The other day when a student came to me with a hypothetical problem and his proposed solution, I ventured the opinion that the solution, although it might be effective for some purposes, glossed over some important underlying notions that if discussed might improve our insight into the problem. I said, a little bit tongue in cheek, "You know I like to break a subject down into its smallest component parts." He replied, a little more tongue in cheek, I think, "Yes, I know, you like to take everything back to Adam." In a sense, for the purpose of understanding the phenomena of the relationships that we group under the rubric "property", I do think it helps to "take things back to Adam."

Perhaps it helps to begin even before Adam, at least as far back as the fifth day, when there was the earth and living creatures, but no people. For the purpose of this discussion, however, we do not have to take in the whole earth but just the approximately 45,000 square miles of it that we now call Louisiana.

In pursuing this quest, I submit the following discussion with no dogmatic purpose but merely as a set of analytic constructs or tools of understanding which I have found useful in comprehending the purpose and function of the doctrine of accession and through it the method by which the legal system of Louisiana performs the allocatory function. I have sought to avoid the use of the traditional terminology associated with this function in the belief that the effectiveness of the terminology depends upon how well it serves as an efficient tool of communication. How well a term serves as communication depends upon how closely our ideas for which the term is intended to stand as a symbol correspond. My observation has led me to suspect that we have assumed too much concerning the coincidence of ideas underlying the terminology. Furthermore, it often seems that in close questions concerning the adjustment of conflicts over things, identifying one person as having "title" or "possession" or being the "owner" of the thing merely states a conclusion as to how a conflict is to be resolved rather than providing an analysis of the justification for the result reached.
Allocation and Conflict Resolution

All things that serve material human needs originated in nature. Many of these things have a history traceable as substance that reaches back to the fifth day of creation. The reference here is to the physical history of things.

Things as objects of conflicting human wants also have a legal history. The primary function of the private law of any legal system is allocation. This is the basic economic function which a legal system performs.

A scheme of allocation could be viewed as the reference materials that make it possible to resolve conflicts among persons over things. However, allocation and conflict resolution are two aspects of the same thing. Conflict resolution becomes necessary at any time two persons feel the need of and demand the use of a single object at the same time. The conflict will always be resolved by some means; but conflict resolution, in a legal sense, becomes possible when there is sufficiently organized power to coerce the losing contender to accept a particular result. A third person or group must represent the organized power and determine whose demand for the thing is to be honored and whose is to be ignored. This determination may be arbitrary or it may be rational. The degree of arbitrariness that is present relates to the absence of controls on the choice permitted to the third person, or judge. The controls are both external and internal. External controls consist of higher authority in the structure of organized power which judges his judging processes, such as an appellate court. The internal controls are the intellectual inquiries upon which the judge feels some constraint to embark. Faced with two claimants to one thing, the judge must, if he is to avoid arbitrariness, direct his attention to receding points of time in the past. Time and change are very much a part of the rational resolution of a conflict over a thing. How would the conflict have been resolved yesterday? The day before?

In the model of conflict resolution found in existing litigation processes, this inquiry into the receding moments in time extends back to the latest point at which a justification for resolution one way or another can be identified. This is the outcome of an adversary system whereby each contending person presents the material with which he seeks to justify resolution in his favor. One person demonstrates a point in time at which an event occurred that would justify, at that moment, resolution of the conflict in his favor. Coupled with this is the absence of any intervening event that would justify an alteration in the result. The losing contender, on
the other hand, is both unable to demonstrate the intervening events and to reach back to a still earlier time at which point a resolution in his favor would be indicated.

Wherever there is litigation in which the matter at stake is the use of a corporeal thing the method of resolving that conflict can be figuratively compared to an iceberg. The immediate and actual conflict is like the above the surface portion of the ice. Beneath the surface lies an entire physical and legal history of the thing that is the object of the actual contest. This history consists of the way conflicts over the object would have been resolved had they arisen in the past. Of the portion of the iceberg that is beneath the surface some is visible from the surface and some is too deep in the water to be seen. The visible portion of the ice beneath the surface stands for that part of the history of the object which is revealed in the litigational process. The extent of this visible portion is determined by the point in time at which one of the litigants can establish an event which would have altered the resolution of conflicts over the object so that he was the person favored. The opposing litigant fails because he is confronted with this event and is unable to demonstrate any subsequent events that would further alter the resolution of conflict to favor him. The invisible portion of the ice is not necessarily revealed in the litigation process but it is there; it was at sometime in the past visible and its recession from visibility is itself an historical event. The invisible portion should be taken into account in order to enhance our grasp of how the allocatory function is carried out.

The physical history of the thing in contention concerns the time and place of its origin, where it has been since, and what physical transformations it had undergone. The legal history of the thing pertains to the way conflicts among persons over the use of the thing would have been resolved at any point of time in the past. The legal history may be said to begin at that point in time at which there is organized power capable of resolving conflicts over the thing and there is an identifiable person in whose favor the authority will respond in resolving existing or potential demands concerning the thing. The full legal history of a thing in contention may not be a litigational necessity in resolving a present conflict, but a theoretical construct of that history should promote a more satisfactory understanding and analysis of a present conflict and emphasize the pertinence of considerations that should lead to its resolution.
For a starting point there must have been a moment in time in which organized social institutions had sufficient control over the thing in question and the persons who may demand use of the thing to effectively adjust those demands—combined with a basis for determining that the demands of one person will be recognized at the expense of those of another. This starting point in the legal history of the thing need not be identified with an actual conflict, but rather with a supportable supposition of how a conflict over the thing would have been resolved had it been presented to the appropriate authority. The question is one of determining at what point in the physical existence of a thing can it be said that the demand of a person with respect to the thing would be officially honored.

From this starting point rational conflict resolution requires that the result of the initial conflict resolution be carried forward through time until a point in time is reached at which an event occurs that justifies altering the result. To alter the result from one point in time to the next without finding an intervening event that justifies the alteration is arbitrary conflict resolution. As to what events justify the altering of the continuity of conflict resolution, they should be identifiable by standards external to and known to the judge if arbitrary determination is to be avoided. In this view the legal history of an object consists of a starting point of a supposition concerning resolution of conflicts over that object with the outcome of that resolution continuing through time until an event occurs that justifies altering that outcome. From the time of that event the new outcome continues until another event occurs that justifies further alteration, at which point a new solution is taken up and so on down to the present.

