for the sake of consistency.

resource is more likely to improve it or use it productively than a person who is unsure that he can keep the fruits of his efforts. Occasionally, however, the two goals clash and the law has difficulty in working out the appropriate results. Such a case involves disputes between various prior claimants and subsequent purchase money mortgagees.

A purchase money mortgagee is a person who, lending the wherewithal for a buyer to acquire the property in question, takes his mortgage on it. The lender may be the seller himself, who takes back a mortgage to secure part of the purchase price, or he may be a third party lender who supplies the funds used to pay the seller. In either case the financer is making possible a purchase, which would not otherwise be possible. The priority problem presented may be illustrated by the following facts. O, in return for a loan by L of $1,000,000, gives L a mortgage of all his real property now owned or later to be acquired. O later buys Blackacre from V for $500,000, giving V $100,000 in cash and a purchase money mortgage of $400,000 to secure the balance. O defaults on both loans. In a conflict as to the $400,000 proceeds from the foreclosure sale of Blackacre, V the subsequent purchase money mortgagee, will prevail over L, the prior mortgagee.[52] Similar rules are applied with respect to the law of personal property security.[53]

Several theories have been advanced to support the purchase money priority;[54] some are more formal than substantive. Thus it is said that the buyer's interest is so transitory that no other claim can fasten onto it before that of the purchase money financer. A variant of this is that title comes to the buyer already charged with the financer's interest. A more substantial reason is that when L made the loan he did not specifically rely upon O's forthcoming acquisition of Blackacre as security, and if he prevails over V he will have a windfall gain of property supplied to O by V. Perhaps the most convincing reason given, however, is that V would never consider making the loan enabling O to acquire Blackacre if the law were that prior mortgages with after-acquired property clauses, or prior judgment liens against O were senior. Since the premise of the economic system is that transfers in the marketplace allocate resources to those persons who will use them most efficiently and productively, governing rules of law should encourage such transfers. A rule protecting the supplier of purchase money will do that and will thus militate toward a more productive economy. In this way it can be said that a second in time rule here serves the goal of economic efficiency. At the same time it

52. *See* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 9.1 (1979).
53. U.C.C. § 9-312(3) & (4)(1972).
54. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 52, at § 9.1.

should be noted that additional efficiency is at the price of subverting notions of security of title, for the prior mortgagee or lienor will not be able to rely on the fact that his debtor's after-acquired property will indeed come under his lien. Perhaps then it might be concluded from this that when there is a conflict between the policies of security of title and economic productivity, the latter as the more fundamental one will predominate.

2. The Construction Mortgage Exception

It was Professor Gilmore who first noted that the cases seem to have created an unarticulated exception to the purchase money priority in the situation where the prior person holds a construction rather than a regular mortgage.[55] A construction mortgage secures a loan used to finance the erection of buildings and other structures. Ordinarily the lender advances the money periodically as the work is completed. It is invariably contemplated that the debtor's own assets, in addition to the loan, will be sufficient to pay for the labor and materials in full, so that no additional purchase money financing should be necessary. Suppose in such a situation there are cost overruns and the debtor is unable to finance the purchase of all the necessary materials, and therefore gives a security interest to the seller of the heating equipment used in the building. Typically courts in such a situation have given priority to the construction financer over the purchase money financer.[56]

Gilmore did not have what he regarded as a convincing explanation for the construction mortgage exception but stated that the consistency of the cases "argue[d] for the soundness of some underlying, albeit inarticulate, policy" in support of the rule.[57] Of course, a construction mortgagee has greater equities than a mortgagee with an after-acquired property clause. The former (like a purchase money financer) makes possible the purchase of the asset sought to be subjected to lien; the latter claims a lien on property whose purchase he did not directly assist. The conflict of construction mortgage and purchase money mortgage clearly involves two liens for purchase money. Since both aid in the purchase, there is an apparent standoff as to who ought to be protected in order to encourage these transactions. Perhaps the best explanation for the construction mortgage priority is that the building would never have been erected at all, if the construction mortgagee (here the first in timer) had not been able to rely on the priority of his lien as against subsequent other purchase

55. Gilmore, *The Purchase Money Priority*, 76 HARV. L. REV. 1333, 1367-69 (1963).

56. *See, e.g.*, Dauch v. Ginsburg, 214 Cal. 540, 6 P.2d 952 (1931). The priority of the construction financer over the purchase money financer of fixtures has been codified by U.C.C. § 9-313(6) (1972).

57. Gilmore, *supra* note 55, at 1369.

money financers. Again a first in time rule was found necessary to encourage productivity and transactions in the market place.

D. The Policy of Encouraging the Use of Scarce Resources—Herein of Western Water Law

The law concerning allocation of private rights to water in lakes and streams is marked by a major division between the wet eastern states and the arid western states. In the east the early rule was the so-called natural flow doctrine, which held that a riparian owner was entitled to continuation of the natural stream flow and lake level without material decrease in quantity or quality caused by the activities of others.[58] Later many of the eastern courts developed the "reasonable use" doctrine that gave a riparian the right to so much of the water as he could put to beneficial use upon his land, provided that it did not unreasonably interfere with similar beneficial uses of other riparians.[59] In the arid west the courts[60] and later the legislatures[61] adopted the doctrine of prior appropriation; that first in time was first in right. Under that system the first person who diverted the water, put it to beneficial use, and followed appropriate administrative procedures, if any, to establish his priority, had a right to the full amount so used before the next senior appropriator had a right to take any of the stream.

Horwitz has argued that the three rules of natural flow, reasonable use, and prior appropriation represent different attitudes toward economic development.[62] Natural flow is clearly anti-developmental as it entitles each riparian essentially to the water supply that exists in a state of nature, with relatively little in the way of diversion permitted. The reasonable use doctrine, Horwitz argues, is for development through competition, with such to be achieved through allowing each riparian to take as much water as would not unreasonably injure the others on the stream. Lastly, he sees prior appropriation as also for development. However, here it is to be achieved through giving monopoly rights to the earlier users.