This sequence is not intended to reflect a simplistic notion that an event which alters the course of conflict resolution of necessity substitutes one person for another. The simplistic notion is based on a model of allocation whereby one person is favored as to a given thing and in conflicts over the thing all other persons are interchangeable losers. The real model of allocation may roughly be analogized to persons playing with a deck of cards. There is only one ace of trump and if that card is played it takes the trick. If it is not played, another card takes the trick. This can be illustrated by considering the event of one person losing an object and another finding it. The event does not alter the condition of conflict resolution in favor of the one losing the object but it does create a new condition of conflict resolution in favor of the one who finds it.
The event of finding has the result that conflicts over the thing will be resolved in favor of the finder in contention with all others except the loser. From the finder's point of view the condition of allocation is not one in which all other persons are interchangeable. In a litigational struggle between two persons over a thing the inquiry into the condition of allocation with respect to the thing has only to take account of conflict resolution as it pertains to the persons involved, or to the cards played on the particular trick. For other functions of the lawyer (title opinions, for example), however, it is necessary to consider the condition of allocation with reference to all other persons, or what cards are outstanding rather than merely to be played on a particular trick.

Concerning the struggles of persons over things, the legal system might be said to have two functions, the resolution of particular conflicts as they arise and the overall allocation of all of the valuable resources (objects) among all of its persons (subjects). The overall allocation may be regarded as providing the rational basis for particular conflict resolution. The legal system may also be regarded in this connection as having two manifestations: the institutions which resolve conflicts and the doctrinal or intellectual materials that guide and provide justification for a particular resolution. The same doctrinal or intellectual materials may also stand as both a source and a reflection of whatever society shares in attitudes and belief concerning an existing condition of allocation. The notion that allocation and conflict resolution are two reflections of a single concept presents itself when it is considered that allocation occurs through the intervention of authority in human struggles over things. The only way such intervention occurs in the area of private law is through the resolution of conflicts. Allocation without conflict resolution does not exist. That which one receives by way of allocation is the protection extended to him by the legal system in his relationship to others with respect to a given thing. The means of extending this protection is through resolving conflicts in his favor with regard to the thing. A person's "property", or that part of his patrimony which can be considered corporeal, consists not of things themselves but of the protection the legal system affords the person in his relationship with others with respect to the things. Such protection is afforded by resolving conflicts over the things in his favor. Allocation may be viewed as a dispensing of claims to things through the legal system. These claims are solely a function of the protection afforded by the legal system and the protection is accomplished by resolving conflicts in
favor of the appropriate person. Allocation is conflict resolution and conflict resolution is allocation. The doctrinal and intellectual materials that inform decision making in actual conflict resolution are descriptive of a theoretical construct of sequential suppositional conflict resolutions surrounding successive dots of time. Successive resolutions are identical unless events intervene which are doctrinally recognized as justifications for altering the next succeeding resolution. The doctrinal materials identify the events and delineate their consequences with respect to the outcome of the next conflict resolution.

The legal history of an object provides the basis for rationally resolving a present actual conflict over the object. An investigation of the legal history of the object necessarily involves also its physical history. The continuity of resolutions of conflicts over a particular thing is an unstated given of the doctrinal materials such as appear in the Civil Code. In other words, it is not stated in the Civil Code that unless certain events occur there will be continuity in conflict resolution; but rather the approach is taken that if certain events occur, conflicts will thereafter be resolved in a new way. These materials identify the kinds of events and specify the new conflict outcome.

In tracing a legal history of an object there is an event that is the starting point: the event that first justifies the initial conclusion that conflicts over the object will be resolved in someone's favor to the exclusion of the demands of others. The other category of events which are the usual subjects of doctrinal statement are those which effect a change in conflict result after the legal history has commenced. The former, the initiating event, diminishes no pre-existing claims for there were none. The initiating event is the one that starts the chain of continuity of conflict resolution in motion. The subsequent significant events are those that affect or alter that continuity. These intervening events may have the effect of obliterating the consequences of the previous legal history of the object in that previously recognized claims are destroyed by the event. Such events make it possible to avoid the practical necessity for following the legal history of the object back to the beginning. On the other hand, some events do not destroy the claims that are the result of the previous history and therefore the history prior to the event retains relevance.

The doctrine of accession, as it is set forth in the Louisiana Civil Code, illustrates and informs in this connection. The events that affect conflict resolution are of two kinds: those that initiate
the legal history of the object, initiating events; and those that effect a change in the immediately preceding status of conflict resolution, intervening events. Accession is a doctrinal means of relating the legal history of an object to its physical history. As to vegetable or plant substance, accession deals with the initiating event. The physical history of a vegetable object begins when it comes into existence and at the same moment in time accession states the way in which the legal history is to begin. At the physical beginning of the object, accession provides the way conflicts are to be resolved with respect to the substance from the outset of its existence. With regard to substances generally, accession identifies the events in the physical history of an object that will act as intervening events in changing its legal history. Accession specifies what physical changes in an object will result in a change in the way a conflict over the object will be resolved and defines what the conflict result will be.

CODIFICATION AND ALLOCATION

Since a civil code plays the primary role in guiding resolution of conflicts over things, it may be interesting to give some attention to the effect of codification as an historical event in the continuum of such conflict resolutions. Codifications have not undertaken re-allocation. The enactions of civil codes have not claimed for themselves the role as an event that effects an alteration in the chain of conflict resolutions. In formulating general standards of identifying future events that affect conflict resolution and in defining this effect, a code may alter the course of future resolution without accomplishing immediate change. In the usual course of codification, however, the designation and effect of these events cover no greater scope than the pre-codal assumptions that guided decisions before. Any formulation and change in legal method in this regard does contain the potential of altering future outcome.

Codification has usually taken place where most of the existing potential objects of allocation had already been allocated. The origins of allocation or the time chains of conflict resolutions as to most objects receded into a long past. The legal history of these objects was too long for the origins to be a conscious consideration at the time of codification.

Some codifications have been inspired by political revolution. The political side of the revolution has provided re-allocation, but this was not the role of the revolutionary civil code. Decrees of revolutionary governments have been established as events that
altered the conflict resolution conditions of the preceding moment. This is exemplified from the point of view of a person in whose favor a conflict over a thing would be resolved up to the point of a decree of nationalizing the thing, after which conflict resolution concerning the thing would be quite different. In the revolutionary model codification follows the event that alters resolution concerning a great many things, but the code itself takes as a starting point the newly created resolution. The identification of future altering events and the delineation of the outcome effected can be expected to be supportive of the political aims of the revolution and the political norms of a scheme of allocation.

The French Civil Code was only partially revolutionary in origin. It did not follow a large scale systematic undertaking of reallocation of resources. There were piecemeal revolutionary changes in the allocatory continuity in the fifteen year period that preceded the Civil Code. The first such changes occurred on the night of August 4, 1789, with the voluntary relinquishment of feudal incidents. Insofar as a feudal incident reflected a favorable outcome of conflict over the thing to which it pertained, the renouncing of the incident altered the conflict outcome since the feudal result was presupposed up to the night of August 4, but was thereafter precluded. Through the revolutionary period there were numerous specific re-allocations accomplished by decrees of the succeeding revolutionary governments, but by and large most of the objects of allocation in France did not have their legal histories altered by direct revolutionary events between 1789 and 1804. The Civil Code, therefore, can be regarded as providing for the future evolution of conflict resolution chains that for the most part were unbroken by revolutionary events and had their origins in the dim past. What the Civil Code did pursue along political revolutionary lines was to assure that future events that altered a condition of conflict resolution would not alter it in such a fashion that the new resolution would repeat the feudal structure that had been eliminated by the revolutionary struggle. In other words, a complex result to conflict resolution over an immovable reflected and supported the complexity of the hierarchy of the feudal social and political system. An objective of the Code was to prevent anyone from engineering an event that would lead to a new conflict resolution that would duplicate that of feudalism and promote the repetition of a discarded system.

The Louisiana Civil Code, while following the French Civil Code in precluding new conflict resolutions that would foster
feudalism, has a distinguishing feature in the way it historically relates to the origins of allocation. In Louisiana, codification followed the fifth day of creation by only a century. This is probably the world's shortest time span between the point at which the resources of the area were unexploited and unclaimed and the point at which there was formal codification. The formal structured conditions for the continuity of allocation were enacted a relatively short time after the first allocation originated. The concept of continuity of allocation should therefore be more easily grasped in Louisian than elsewhere.

**Physical History of Objects**

Things as objects for allocation have two histories. One is the history of their physical existence. The other is the history of their allocation.

Consider for a moment a pair of shoes or a book. The shoes are probably made of leather and hence from the hide of an animal. The book is probably made from wood pulp. The substance that now makes up the shoes may be regarded as having its beginning with the beginnings of the lives of the animals from which the hides were obtained. The substance that now makes up the book may be regarded as having its beginning with the growth of the trees that were used in making the paper.

Consider also a belt and a pencil. The belt is probably made of leather with a metal buckle. The substance of the leather may be regarded as having its beginning with the life of the animal from which it was made, but what about the metal buckle? The pencil is probably made of wood and graphite. The wood began with the tree. When did the physical history of the graphite begin?

At any given time plant and animal substances either in a natural or manufactured state have a fairly short history. Hence the book, the leather shoes and belt, and the wooden and rubber parts of the pencil have a recent origin as substance. The graphite part of the pencil, in its manufactured state, derived from petroleum which, as an organic substance, had plant or animal origins but has been in existence thousands of years. The metal buckle, having its origin as an inorganic mineral substance, is in traceable form as old as creation.

To treat plant and animal substance as having such a short history ignores modern ideas concerning relationship of matter to energy and their conservation, but this thought is much newer than
the Civil Code and is not particularly relevant to the subject of allocation anyway.

Next consider the first time that each of these things in their original state as natural substance became the object of allocation. This should be understood as the first time the legal system might be regarded as having developed a statement which would be backed up concerning the relationship of one person to others with respect to that substance. The leather things were allocated in their initial state with the birth of the animal if it was a domestic animal, to the person to whom the mother animal had previously been allocated. If on the other hand, the animal hide is obtained from a wild animal, the initial allocation occurs upon occupancy. Concerning the objects that have wooden origins, trees that have come into existence since the space they occupied was first allocated, were initially allocated to the person to whom that space was allocated at the moment the tree came into existence. If, on the other hand, the wooden object was derived from a very old tree that grew initially in unallocated space, then the initial allocation of the substance of that tree occurred when the space it occupied was allocated and the tree was allocated along with the space.

As far as the inorganic mineral substance which is now, in its manufactured state, a belt buckle, the natural substance was first allocated along with the space it occupied. Concerning the petroleum that is now made into graphite, that substance was first allocated upon its occupancy.

**SPACE AS OBJECT OF ALLOCATION**

The allocation of substance as raw material, both existing substance and substance to come, is closely connected with the allocation of space. Conceptualization concerning the method of allocation of space and how it was brought about is therefore indicated. Any given unit of space is, for our purposes, eternal. The space itself has no physical history. As a result the point of concentration is solely on the critical moments in the allocation of space. The starting point must be at the moment a sovereign has sufficient physical control over a space to be able to effectively resolve conflicts between persons concerning the exploitation of that space. In other words, since allocation consists of a legal system's effectively affording protection to one person in his relation to others with respect to a given space, the potential for allocation arises when the sovereign has sufficient control over an area of space and its human occupants in order to perform the allocatory function.
While the component parts of the allocatory function with respect to space are the legal system, persons, and space; there are also international aspects to the history of the allocation of space. Control of space and the persons in it as an exercise of the effective power of the sovereign's institutions results in the sovereign capacity to resolve conflicts over space between its own subjects. The recognition of this power in one sovereign by another sovereign with the attendant restraint by the latter from attempting the exercise of such control yields the efficacy of private allocation on the international level. Furthermore, in a federated system such as the United States, the relationship between the federal government and the component states is also part of the overall picture of the history of allocation of space. The organic or constitutional structure of the federal system and the attendant operation of parallel legal systems plays a role.

In other words, the primary concentration in the history of allocation has as a starting point the beginning of effective power by the sovereign to resolve conflicts between persons over a given space. However, this takes account only of power exercised between the sovereign's institutions and the persons involved. A more complete picture is gained by consideration of the international aspects, whereby one sovereign's power in this respect is enhanced by the restraint of other sovereigns. The other sovereign does not attempt to make different resolution of conflict over the space in question. In a federal system this becomes even more complex, since it involves the power of one sovereign in the duality to perform the allocatory function to the exclusion of the other. This involves the complexities that are aspects of the organic/constitutional structure of the federation. Therefore, a part of the whole story of the history of allocation is the sovereign's position to exercise this power without conflict either in a federal or an international sense.

The history of the allocation of space in Louisiana requires consideration of the international and federal aspects of the allocatory function. This is so because of the succession of sovereigns over this 45,000 square miles of space and because of Louisiana's federal position.

The usual means of effecting an allocation of space by the sovereign to a person is for the appropriate representative of the sovereign to indicate the sovereign's choice that the designated person should have a specified area of space. This is manifested by a document usually called a patent. Subsumed within this act of the
sovereign is an assumption concerning just what the sovereign or its legal system will do for that person in his relationship with others with respect to that space. This is so because the sovereign cannot give space but only protection in the enjoyment and exploitation of that space. The initial private allocation of space occurs as an act of will of a representative of the sovereign. The will of the sovereign in this regard contains the identity of the recipient and the boundaries of the space.