The conventional wisdom has been that the reasonable use doctrine is more appropriate to the east where water is relatively abundant. However, it has been more recently argued[63] that as demand for water has increased the doctrine should be abandoned for a number of

58. 6A AMERICAN LAW OF PROPERTY, *supra* note 31, at § 28.56.
59. *Id.*
60. Irwin v. Phillips, 5 Cal. 140 (1855).
61. A summary of statutes is contained in S. WIEL, WATER RIGHTS IN THE WESTERN STATES §§ 72-73 (3d ed. 1911).
62. M. HORWITZ, *supra* note 38, at 34-43.
63. Gaffney, *Economic Aspects of Water Resource Policy*, 28 AM. J. ECON. & SOC. 131, 137-39 (1969).

reasons. First, the amount of "reasonable" consumptive withdrawal permissible is necessarily uncertain, so nobody knows what his rights are. In addition, in time of scarcity the rule often results in proration to riparians in proportion to the amount of land held. This measure has no necessary relationship to the economic value of the water in each use, so that it becomes likely that some of the resource will be utilized in low value and therefore inefficient activities. Lastly, only parcels actually bordering the stream have riparian rights. If the parcel extends a great distance away from the stream then the water can be used in that entire area. On the other hand, if the parcel extends only a short distance the water cannot be used to benefit the next parcel away even if it would be used in a much more valuable way.

The conventional wisdom concerning the west has been that prior appropriation is the proper rule as the best mode for rationing a scarce resource. Certainly, as already noted, reasonable use makes no sense in a situation of real shortage. Some system of priority had to be implemented, and the real question for the west was on what basis precedence should be determined. To answer that the courts reached for a first in time rule, but they did it for more than just instinctual reasons. The sound policy behind prior appropriation was that no one would expend the large amounts of capital to divert water for mining, irrigation, or other activities if the flow of water he got from the effort would soon be interrupted by others doing the same thing.[64] The first in time rule thus became a means of encouraging the exploitation of a scarce resource.

But the first in time rule also has many defects.[65] First of all, it tends to encourage a premature or too intensive exploitation of the water resources—this in order for a potential user to guarantee that when he needs the water he will be able to get it. In addition, it ignores the principle of marginal productivity. Where there is a shortage the junior appropriator loses all his water before the senior loses any. Thus a junior loses units with a high productivity to a senior who gets those units that are only marginally productive to him. Lastly and perhaps most importantly, though appropriative rights are theoretically marketable, as a practical matter they are not, because of the uncertainty in determining exactly what quantity of water they represent. It has been pointed out that there has not been an active

64. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development.

Irwin v. Phillips, 5 Cal. 140, 146 (1855).

65. *See* Gaffney, *supra* note 63, at 139-41.

market in western water rights, mostly because the actual extent of the water right is unclear and potential buyers are unwilling to pay substantial consideration for rights that are uncertain.[66] Thus one could argue that the doctrine of prior appropriation made economic sense as an initial mode of allocation in order to encourage the recovery of previously unused water resources. However, to maintain and increase efficiency in the use of water, rights therein should be readily marketable so that it is possible for another person to buy them and put the resource into a more productive use. As long as there is no active, viable market in water rights or some other system of pooling or transfer there is bound to be a continued misallocation of these resources.

To summarize, the systems that have evolved to allocate water in both east and west have been justified on the basis of their ability to encourage the rational and efficient allocation of this important resource. Once again the policy in favor of economic development can be seen to predominate.

E. The Policy of Encouraging the Use of Overabundant Resources—The Homestead Act of 1862 and Modern Urban Homesteading

It might seem anomalous that society would utilize similar approaches to deal with the two apparently quite different problems of handling scarce and overabundant resources. As noted above, the law adopted the rule of prior appropriation as a means of allocating the insufficient water of the arid west in order to encourage the large investment necessary for its efficient utilization. In the nineteenth century, a similar rule, in the form of the Homestead Act of 1862, became applicable to the plentiful vacant lands located in the midwestern and far western sections of the United States.[67] The Act provided that settlers could become outright owners of 160 acres free of charge, except for a nominal filing fee. The major requirement was that the individual had to live on and cultivate the homestead land for a period of five years.

Unlike the water case, the reasons for the passage of the Act had very little to do with encouraging persons of some means to make large investments. There was in a sense too much land for the popula-

66. Ellis, *Water Transfer Problems: Law*, in WATER RESEARCH 233 (A Kneese & S. Smith eds. 1966). Ellis lists three factors that account for the uncertainty: "1. Inadequate definition of the amount of water the right entitles the owner to use; 2. Possibility of past abandonments or forfeitures; 3. Steps that have generally been felt necessary to protect junior appropriators when there is a change in the point of diversion." *Id.* at 235.

67. On the Homestead Act, see generally B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES 347-410 (1965). *See also* G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 65-81 (1981).

tion and the problem to be solved was to find persons who both wanted to settle the various tracts and could afford to purchase them. The people already in the west were in the forefront of the movement to get their areas settled rapidly. As Professor Hibbard describes it:

> For a half century, or more, following 1841 the policy of using the public domain in the promotion of settlement, the very basis of national strength and security, of civilization itself, was accepted and furthered in the disposition of the western lands. It was the fruition of the work and teachings of such men as Gallatin, Jefferson and Benton. In 1826 Benton had said regarding a liberal treatment of the western pioneer: "I speak to Senators who know this to be a Republic, not a Monarchy, who know that the public lands belong to the People and not to the Federal Government." Thus debts were to be forgiven, preemption was to be granted, land was to be made easy of access and of acquisition, indeed free as soon as the East could be converted to the view.
>
> Every new Territory and State wanted people to take up and use the vacant lands. Immigration agents were employed by the state. Advertising campaigns were adroitly conducted by the railroads. The private land agent became an institution, offering to conduct land seekers to the best locations. All forces combined to get the land into the hands of settlers. The government helped the campaign along. With the transportation lines established, the ownership of land assumed a new aspect; values were expected to increase. In the early years of the development of farms on the frontier the settler was looking for room, for a chance to support himself and family. With a market assured, not by going around half a continent by water, taking weeks for the trip, but going with speed directly toward the eastern seaboard with its cities, meant a price for product which would soon reflect itself in land values of the West. Thus the farmer, not altogether for the first time, but with a new emphasis, began to look upon the land as a prize in itself, easily obtained, and likely to increase rapidly in value. With this optimism permeating the imaginations of the on-coming waves of settlers it was inevitable that more enterprising adventurers should precede them and profit by the optimism by taking the first advance in price over the government minimum. The Preemption Act was designed to preclude, at least to restrict this practice.[68]

A number of arguments were summoned to justify the giving away of vast areas of the west.[69] Chief among them were philanthropic ones—that it was the right thing to do for the poor, and economic ones—that settlement of the lands would raise the value of all the lands in the area. Moreover, it was argued that the homestead right was not really a gift, as the bill's opponents had claimed, but rather in consideration of five years' residence and cultivation. Lastly it was claimed by some that man had an inherent right to the soil. It was Galusha Grow who eloquently said:

> For if a man has a right on earth, he has a right to land enough to rear a habitation on. If he has a right to live, he has a right to the free use of whatever nature has provided for his sustenance—air to breathe, water to drink, and land enough to cultivate for his subsistence. For these are the necessary and indispensable means for the enjoyment of his inalienable rights of 'life, liberty, and the pursuit of happiness.' And is it for a Government that

68. B. HIBBARD, *supra* note 67, at 138-39.
69. *Id.* at 369.

> claims to dispense equal and exact justice to all classes of men, and that has laid down correct principles in its great chart of human rights, to violate those principles, and its solemn declarations in its legislative enactments?[70]

No matter how meritorious the arguments formally posed in support of the bill, Congress' motivation in passing it was at least partly political, for the popular will, particularly in the west, was strongly in favor of free land for the homesteader. With the traditional opposition of the south having been made politically irrelevant by the Civil War, enactment of the new law at that point had become just about inevitable.

Though it therefore obviously cannot be said that there was any one policy that underlay the new law, probably the single most important impetus for its enactment was sheer necessity, if the area indeed was to be developed at all. The land was essentially worthless. As Professor Hibbard has pointed out: "Leniency toward the squatters, donations to defenders of the frontier, preemption concessions, all pointed to land without price."[71] If the land was to be settled, it had to be given away. Of course, theoretically one could have accomplished that by some other method of distribution than homesteading, such as by lot or according to demonstrated need. However, the most practical way of doing it, with some degree of certainty that the land would be settled and used, was to require actual settlement and use. A first occupant rule was probably the unavoidable conclusion.

In spite of the high hopes for it, the Homestead Act in operation was not a panacea, nor was it free from the corruption that ordinarily accompanies programs involving government largesse. As Coggins and Wilkinson describe it:

> Homesteading became the national preoccupation, but difficulties in its administration multiplied. Many chose not to wait the five years but "commuted" their claim by payment. Homesteads and preemption claims were used to strip timber lands without any payment. Perjury became universal as speculators again surmounted legal barriers such as the 160 acre limitation. The semi-arid lands beyond the 100th meridian were not sufficiently productive to support small farming units. Surveying was fragmented (in 1877 there were 16 surveyors general), incomplete, and often fraudulent. Litigation proliferated, as legislation already had done. Publication of the voluminous reports of a public land law review commission effected little change. More specialized land grant acts, summarized below, complicated the overall picture. Indian reservations were broken up both by treaty and by allotment to individual tribal members. In either case, the lands soon passed into white hands. Settlement proceeded apace—one half million farms were created between 1880 and 1900. Range wars between settlers, sheepmen, and cattle ranchers periodically erupted. Foreign owners gained title to immense tracts: a company owned by a Scot was said to have fenced in over a million acres. Even though the famous inclosure order of 1885 was enforced strictly at first,

70. CONG. GLOBE, 32nd Cong., 1st Sess. app. at 427 (1852), *quoted in* B. HIBBARD, *supra* note 67, at 369.

71. B. HIBBARD, *supra* note 67, at 408.

> President Roosevelt 15 years later had to start removing the unlawful fences all over again. Whenever a federal official made a proposal for radical, effective reform, or made a point of decrying abuses under the land laws, or tried to do something about it, his job was in jeopardy.
>
> Notwithstanding the fraud, politics, and other problems, much of the West was settled under the Homestead and cognate acts. True, often the final farm size was far in excess of the legal limits, but often conditions dictated larger farming units. Hostility to large holdings was directed at aliens, and in 1887 alien ownership was severely restricted. Many of the more abused laws were repealed in 1891, but the Homestead Act survived. From 1868 to 1904, when much remaining land was withdrawn from entry, nearly 100 million acres were homesteaded, many if not most by the yeoman tillers of the soil that the expressed national policy was intended to benefit.[72]

As in the past, there are places today where real property is worth very little in the market place. Among these are some of the declining areas in various urban centers of the United States. Dwellings there are being abandoned to mortgagees and taxing authorities, as ownership of them becomes more of a liability than an asset, and as owners find that there is no buyer willing to pay even a penny for their supposed equity in them. With respect to this problem, too, we have experimented with a program to give realty away, in order to put together persons in need and property going begging.