For some purposes it may suffice to say that allocation of a given area of space occurs only upon private allocation from the sovereign to a named person. As between sovereign and subject and among the subjects themselves the absence of private allocation might be looked upon as the absence of any allocation. On the other hand, comparison of the positive characteristics of allocation with the negative side suggests a different approach. On the positive side, the sovereign has given to a person protections with regard to a space which it will not withdraw. The negative side concerns the situation in which the sovereign has extended no such protection to any person with respect to a given space. The absence of such claims to the space can be analyzed as allocation to the sovereign rather than no allocation at all. Where no claims have been granted, the sovereign can exclude others from the space in its own favor just as it could give protection to the private person as far as claims to spaces already granted. In other words, conflicts concerning the use of the space will be resolved in favor of the sovereign. Under this view, the absence of a claim to a space by a person equals allocation to the sovereign; therefore, the initiating event occurs at the moment there is effective control by the sovereign's institutions over the space.

This becomes more than a mere exercise when viewed in the light of potential conflicting claims between sovereigns. In Louisiana one encounters the problem of successive sovereigns along with the problems of a federal system. The function herein referred to as sovereign in effecting allocation passed from France to Spain to France to the United States to Louisiana in this 45,000 square miles of space. For the purposes of brevity in this illustration it is best to ignore the Spanish interlude and treat the matter as involving only France, the United States, and Louisiana. The history of allocation of the 45,000 square miles of space that is Louisiana begins when France, as a colonial power, had sufficient control over this space to effectively resolve conflicts between persons in their potential use and exploitation of this space. By
1803, much of this space had been allocated by France to private persons. As between France and French subjects in the area, that which had not been so allocated could be regarded as having been allocated to France. There the matter could rest until France relinquished the sovereign function to the United States. By treaty, the United States committed itself to the recognition and protection of the claims reflected in previous private allocations, but that space which had not been privately allocated was passed by French consent to the United States. At that point in time, the emergence of United States sovereignty over this area, there existed spaces that were privately allocated and spaces that, as between the United States and France and as between the United States and its subjects, were allocated to the United States.

In 1812 occurred the birth of Louisiana and its emergence as the holder of the allocatory function of the sovereign. The transition this time was different. Louisiana was committed to honoring all the private allocations which were recognized by the United States but as between the United States and Louisiana, the United States retained all the claims it had to the space that was not privately allocated. In other words, the absence of private allocation resulted in a true allocation to the United States. The negative aspect of allocation to the sovereign by the sovereign then became a positive allocation as a result of the United States' passing of the sceptre to Louisiana while retaining the claims it had enjoyed in its prior role as sovereign.

There is a notable exception to this outcome involving spaces occupied by navigable waterways. Space passed from the United States to Louisiana. The boundaries of this space were defined by the extent of the coverage of the navigable waters at the moment Louisiana came into existence. The claims to this space were transferred from the United States to Louisiana as a result of the admission of Louisiana as a state. Each creation or transfer of claims to space involves the designation of the person to receive the space and the definition of the extent of the space. Defining the extent fixes the boundaries of the unit of space concerning which claims are transferred. At any point where the existence of boundaries are mentioned, it should be realized that at some point that boundary was defined or created by the manifested act of will of the one who could effectively dispose of claims to the space in question. On initial private allocation the sovereign chooses and manifests that choice in a patent (or other form of document) that the initial recipient of claims receives claims to a certain defined space. The expressed definition of that space establishes a
boundary. When the original patentee subsequently subdivides, his choice of the area he is transferring as manifested in a deed or other document creates another boundary. Behind the location of each boundary rests a manifestation of human, either individual or collective, choice that it be in that particular location.

This location might either be defined in terms of geometrically established lines or it might be in terms of some line that is defined by a natural phenomenon such as the water's edge. The latter can be considered as a series of points on the surface of the earth where there is wetness on one side and dryness on the other. The effects of changes in the location of the natural phenomenon, which is subject to natural changes, on the space of allocation that was initially defined by that phenomenon will be discussed later. For the moment the subject at hand is through what choice by the United States were the boundaries set of the space that was to go from the United States to Louisiana on Louisiana's admission to the Union.

In each of the original thirteen states mostly complete allocation of space had taken place during a colonial period. By English doctrine the space occupied by navigable waterways was retained by the sovereign. Upon severing political ties with England this space passed from the crown to the new allocating sovereign, the state. Upon the formation of the Union, either that of the Articles of Confederation or the Constitution, the claims to the space occupied by the navigable waterways remained in the state although the federal authority did receive from the organic document some power to regulate the use of the waterways.

The Constitution sets up the conditions and the means of effecting the creation and admission of new states. The doctrine in this area provides that the decision of Congress to admit a new state must be a decision to admit the new state on an equal footing with the existing states. Since existing states have allocated to themselves the space occupied by navigable waterways, then the new state, in order that it achieve this status of equality, must also be allocated the space occupied by navigable waterways. As a result the decision to admit the new state carries with it the decision to transfer from the United States to the new state all the claims to the spaces occupied by navigable water.

At the moment Louisiana was admitted to the union the effective decision to admit transferred from the United States to Louisiana all the space that contained navigable water. The location and extent of the space was fixed by the natural
phenomenon of the location of the water and its capacity to support navigation. It was the water as it was at that moment and not at some future time that determined what space passed from the United States to Louisiana. This is the extent of the operation of the doctrine that is commonly called “inherent sovereignty”. That doctrine describes the transfer of space that occurred in 1812. It pertains only to the transfer of claims between the United States and Louisiana at that time. It has nothing to do with subsequent changes in water location and any re-allocation of space that may result therefrom. It has no application in adjusting conflicts between Louisiana and any person other than the United States over space where water location has shifted or the status concerning navigability has changed.

Once the space occupied by water in 1812 became Louisiana’s space it would remain Louisiana’s space unless some event occurred which would deprive Louisiana of its claim. The changing of a waterway from navigable to non-navigable is not such an event. A phrase such as “once navigable always navigable” is simply a false statement and a misleading memory aid.

Louisiana’s acquisition of space from the United States that was not occupied by navigable water in 1812 had to await subsequent acts of Congress by which the United States voluntarily transferred its claims to space to Louisiana.