In 1974 Congress passed a statute providing for an urban homesteading program.[73] The program as conceived is somewhat similar to that contained in the original Homestead Act. It provides for a conveyance "without any substantial consideration" to homesteaders who occupy the premises for at least five years and make appropriate repairs upon the property.[74] However, there are some important differences between the old and new programs. First of all, the modern one is minuscule in size compared to its predecessor. From 1868 to 1904 nearly 100 million acres were homesteaded under the original Act.[75] By contrast the new program was conceived of as a trial or demonstration. Under it in the entire nation from 1974 until 1981, a grand total of 6,133 properties were acquired by local program administrators, of which 5,122 were conditionally conveyed to homesteaders.[76]

This leads us to a second point of difference between the two programs: the new statute requires a procedure for selecting the homesteader "giving special consideration to the recipients' need for housing and capacity to make . . . the repairs and improvements" required under the Act.[77] That difference is a significant one in terms of

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72. G. COGGINS & C. WILKINSON, *supra* note 67, at 70-71.
73. 12 U.S.C. § 1706e (1976 & Supp. 1984).
74. 12 U.S.C. § 1706e (b) (1976 & Supp. 1984).
75. G. COGGINS & C. WILKINSON, *supra* note 67, at 71.
76. HUD, OFF. OF COMMUNITY PLAN & DEV., CONSOLIDATED ANN. REP. TO CONG. ON COMMUNITY DEV. PROGRAMS 111 (1982) [hereinafter cited as HUD ANN. REP.].
77. 12 U.S.C. § 1706e (b)(2) (1976 & Supp. 1984).

our analysis. Here it is not the first one to take possession of the land and file an appropriate claim who gets the land. Rather the decision on the identity of the recipient is made by local bureaucrats based on criteria of need and ability to repair. Reports of the Department of Housing and Urban Development (HUD) indicate that there are twenty-five applicants for every vacancy,[78] so it is clearly not as easy to get into the modern program as it was the old. The process for selection of the homesteader is locally administered and, because of the large number of qualified candidates, judgmental screening and lotteries are combined in various ways in different communities around the country in order to make the final choice of beneficiary.[79]

Assuredly therefore, the new program cannot be said in any sense to embody a first occupant rule. Nevertheless, it has a purpose similar to the original program—viz., to distribute property of relatively little value[80] to those persons who might make beneficial use of it. Of necessity, that distribution has been limited because of the small supply of properties that HUD has in the program.[81] The use of a lottery seems particularly appropriate where there are many more qualified possible beneficiaries than there are available houses.

Thus the case of urban homesteading differs most markedly from the original in that the supply of properties *is* so limited. Not that there is a shortage of dilapidated abandoned housing in this country. What is short are the number of such houses actually in HUD's hands and the federal money necessary for financing the appropriate repairs. The fact that the supply of housing available for the program is so limited readily explains the impracticability of using a first occupant rule and Congress's choice of other means. First occupancy can appropriately be used to allocate overabundant resources (as in our public lands in the nineteenth century) or scarce resources requiring a large investment (as in our western water), but it cannot fairly be used to allocate scarce resources requiring very little investment. The use of a lottery seems as appropriate as any method to do that.

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78. HUD, OFF. OF POL'Y DEV. & RESEARCH, EVALUATION OF THE URBAN HOMESTEADING PROGRAM: FINAL REP., VOL. I: SUMMARY ASSESSMENT 14 (1981).

79. *Id.* at 18. Perhaps surprisingly, in 1979 the average urban homesteader had an annual income of about $17,000. That was only a little below the national average of $17,730. *Id.* at 39. On that basis it certainly cannot be argued that the program has been instrumental in helping a great many of the poor. However, it should also be noted that 68 percent of the homesteaders are headed by a member of a minority group. *Id.* at 37.

80. The median value of the properties in the program as of Apr., 1979 was $5,319. *Id.* at 15. The value of a property was measured by its fair market value minus the estimated cost that HUD would have to pay to hold it until its conventional disposition. *Id.* at 13.

81. As of Sept. 30, 1981, there were only 19,000 single family dwellings in HUD's inventory that were possible candidates for the program. HUD ANN. REP., *supra* note 76, at 112.

Lastly, it should be noted that the above important differences between the two homesteading programs should not obscure the important characteristic that they have in common. Both programs were designed to encourage the use, development, and exploitation of very important resources for the overall good of society.

F. The Policy of Avoiding Inefficient Conflicts—The Law of Nuisance

For efficiency's sake the law where possible ought to be framed in such a way as to discourage conflicts between two inconsistent resource users. The nuisance area presents an interesting illustration of the failure of the law to do that. The following facts taken from a famous case[82] illustrate the difficulties.

In 1949, defendant, a farmer, bought twenty-five acres of land located in a thoroughly rural area that he began operating as a piggery. During the next ten years his usual stock of pigs increased from the original 400 to 850. All were fed from garbage. As time passed, the odors emanating from the area became more and more intense and offensive. Beginning in 1960, the nature of the area started to change, with more and more houses being constructed; at least thirty of these were located near the piggery. By 1960, there were many residents in the area who had strong objections to the defendant's operations. These persons brought suit for damages and to enjoin the continued operation of the enterprise. The court found defendant's equipment could be moved with little loss, but that the structures built by him and costing $60,000 had a salvage value of only $5,000 and that a forced sale of the pigs would result in a loss of around $20,000. Nevertheless the court awarded plaintiffs damages for the past impairment of their use and an injunction ordering the termination of the operation within a reasonable time set at no more than fifteen months off. It was clear to the court that even though plaintiffs came to the nuisance they had a right enforceable by specific relief to have their "residences comfortable and free from 'stench' ".[83]

Timing problems not only occur where the party injured came after the nuisance; they also can obviously occur in reverse order, for example with residences there first and the polluter second. Traditional law dealt with timing problems under several rubrics: (1) the doctrine of coming to the nuisance; (2) statutes of limitations on actions for nuisance; and (3) the doctrine of prescription. They will be discussed in that order.

1. Coming to the Nuisance

Though there are a few cases that hold that the plaintiff is barred

82. Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963).
83. *Id.* at 314, 187 N.E.2d at 146.

from nuisance recovery by reason of the fact that he came knowingly to a preexisting nuisance,[84] most American courts seem to have concluded that it is not a defense[85] or is merely one factor among others to be considered on the question of whether defendant's use of his property was "reasonable."[86] Indeed there are also many courts that state the law applicable to the case without any express reference to the fact that one or the other activity was conducted there first.[87]

In some of the cases the temporal order of the conflicting activities affected the remedy granted by the court. For example in *Spur Industries, Inc. v. Del E. Webb Development Co.*,[88] the fact that the defendant's feedlot was built far away from the city and that plaintiff developer later built housing close to defendant's land was a factor in the court's fashioning a new remedy, viz. that plaintiff was entitled to an injunction but had to compensate defendant for the loss caused thereby. And in a few cases, the courts have indicated that where the plaintiff moved to the nuisance he might recover damages but was not entitled to an injunction.[89]

What role should be played by the fact that one or the other of the incompatible uses was prior in time? The Restatement of Torts takes the position that plaintiff's coming to the nuisance should not of itself bar his recovery, but rather should be one factor used in determining actionability: "Otherwise the defendant by setting up an activity or a condition that results in the nuisance could condemn all the land in his vicinity to a servitude without paying any compensation, and so could arrogate to himself a good deal of the value of the adjoining land."[90] Certainly that view is the one underlying many of the decisions that give little or no weight to the fact that the plaintiff arrived on the scene and built his inconsistent use well knowing about defendant's prior offending activities. But the perspective of that argument is strangely asymmetrical. Is it not at least as true that to allow the later arriving plaintiff the right to damages or injunction is to permit *him* to arrogate to himself a good deal of the value of *his* neighbor's land? The law of nuisance is supposed to adjust conflicting land use claims fairly and efficiently, and it is submitted that the Restatement position does not do that.

Let us first consider the question of fairness. As a general proposi-

84. *See, e.g.*, Steele v. Rail & River Coal Co., 42 Ohio App. 228, 182 N.E. 552 (1927).
85. Krebs v. Hermann, 90 Colo. 61, 6 P.2d 907 (1931); Campbell v. Seaman, 63 N.Y. 568 (1876). *See also* Annot., 42 A.L.R. 3d 344, 347-53 (1972 & Supp. 1984).
86. Curry v. Farmers Livestock Market, 343 S.W.2d 134 (Ct. App. Ky., 1961). *See also* Annot., *supra* note 85, at 353-57.
87. *See, e.g.*, Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963).
88. 108 Ariz. 178, 494 P.2d 700 (1970).
89. Bushnell v. Robeson, 62 Iowa 540, 17 N.W. 888 (1883). See other cases cited in Annot., *supra* note 85, at 372.
90. RESTATEMENT (SECOND) OF TORTS § 840D comment b (1979).

tion, a rule of law used in resolving land use conflicts is arguably unfair if it ignores or gives little weight to the fact that a person was in the area first, engaging in and expending substantial sums in furtherance of a lawful and economically useful activity. A person ought to be able to set up a business in an unoffending location without fear that those coming later and fully knowing of his activity can step in and prevent him from doing what had theretofore been lawful.

With respect to the question of efficiency, the applicable rule of law should be designed to prevent costly land use conflicts before they arise. The present rule, which protects those coming to the nuisance, does just the opposite. Thus it encourages persons to build residences near a preexisting piggery knowing that the law will probably bail them out at no cost to themselves. Indeed, if the price they pay for the land reflects the unpalatability of the nearby odors the law will be awarding them with a windfall profit at their neighbor's expense. Rather the law, as in *Spur Industries*, should require the later arriving plaintiffs to compensate the owner of the offending activity if they seek its termination. Then they can make the decision as to whether they desire freedom from their neighbor's odors enough to pay the true costs of accomplishing that which they seek. If they know in advance that they may be forced to pay defendant's damages, this will often deter them from causing an inefficient land use conflict that they could have avoided, and will cause them to go to another place where such conflicts do not exist.

The present law, with its refusal to use a first in time approach, will also have an economically adverse impact because of its effect upon the behavior of the first developer of a new area. Such a person, if he knows the rules and desires to engage in an activity that under later circumstances may be held to be a nuisance, will be fearful of going ahead with the activity. Thus the common law of nuisance may be said to be strongly anti-developmental, in sharp contrast with the courts' pro-developmental approach in other areas of the law.

The Coase Theorem,[91] the classic economic analysis of land use conflicts, does not emphasize the timing question. It holds that if a potential plaintiff moves near to a preexisting nuisance, the efficient result will follow in the market, unless high transaction costs preclude that result. The reason is that if the cheapest solution is for the defendant to move, plaintiff will pay him to do so—plaintiff will purchase an injunction from defendant. On the other hand, if the cheapest solution is for the plaintiff to move, plaintiff will do that. Indeed he is unlikely to go there in the first place.

It should be pointed out, however, that in a particular case efficiency might not be reached. For example, if in spite of the above rule

91. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

multiple plaintiffs move into a preexisting nuisance and the cheapest solution is for the defendant to move, it might be difficult and expensive to get the various plaintiffs together to purchase an injunction from the defendant. The inefficient conflict might then continue.