The claims to space which might be asserted by the United States upon Louisiana and persons in Louisiana are the product of the legal system authored by the national sovereign. Beginning in 1812, conflicts over space in which the United States was not involved were adjusted by the legal system generated by Louisiana. Louisiana and its institutions did not, however, receive an unlimited range of choices in performing the allocatory function. Insofar as the national organic law, the United States Constitution, imposed restraints, those choices were removed from Louisiana in performing its allocatory function. In the beginning the most extensive restraint was in the binding effect of the treaty between the United States and France which required Louisiana to honor allocations made before 1803. Subsequently the Fourteenth Amendment and its due process clause limited Louisiana in carrying out its allocatory functions by restricting choices in dealing with allocations already made.

In beginning the performance of the allocatory function, Louisiana confronted spaces already allocated to private persons,
spaces retained by the United States, and spaces occupied by navigable water concerning which the United States had relinquished its claims. As to the first, Louisiana was restricted by treaty in dealing with the space, the persons concerned and their claims received from preceding sovereigns. As to the second, the claims were the creation of the legal system of the United States and were beyond the reach of Louisiana's legal system. Concerning the third, the policy which found expression in Articles 453\(^1\) and 455\(^2\) of the Civil Code dictates that these spaces not be made the object of private allocation. This policy, however, was a matter of legislative creation and did not prevent a contrary legislative choice. Spaces occupied by navigable water could be made the object of private allocation by the legislature until the Constitution of 1921\(^3\) elevated this policy to the constitutional level, thereby removing the matter from the scope of legislative choice.

Until 1921, the effect of these policy dispositions as set forth in Articles 453 and 455 concerning navigable waterways was to give expression to the idea that pre-1803 private allocations had not included spaces occupied by navigable water. Furthermore, it served as a basis for interpretation of subsequent documents whereby Louisiana made allocation of a unit of space to a private person in which a boundary was stated to be a waterway. The precise location of that boundary would, with Article 453 as an interpretive aid, be regarded as the ordinary low water mark if the waterway were navigable, but the thread of the stream if it were non-navigable. The policy of Article 453 concerning navigable waterways thereby has become a means for interpreting the documentary expression of the sovereign will as expressed in a patent. Similarly it provides an interpretation of the extent of authority of state officials in any grant of authority to issue patents. Since it is an expression of legislative policy that navigable

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1. **LA. CIVIL CODE** art. 453 (1870):
   Public things are those, the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation: of this kind are navigable rivers, seaports, roadsteads and harbors, highways and the beds of rivers, as long as the same are covered with water.
   Hence it follows that every man has a right freely to fish in the rivers, ports, roadsteads, and harbors.

2. **LA. CIVIL CODE** art. 455 (1870):
   The use of the banks of navigable rivers or streams is public; accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like.
   Nevertheless the ownership of the river banks belongs to those who possess the adjacent lands.

3. **LA. CONST.** art IV § 2 (1921):
waterways are public property, any authorization to an officer of the state to issue patents does not include the authority to make private allocation of the space containing navigable water.

Article 453 was given an extended interpretation in the *Miami Corporation* case. There the notion that space occupied by navigable water is a public thing was regarded as bringing about the automatic reallocation of space that had been privately allocated when unoccupied by navigable water once that space becomes occupied by navigable water. Therefore, Article 453 requires that the person loses claims to space in favor of the state upon the entry of navigable water into that space.

**Allocation of Substance as it Relates to Space**

At the time of codification, there had been a century long period in which there had developed extensive allocation of the space and the natural resources contained therein. The Civil Code, addressed as it is in Book II to things, is concerned with the extent of protection given by the legal system to one person in his relationship to others with respect to the thing in question. Each initiation of such protection in pre-codal allocation contained inherently some assumption concerning what the nature and extent of that protection was. Any such protection does not merely relate to the moment of its creation but must have a future in order to have a reality. Therefore, continuity and the conditions for termination of protections are necessary parts of the initiation of allocation. Codification does not purport to alter existing allocations as to the things that are the objects of allocations or as to the extent and duration of the protections extended by the sovereign. The consciousness of codification in this view is not one of creating or altering the assumptions which are the essence of the mode of allocation, but rather addresses itself to formal, concise guides to conflict resolution that will effect a continuation of that which is already a given of the legal system.

The 1808 Code, and expression of the legal system sanctioned by the United States as the sovereign of that moment, was in this regard a conscious continuation of the assumptions that effect allocations through preceding sovereigns. The 1825 Code, being the first systematic expression of the legal system under the Louisiana aegis, was also consciously such a continuation.

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The objects of allocation are space and the substance contained therein. Allocation of space is a starting point for viewing any legal system's commencement of the process of allocation. The allocation of the contents of space then falls into perspective by considering the relationship of the material object to the dispositions that have been made of the space. In developing concepts along these lines consideration should be made of the physical relationship of any given substance to the space in which it is located on the one hand and the legal significance attached to the physical connection on the other. The time factor needs also to be considered. Time enters the thinking in this area as it relates to the movement of objects through space and as it relates to the transitions in form that the substance may undergo. Here too must be considered the legal significance attached to the physical transition. This is both transition in form and transition in spatial location. Time is also part of the picture as it relates to plant and animal life that has no present existence but is a substance yet to come. Concerning the claims to matter as distinguished from the space it occupies, the inquiry should be pointed at the legal significance surrounding the beginning of existence, the movement and the changes in the history of any given object in its relationship to space and the allocation of that space.

Concentration on a given unit of space requires consideration of what protections were encompassed in its initial private allocation, what substances are contained within the space at the moment and what substances are not in the space now but may be expected in the future. The substances should be broken down into solid, liquid and gas because the propensity for spatial movement of these forms of matter affect the treatment given to claims to them in connection with the claims to the space they occupy. The substances should be distinguished also as plant, animal and mineral because of the duration of their physical histories along with their propensities for movement into and out of the space. A given mineral substance has always been in existence and always will be in existence. Some plants and animals are here now but have been here only a short time. Other plants and animals with which the legal system will have to concern itself are not yet in existence but can only be anticipated.

At this point it should be emphasized that a conceptional distinction between space and the matter that occupies that space is a useful component of this analysis. With this focus one might consider the way conflicts will be resolved concerning a given unit
of space upon the occurrence of the event in the legal history of that space that involves the issuance of a patent by a representative of the sovereign in favor of a private person. The description of space in this document, as a reflection of the will of the sovereign, is two dimensional, setting forth its geographical limits on the plane of the surface of the earth. Article 505 should be regarded in this context as determining the effect of that event. The force of Article 505 perhaps should be limited to a definition of the way conflicts are to be resolved as a result of the legal event encompassed is the issuance of a patent. Prior to the issuance of the patent, presumably, all potential conflicts over the space would have been resolved in favor of the sovereign. Upon issuance of a patent this is changed. Article 505 states the extent of the change.

Article 505 reveals that the protection extended pertains not merely to the plane of the two dimensional description contained in the patent, but covers also the third dimension with the result that the patentee is to have protection extended over a whole column of space. This column, extends theoretically from the center of the earth's sphere upward to infinity The portions of Article 505 stating the activity that the "owner" may carry out in the space relate to the way conflicts are to be resolved concerning the activity after the event of the issuance of a patent. Conflicts concerning what the "owner" may do after the issuance of the patent are to be resolved in favor of the owner. By negative inference conflicts between the "owner" and another when the other carries on those activities in the space are resolved in favor of the "owner": Article 505 should be regarded as stating the condition of conflict resolution brought about by the event which is the transfer of space from sovereign to person. Other transitions in the legal history of the space in question await subsequent events and the consequences of those events are determined by materials apart from Article 505.

The significant event in the legal history of space as space takes place through a specific act of the sovereign in conferring upon a designated person protection with regard to a space having

5. LA. CIVIL CODE art. 505 (1870):
The ownership of the soil carries with it the ownership of all that is directly above and under it.
The owner may make upon it all the plantations, and erect all the buildings which he thinks proper, under the exceptions established in the title: Of Servitudes.
He may construct below the soil all manner of works, digging as deep as he deems convenient, and draw from them all the benefits which may accrue, under such modifications as may result from the laws and regulations concerning mines and the laws and regulations of the police.
defined geographic limits. This specific act of allocating a particular thing to a designated person should be contrasted to a general rule of the legal system that if a designated kind of event happens then certain claims will arise. Space is allocated by the statement attributable to the sovereign that Mr. X is to get the space. A domestic animal, for example, is allocated by the effect of a general rule that when an animal is born the owner of the mother gets the new born animal.

All corporeal things having value originated in nature and occupied space in their original natural state. All initial allocations of space made by the sovereign through a specific act to a person are of space containing substance. The substance contained in that space constitutes the natural resources from which all things are made. It is well in this context to consider what the effect of the issuance by the sovereign of a patent describing space is concerning the substantive contents of that space. Approached from another direction, it might be asked just how allocation pertaining to material substance is initiated.

In this connection assume that Mr. X receives a patent from the state granting him a defined unit of space. This is a significant event in the legal history of the space; but what of the substances that are at the moment contained in that unit of space. The substances in the space at that moment are solid, liquid or gas. They are also plant or animal or mineral. By virtue of the protection afforded Mr. X he receives the right to occupy the space to the exclusion of others. As a result he would have exclusive access to the matter that is contained in his space as long as it remains in his space. The fact that he has exclusive access to the substance at the moment does not necessarily mean that the legal system recognizes in him any claim with regard to the substance. At this point the only protection he has relates to the space. As far as the substances contained within that space are concerned, Mr. X's position is attributable only to the physical relationship of the substance to the space combined with the legal fact of his protected status with regard to the space.

If movement of a substance beyond the limits of Mr. X's unit of the space had the effect that conflicts over the substance would not be resolved in his favor, it would be difficult to say that Mr. X received any protection with regard to the substance apart from that which he received to the space. The other side of this coin is determining by what means is the legal history of natural substance
initiated. Upon the happening of what event can it be said that a conflict over the substance as substance will be resolved in favor of one person at the expense of the demands of others?

If any substance contained within the allocated space would be conceived of as immutably fixed within the space it occupies then space allocation would effectively equal substance allocation. All substance, however, is subject to being moved through space by some means. What can be said about the initial allocation of substance in its natural state is necessarily tied closely to the susceptibility of the substance to movement through space and the means by which it moves or can be moved. The significant distinction here is between substances that move without human intervention and substances that move only as a result of human activity. As to substances the movement of which can result only from human activity there is a further distinction according to where the human activity may take place. On the one hand, there are substances which can be moved only by human activity that takes place in the space where the substance is located; while, on the other hand, there are substances that move only as a result of human activity but the activity can take place at a distance from the space where the substance is located.

Air and running water clearly belong to the category of substance that move without human intervention and the conclusion is quite readily reached that once these substances have moved beyond Mr. X's space he should have no right to regain them. In this case the patent issued to Mr. X did not initiate a claim to the substance within the space.

The solid substances contained within Mr. X's space can be moved only by human activity within that space. If Mr. X's space is invaded by another and solid substance is removed, there is little difficulty in concluding that Mr. X should be allowed to recover the solid substance after it has gone beyond the limits of his space. In effect the solid substance that occupies space is allocated with the space. Through his patent Mr. X not only gets claims to space but in addition gets claims to the solid substance that occupies the space.

Subsurface liquid and gaseous substances generally do not move in space without human intervention. The activity which can cause movement, however, can take place either inside or outside of the unit of space where it is located. It is probable that insofar as subsurface liquid or gases may have been considered at the time of
the issuance of an original patent or at the time of codification, these substances were considered as subject to natural movement just as are liquids and gases above the surface. It is now known that petroleum liquids and gases will remain in the space they occupy in the absence of human intervention. In determining whether Mr. X receives any claim to the liquid and gaseous substance in addition to his claim to the space it helps to make the distinction between the two types of situations. In the first situation the activity which results in the movement of the petroleum substance occurs without invading Mr. X's space. In the second situation the activity that causes the petroleum substance to move occurs within Mr. X's space.

In the first situation with the activity taking place outside of Mr. X's space that causes the petroleum substance to move from his space, there is little difficulty in reaching the conclusion that he will not be allowed to regain the substance. In a conflict over the substance the one who removed it from beneath the ground prevails. The first time it can be said that a conflict over the substance will be resolved in favor of a particular person is when the substance is removed from beneath the ground. It is that event, therefore, that initiates the legal history of the substance. At that time the conflict is resolvable in favor of the person who removed it. The initial allocation is made in favor of a person as a consequence of his activity with respect to the object. This is initial allocation through occupancy.