A number of other scholars in the law and economics area have analyzed the conflicting land use problems with varying approaches. As here, Rabin argues that where the plaintiff is at fault by moving into the nuisance, his proper remedy is an injunction but only if he pays defendant's cost of compliance.[92] He notes that the twin goals of fairness and efficiency can thereby be served. Wittman on the other hand argues that the question of whether a plaintiff coming to a nuisance should have a remedy depends upon whether the defendant polluter should have gone there in the first place, i.e., whether he should have foreseen that inconsistent uses were more appropriate to the area.[93] If he should have, plaintiff should be entitled to damages or injunction; otherwise not. The difficulty with that approach, however, is that it puts a great burden upon a person who is selecting a site for his economic activities. If the test is applied through the prism of hindsight, unjust results will often occur.[94]

In summary, fairness requires at the least a rule giving protection to a first in timer by way of a right to compensation, where the law for reasons of efficiency calls for the termination of his activity. It is undoubtedly those policy considerations of fairness and efficiency that have led many states to pass so-called "right to farm" acts. Those laws protect a farmer from liability for public or private nuisance resulting from operations, which both existed before a change in the neighborhood and were not a nuisance at that earlier time.[95] It is ironic that the common law has in the case of nuisance shied away from a first in time rule—an approach that judges for the most part have instinctively gravitated toward—and that it is the legislatures that have begun to adopt it. Perhaps it might be accurately said that in this instance the legislatures are providing leadership in an area of the law that has traditionally been the province of the courts.

2. *Tort Statutes of Limitations and Prescription*

The other nuisance timing rules involve the statutes of limitation on tort recovery and the separate though related doctrine of prescrip-

92. Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299, 1342 (1977). *See also* Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 292, 307 (1969).

93. Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEG. STUD. 557, 565-66 (1980).

94. Other authors place very little emphasis on the question of who was there first. *See, e.g.*, A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS, 15-24 (1983).

95. *See, e.g.*, NEB. REV. STAT. §§ 2-4401 to -4404 (1983).

tion. Under the law of every state there is a statute of limitations of relatively short duration, usually two to five years, barring recovery in actions for nuisance. The major issue coming up under these statutes is whether, on the one hand, the nuisance is "permanent," giving rise to a single cause of action for the total decrease in fair market value of the realty affected, or whether, on the other hand, it is "temporary" or "recurring," in which case there is a new cause of action for each injury.[96]

Where a nuisance is held to be permanent the statute is usually held to begin running at the time of the original wrong, at least if the permanent nature of the tort and damages caused can then be reasonably ascertained.[97] In such a case a cause of action can be completely barred if the original wrong was committed outside the period of the statute. Where the nuisance is held to be temporary or recurring, plaintiff may not recover for the decrease in value to his freehold; rather he may recover only for damages to his use for harms done during the period within the statute.

The difficult question in this formulation is to decide which nuisance is permanent and which temporary or recurring. The determination is based on whether the injury is a "constant and unavoidable result of the operation"[98] where it is said to be permanent or "the result of negligent conduct of the operation or of variable . . . conditions"[99] where it is regarded as temporary. In a similar formulation some courts look at whether the offending condition can be remedied at reasonable expense. If it can, then the nuisance is said to be temporary; if not, then permanent.[100] Both approaches, it will be seen, look to the reasonable avoidability of the damage. Though the theoretical difference between permanent and temporary nuisance may be easy to state, the courts, as might be expected, are in disagreement when it comes to determining into which category a particular fact pattern falls.[101]

The doctrine of prescription is closely related to the foregoing. It holds that if a person for the statutory period of adverse possession commits acts or maintains structures or conditions that so harm a neighbor's use of land as to amount to an actionable private nuisance, the tortfeasor may get an easement by prescription giving him the perpetual right to continue doing the same.[102] Requirements similar to

96. *See* Annot., 19 A.L.R.4th 456 (1983), and cases therein cited.
97. *Id.* at 462.
98. *Id.* at 461.
99. *Id.*
100. Lynn Mining Co. v. Kelly, 394 S.W.2d 755 (Ky. 1965).
101. *Compare* Chicago & E.I.R. Co. v. McAuley, 121 Ill. 160, 11 N.E. 67 (1887), *with* Willson v. N.Y.C. & H.R.R. Co., 146 N.Y.S. 208 (N.Y. App. Div. 1913). Both cases involved railroads throwing smoke and ashes on plaintiff's premises.
102. See Annot., 152 A.L.R. 343 (1944), and cases therein cited.

those applicable to acquisition of title by adverse possession are imposed. That is, the nuisance must be adverse, open, continuous and uninterrupted. Most of these need no further explanation for our purposes, but the requirement of continuousness should be further examined. It does not mean that the nuisance has to be incessant, rather that it must occur "more or less frequently, according to the nature of the use."[103] Thus in a case where defendant canner dumped tomato peelings into a non-navigable stream from June to November each year for twenty years in such a way as to harm operation of plaintiff's downstream grist mill, he acquired a prescriptive right to continue doing so.[104]

It would be useful to examine the relationship between the operation of nuisance statutes of limitations and the doctrine of prescription. Since the period of the former is invariably much shorter, it will obviously be the operative rule where applicable. Where the nuisance is deemed a "permanent" one, the tort statute will bar all remedies as soon as the requisite number of years passes since injury first occurred. In such a case the rules of prescription becomes superfluous. On the other hand, where the nuisance is held to be temporary or recurring a new cause of action arises for each injury and the tort statute will bar only actions for injuries occurring prior to the statutory period. There prescription becomes very important, because where it applies it will bar all causes of action arising prior to the running of the statutory period for adverse possession. It might well be asked whether an injury can be "temporary" or "recurring" for tort statute of limitation purposes and "continuous" for prescription purposes. Undoubtedly it can. A perfect example is the above described case involving a canner who for five months of each year dumped tomato peelings into a stream.[105] Such an activity would clearly be recurring and so the canner could never completely escape tort liability under the nuisance statute of limitations as long as he continued dumping. But the activity was held to be "continuous" for prescription purposes and all remedies in damages or injunctions were thereby barred.

Let us examine the tort statutes of limitation and the prescription doctrine from a policy standpoint. Both involve consideration of the effect of the passage of time and are governed by the same principles. We indicated earlier that doctrines of adverse possession and prescription were typically last in time rules. The exception noted was the case in which prescription operated to confer new rights against the world; that was clearly first in time.

What classification does a prescriptive right (easement) to continue a nuisance fall into, in a "coming to the nuisance" kind of a case? Let

103. Anneberg v. Kurtz, 197 Ga. 188, 192, 28 S.E.2d 769, 772 (1944).
104. *Id.*
105. *Id.*

us take as an example the case of the piggery moving into an agricultural area. Under the law the period of prescription would not begin to run until the offensive use was unreasonable as to the neighboring property.[106] Therefore, a piggery often would not be an unreasonable use as against neighboring agricultural land[107] and in such a case the prescriptive period would not begin to run until the latter was converted to some inconsistent use, such as residential. There the piggery operator would not be adversely affecting his neighbor's prior existing right to use her own land as in the typical prescription or adverse possession case, but rather would by prescription be acquiring the right to continue his offending use against her later inconsistent one. His prescriptive right would therefore be a first in time rule.

Whether the rule here happens to fit into the first in time or last in time category is not half as important as analyzing the fundamental question of what policy supports the creation of these prescriptive rights to maintain nuisance. As we saw, security of title justifies giving a trespasser or thief ownership of the property he wrongfully occupied or seized. Society and innocent third parties benefit from the fact that adverse possession makes titles to land more marketable. It cannot be said that the doctrine of prescriptive nuisance operates to clear land titles in quite the same way. Nevertheless, the doctrine does serve to promote land development in this sense. A person who wishes to develop will know that if he continues a use deemed a nuisance for the statutory period of prescription he will eventually be protected. It is also at least arguable that a person buying a piggery with intent to continue operations should be able to rely upon its long and uninterrupted continuance as a ground for resisting attempts to impose new restraints upon it. On the other hand it is probably true that the policy underlying prescriptive rights to commit nuisance is not as compelling as that underlying adverse possession, where the very question of ownership is at stake.

G. First in Time as a Residual Rule—Seniority in Labor Union Contracts

We discuss here employment seniority,[108] a first in time rule that is of a somewhat different nature from the others heretofore explored, in that it is not judicially or legislatively mandated, but typically the result of an agreement between the parties. The vast majority of labor union contracts, particularly in the industrial union areas, contain such clauses, which generally give employees having greater seniority

106. Annot., *supra* note 102, at 354.
107. Pendoley v. Ferreira, 345 Mass. 309, 312, 187 N.E.2d 142, 145 (1963).
108. For an excellent general discussion of seniority, *see* S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT chs. 5-7 (1960).

priority with respect to at least some of the following issues: layoffs, callbacks, promotions, discharges, transfers, working hours, automatic progression of wages, and certain fringe benefits such as vacations, sick leave, and pensions.[109] In most cases the priority with respect to layoffs, promotions and the like is not an absolute one; rather consideration is given to factors of merit including skill and ability.[110] On the other hand, with respect to various fringe benefits, seniority is often absolute.

What accounts for the almost universal presence of seniority provisions in these labor contracts? The following is one explanation that has been offered:

> How should a firm determine layoffs in bad times and promotions in good times? Put the question to a democratic vote of employees, and there is little mystery what the answer will be. "They'll say seniority," confirms Douglas Fraser, the outgoing UAW president, standing poolside at the Sheraton Bal Harbour. "It's just fundamental human nature."
>
> He's right. Seniority eliminates all the invidious comparisons that come with a system where promotions are based on somebody's judgment of merit. Seniority has a natural democratic constituency—namely, the 51 percent of the workers who are most senior. Alternative constituencies, like the 51 percent of the workers who are the best workers, don't know who they are. And some of the people who would lose most under the rule—those workers who have yet to be hired—don't get to vote because, well, they have yet to be hired.
>
> In fact, 99 percent of U.S. collective-bargaining agreements establish some sort of seniority system. At 84 percent of the unionized firms surveyed in a 1983 study, a strict seniority system was in force, meaning that a senior hourly worker would *never* be laid off before a more junior worker. In contrast, only 42 percent of the nonunion firms had a strict seniority system.[111]

Though the self interest of the majority does play an important role in inducing labor organizations to demand seniority as a standard for determining various employee rights, unions press for it for other reasons as well. Chief among them is the desire to avoid giving management the power to make arbitrary decisions over the fate of their membership, thus diluting union power.[112] The argument is that "[t]he union is strengthened by seniority, because it acquires a function to protect and interpret seniority against management's obvious desire to make decisions on grounds other than seniority."[113] Unions also argue that merit is too nebulous a concept to be fairly applied.

The omnipresence of seniority is also accounted for by the fact that many employers desire it. Undoubtedly they regard it as a means of avoiding employee and union pressure when they are obliged to make

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109. A. CARTTER & F. MARSHALL, LABOR ECONOMICS: WAGES, EMPLOYMENT, AND TRADE UNIONISM 342 (1967).
110. C. MORGAN, LABOR ECONOMICS 207 (3d ed. 1970).
111. Kaus, *The Trouble With Unions*, 266 HARPER'S MAG., 23, 29 (1983).
112. J. ADDISON & W. SIEBERT, THE MARKET FOR LABOR: AN ANALYTICAL TREATMENT 305 (1979).
113. A. CARTTER & F. MARSHALL, *supra* note 109, at 344.

such difficult decisions as which persons should be laid off or rehired. In addition, employers often do not believe that the seniority device raises costs.[114] For example, where an employer has accumulated a substantial investment in training his senior employees it is clearly in his interest to lay off junior employees who have not had as much invested in them. On the other hand, it has been suggested that this argument is partially circular, for if seniority were not the rule, employers would invest in less specific training and workers would finance more of their own training.[115]