In the second situation, where the substance is moved as a result of someone's activity while invading Mr. X's space, the solution has proved troublesome. In a conflict between Mr. X and the invader who took the substance from the ground where the objective is the substance itself, consistency with the result reached in the first situation would indicate that the invader be allowed to keep the substance. If the initiating event concerning the legal history of petroleum is occupancy, the initial conflict resolution is in favor of the actor, the one who "occupied" the substance. On the other hand it has happened that such conflicts have been resolved in Mr. X's favor. This result points to initial allocation of the substance through accession. When a substance is initially allocated through accession the initial conflict resolution with regard to that substance follows the condition of conflict resolution with regard to the thing that the substance is most closely connected to. To allow Mr. X to have the substance is to allocate it in the same way the space from which it was removed was
allocated. Decisions on this problem have gone both ways, reflecting both occupancy and accession approaches. Furthermore, some approaches to this type of problem appear to assimilate petroleum substance to solid substance and therefore the initial allocation would be regarded as occurring at the time the space was allocated. This is obviously inconsistent with the result reached in the first situation. The inconsistencies in resolving conflicts in this area seem to stem from a tug between the need to protect the integrity of Mr. X's rights to the space on the one hand and the need to be consistent with the occupancy solution of the first situation, on the other. One practical reason for tilting the balance in favor of the occupancy solution is that the petroleum substance is put into commerce by the one who removes it from the ground. If initial allocation is in favor of the person in whose space the substance was taken, then the petroleum would move in commerce still subject to recovery by Mr. X until some event occurred that would justify altering the conflict resolution pattern.

Clearly Mr. X is entitled to be compensated for the invasion of his space even if he is not entitled to recover the substance itself. This raises the question of to what extent he is to be compensated for the invasion of his space. To say that he should have the value of the oil while not being entitled to the oil itself seems to be a contradiction.

There are three purposes that a money judgment in favor of the one whose space has been invaded could reflect:

1—Compensation for a loss caused by the invader's faulty behavior;
2—Rectification of an enrichment of the invader's partrimony with an attendant impoverishment of the one invaded, this shift in values being without justification in the legal system; or
3—The one invaded is entitled to the substance in a conflict over the substance and alternatively is entitled to a money judgment for the value of the substance as a substitute for a judgment requiring the invader to surrender the substance.

A judgment for the value of the oil fits the third purpose only. This result is inconsistent with the notion that oil is initially allocated upon occupancy in favor of the actor. Also, a judgment for the value of the oil less the expenses of obtaining it would reflect the third purpose; money as a substitute for the recovery of the substance itself, with the deduction of expenses being made to prevent bestowing unjustified enrichment of the plaintiff. This formula of value of the substance less the expenses of obtaining might also be justified if there is sufficient bad faith on the part of
the invader to warrant the conclusion that he should not profit from his wrong; therefore compensation should be measured by the extent of the enrichment without regarding the nicety of limiting the compensation to the demonstrable loss. This may be the theory behind the remedy of an accounting in some cases.

The amount of a judgment pursuing either the first or second purpose would have the loss or impoverishment suffered by the one whose space has been invaded as a limiting factor. By excluding the idea that he is entitled to the oil itself, only this remains. It then becomes a matter of ascertaining the loss. He has not been deprived of oil concerning which he had any claim. What he has been deprived of is the chance of exploiting his space in order to obtain oil. It is the chance of getting the oil and not the oil as substance which he has lost. This chance, this exercise of his claim to his space, has value and this value follows as the measure of his judgment.

**FUNCTIONS OF ACCESSION**

Since accession and occupancy have roles as an initial event in the legal history of substance it might also be well to consider the function of accession as an intervening event that changes the prior condition of conflict resolutions.

Accession has two distinct operating areas:

1. As an initiating event or a non-transfer situation, since there is no previous legal history and therefore claims to the thing can achieve recognition without the necessity of terminating prior claims;
2. As an intervening event of a transfer situation where there is a previous legal history, therefore the recognition of new claims necessitates the termination of prior claims.

These two areas in which accession operates can be illustrated by considering what happens with reference to alluvial accretions as they occur along a navigable river. The claims that are created by the dictates of Article 509 of the Louisiana Civil Code illustrate both transfer and non-transfer accession. The space that was occupied by the river in 1812 was allocated at

6. **La. CIVIL CODE art. 509 (1870):**

The accretions, which are formed successively and imperceptibly to any soil situated on the shore of a river or other stream, are called alluvion.

The alluvion belongs to the owner of the soil situated on the edge of the water, whether it be a river or stream, and whether the same be navigable or not, who is bound to leave public that portion of the bank which is required by law for the public use.
the time to Louisiana. The riparian owner acquired his claims to space at some other time with one boundary of his space designated as the ordinary low watermark of the river: thus a natural phenomenon was used to define the limits of a space allocation. There are two objects of allocation involved here: the substance which is the silt that builds up at the river's edge and the space which it occupies.

The substance before it became dry land in the alluvial buildup consisted of particles of sediment in the river. In that condition, the substance had too tenuous a connection with society to be the object of conflicting demands and hence had not yet become an object of allocation. As these particles attach to the river bank and become perceptible as land they first become objects for initial allocation. At that point they have settled in space that is allocated to Louisiana but are adjacent to space that is allocated to the riparian owner. One solution would be to say that the substance is allocated to the one (Louisiana) in whose space nature first settles it as an object for potential allocation. This, however, would be a solution that is irrelevant to all the considerations that went into establishing the boundary between Louisiana's space and the private person's space as the river line. Article 509 reflects the determination to make the initial allocation of the substance to a person on the basis of his claim to old substance to which the new substance has become attached. The riparian owner is allocated the mud as substance with no necessity for terminating claims to that substance since there were none. This is non-transfer accession.

There is transfer accession with regard to the space. The riparian owner not only gains the substance but he also must gain the space or else there would be the anomalous result of his being allocated the mud-substance in space that was allocated to Louisiana. In the gaining of space by the riparian owner, Louisiana’s claims to that space are terminated. Thus there is an initial allocation of substance while there is a transfer of the space it occupies.

When allocation occurs initially it contains the concept of continuity. The person favored by the allocation will continue to have the protections that constitute the allocation until something happens to justify withdrawing those protections. Accession has the dual role of commencing allocation—the substance of the alluvial buildup—and defining an event that will terminate extant claims, that is Louisiana’s claim to the space occupied by the alluvial buildup.
Accession and Occupancy

Accession gives and accession takes away. For an initial allocation of a particular substance it is possible to give without the necessity of taking away. Where the thing has already been allocated the giving makes necessary the taking away.

While this may be true in the areas where accession operates it is not a logical necessity for there are situations where new claims can be created without destroying the old. The standard illustration is a thing which is lost. The finder acquires no claims vis-a-vis the existing claimant. As to all other persons though the finder receives protection from the legal system. The protections for the loser are unaltered. As far as he is concerned the legal reality remains the same. It is only the physical reality that has changed that through the physical inability to connect the loser to the lost thing so that he might enjoy the protections the legal system extends to him with respect to that thing. Concerning the finder, the legal system extends to him a newly created protection upon the act of finding. It is not an initial allocation of the thing but it is a creation of new claims without terminating the old claims.

There are three categories of things in which new claims can be created without the termination of old claims.