Recently, use of the seniority device for transfers and layoffs has come under increasing attack as a violation of the laws against employment discrimination embodied in Title VI of the Civil Rights Act of 1964.[116] Section 703(a) of the Act makes it an unlawful employment practice for an employer to discriminate against a person on the basis of race, color, religion, sex, or national origin in connection with compensation or terms and conditions of employment.[117] However, section 703(h) provides that it shall not be an unlawful practice to apply different standards to employees "pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."[118] Needless to say a complex body of law interpreting the necessarily vague statute has resulted.[119] Congress and the courts are trying to reconcile what may be irreconcilable, viz., the conflict between society's desires, on the one hand, to protect a senior individual who is not personally responsible for the former discrimination from which he benefits, and, on the other, to somehow compensate those who have suffered from such discrimination. This is not the place for a detailed review of the development of that jurisprudence. Suffice it to say here that the United States Supreme Court has tread a very careful middle path in trying to deal with this essentially insoluble first in time problem.[120]

Aside from the problems of discrimination, one can fairly debate whether the growth of the seniority device has been a good or bad

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114. J. ADDISON & W. SIEBERT, *supra* note 112, at 305.

115. *Id.* at 306.

116. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

117. 42 U.S.C. § 2000e-2(a) (1976).

118. 42 U.S.C. § 2000e-2(h) (1976).

119. For an excellent overview of the issue of seniority and employment discrimination, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 23-79 (2d ed. 1983).

120. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) (retroactive seniority available to post-Act victims of hiring discrimination); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) (employees suffering from perpetuation of effects of pre-Act discrimination not entitled to relief).

thing for society.[121] A leading argument against it is that it tends to reduce efficiency and thereby raise costs because older and slower workers are retained while younger and more productive ones are forced out. (The opposite position that retention of more experienced workers results in cost reduction has already been referred to.) It has also been advanced that with greater security older workers will become complacent and less productive. Additionally, it is contended that seniority will discourage the mobility of labor that is necessary for the efficient reallocation of human resources.

On the other side it is argued that with seniority, the tendency to oppose needed technological advances will be lessened. Further, seniority will encourage management to be more careful in its recruitment of personnel if it knows that a long-term commitment to hirees will follow a period of substantial employment. This in turn will reduce excessive labor turnover which can be very costly to the economy. Also it is said that seniority will encourage loyalty to the employer as well as higher morale, leading to a more productive work force. Lastly and perhaps most importantly, the argument that seniority in layoffs and promotions raises labor costs is met with the point that getting rid of seniority with respect to layoffs would not eliminate the social costs of aging, but instead would likely shift them to society through the burden of increased social programs and loss of morale.[122]

Whatever the validity of these arguments, one point is undeniable: the use of seniority is well-established in the economy not only in the unionized sector but in government, academia, and even in the non-unionized industrial sector as well. A 1950 survey of 110 non-union firms by the National Industrial Conference Board disclosed the use of seniority by 95.5 percent of the firms as to layoffs, 82.7 percent as to rehiring, 72.2 percent as to promotions, and 61.8 percent as to transfers.[123]

Considering all the reasonable arguments for and against the use of the seniority criterion in the labor field, I would suggest that its well nigh universality must be accounted for by some very fundamental psychological factor. Perhaps all that can finally be said is that this phenomenon represents just another instance of the very human instinctive feeling that unless there is a compelling, indeed overwhelming, reason to choose another way to allocate a good, it is only fair to accord priority in it to that person who got into the line first. In that

121. For a good discussion of the arguments pro and con, see C. MORGAN, LABOR ECONOMICS 208-13 (3d ed. 1970).

122. *Id.* at 213.

123. National Industrial Conference Board, Seniority Practices in Nonunion Companies, Studies in Personnel Policy, no. 110 (New York 1950), *noted in* C. MORGAN, *supra* note 121, at 211.

sense, the first in time rule seems to operate as a kind of residual rule of last resort.

IV. CONCLUSION

This Article has attempted to delineate many of the fundamental arguments that militate for and against application of a first in time rule in various kinds of disputes. Certainly no attempt has been made to catalog all of the situations in which these conflicts have arisen. The purpose has been to analyze and perhaps to shed some light on when courts are impelled to follow or reject a so-called fundamental legal principle.

It is probably true that occasionally our society rather instinctively holds in favor of persons having temporal priority where it has no compelling reason for another approach, thus utilizing it as a sort of rule of last resort. However, in the vast majority of cases where the first in time approach is used, good reasons of policy preponderate to support its application. Where the rule is applied in those many areas involving private conflicts over the right to the same resource, as in water law and homesteading, it can most often be justified on grounds of the promotion of economic efficiency through encouraging development. Indeed that same policy can be discerned where the courts refuse to apply a first in time approach. Thus though the oft-stated justification for the last in time approach used in adverse possession and prescription cases is the policy of promoting security of title, it can be argued that what really underlies that policy is the law's desire to promote the efficient exploitation of resources. After all, it is the adverse possessor who is *now* productively utilizing the property in dispute.

Carrying the argument one step further, where there is a conflict between the two policies of security of title and encouraging development, as in the dispute between a creditor claiming under an after-acquired property clause and a purchase money financer, the law favors the latter party—the one who can credibly make the development argument. On the other hand, occasionally the law has refused to apply the rule that a pro-development approach might lead to. That is certainly the case in its adoption of a last in time approach to the "coming to the nuisance" problem, which can be attacked on both fairness and efficiency grounds. Nevertheless, if it could be said that there was any one principle that guided the courts in their resolution of timing problems in private conflicts over resources, it is clear that it is the policy of promoting their efficient utilization and development. No other principle runs so deeply and pervasively through this vast area of the law.