1—Things which have already been the object of allocation but the claims that exist cannot be enjoyed because the thing is lost; or the claims which evolved from the initial allocation have been voluntarily relinquished, the thing having been abandoned.

2—Things which prior to the time of allocation had no existence. Upon the thing’s coming into palpable existence the legal system is called upon to make allocation. These are the things with relatively short physical histories, plant and domestic animal substances.

3—Things which exist prior to the need for their allocation but since they are beyond immediate control of anyone are only potentially the objects of conflict. These are the substances that have spatial mobility: liquid, gaseous and wild animal substances.

Generally speaking accession determines the allocation of claims to the second category while occupance determines the first and the third. There is a single instance in the Civil Code, Article 3423, in which an allocation is effected simultaneously by

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Although a treasure be not of the number of the things which are lost or abandoned, or which never belonged to any body, yet he who finds it on his own land, or on land belonging to nobody, acquires the entire ownership of it; and should such treasure be found on the land
occupancy and by accession. Where the thing with which the claims are concerned is treasure and is found by one person in space allocated to another person, each is given one-half. The finder receives his claim as a result of his activity, finding, hence occupancy. The claimant of the space receives his claim as a result of his pre-existing claim to the space, hence accession.

Application of article 3423 provides an illustration of a classification process. Classification processes and the reasons dictating their use are often critical in resolving conflicts over things. As a result classification process plays a significant role concerning transitions in allocations. The classification process involves determining whether a particular thing falls into a given category or not. In this instance a thing is either treasure or it is not treasure. Focus should always be made on the reason for engaging in the classification process in settling a conflict. This is often not done with the result that clarity in explicating the justifications for the conflict resolution is often lacking. Here the purpose of engaging in the classification process of treasure/not treasure is that the application of Article 3423 and hence the claim of the space claimant to half the thing is dependent on the determination that the thing in question is in the treasure category.

One requisite for classifying a thing that is the object of contention as treasure is that the thing be lost. It is a thing that if the prior claimant could be identified the legal system would recognize the pre-existing claim and the finder and the claimant of the space where the thing was found would have no claims vis-a-vis the holder of pre-existing claims. The classification process of whether a thing is treasure or not has relevance only in determining whether claims arise in favor of the one in whose space the thing was discovered. It is necessary only in resolving conflicts over the thing between the space claimant and the finder and not persons whose claims pre-date the act of finding.

True classification asks whether the thing is treasure or not treasure. Commonly treasure is treated as a species of lost things and the question is stated as one of whether the thing is treasure or a lost thing. If it is treasure, the space claimant receives half. If it is a lost thing, the space claimant gets nothing and the finder gets all. This is the reason for this classification of a thing as treasure in of another, one-half of it shall belong to the finder and the other half to the owner of the soil.

A treasure is a thing hidden or buried in the earth, on which no one can prove his property, and which is discovered by chance.
Louisiana; it is solely a question of whether Article 3423 applies in order to benefit the space claimant.

Perhaps it should be noted in this connection that for a thing to be treasure it must be found buried in the ground and this concept excludes substance which is in its natural state at the time it was discovered, for if it is solid substance in its natural state then its allocation follows that of the space it occupied, while if it is liquid or gaseous substance in its natural state its allocation occurs upon occupancy as previously discussed and not through the mixture of occupancy and accession in Article 3423.

A further clarification of the role of treasure classification might be made by referring to that classification process in Anglo-American doctrine since in Louisiana we are frequently exposed to that terminology in action. In England if a thing that is found is determined to be treasure then it is regarded as having been allocated to the crown at some prior time, probably when it became impossible as a practical matter to identify the pre-existing claimant to the thing. In other words, a person who finds treasure merely finds something that has already been allocated to the crown. In England the treasure classification process had its role in resolving conflicts over a thing between the finder and the crown. The finder of a thing received claims to the thing against all persons "save the true owner" if it were merely a lost thing, but if the thing were treasure then the finder received claims only against all persons "save the true owner and the crown." Generally, in the common law states of the United States, there is no doctrine that dictates that treasure is allocated to the state and therefore the role of treasure classification has disappeared. At common law treasure classification pertained to claims of the crown while in Louisiana treasure classification pertains to claims of the owner of the space in which it was found. The reason for treasure classification has disappeared in common law states while it remains in Louisiana.

The statement that the role of treasure classification has disappeared in common law states may be inaccurate as are so many broad generalizations. Where there are statutory provisions requiring a finder of a lost thing to advertise the fact of finding, the requirement has been regarded as having the effect of precluding recognition of any claims on behalf of the finder by the legal system unless the finder does so advertise. Along this line of reasoning the treasure classification assumes a new role. In this role there is not the question of whether the thing is treasure or not treasure but rather whether the thing is a lost thing or not a lost thing within the meaning of the statute.
This approach defies the inescapable idea that treasure is a species of lost things but it does accord with a common sense notion that the reasons for requiring advertising do not apply to treasure since in the usual signification of the term the claimant to the thing and the thing have been so long parted that there is no possible way of getting them back together. Following this, treasure is not a lost thing and if a finder of a thing seeks recognition of a claim to the thing as a result of the act of finding, without having fulfilled advertising requirements, he might achieve this recognition by having it determined that the thing is treasure and hence not a lost thing. This type of analysis has no relevance in Louisiana since, although Article 3422 requires advertising the fact of finding, the consequence of failure to advertise is to retard the commencement of the ten year prescriptive period. The finder receives protection with respect to the thing against everyone but the pre-existing claimant. The pre-existing claimant’s protection with respect to the thing is not lost by his losing the thing. He may regain it at any time he learns its whereabouts. After the thing has been found the protection which enables him to reclaim the thing continues as against the finder. If the finder advertises and ten years elapse this right by the loser then prescribes, hence the loser cannot regain the thing and the protection afforded him by the legal system is at an end. If the finder fails to advertise, prescription does not run and the loser continues to be protected after ten years from the date of finding. Where the thing is treasure in its ordinary meaning the loser is so far removed in time from the event of the loss his or his heirs’ reappearance is of such a remote possibility that the need for the beginning of the running of prescription is of no practical significance and is not worth the price of the advertisement.

**Occupancy and Possession**

In comparing the concept of accession with that of occupancy it is interesting to note their respective locations in the organization of the Civil Code. Accession appears as a central part of Book II—*Of Things*. Occupancy appears in Book III—*Of the Different Modes of Acquiring the Ownership of Things*. Both concepts

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If he, who has found a movable thing that was lost, having caused it to be published in newspapers, and having done all that was possible to find out the true owner, can not learn who he is, he remains master of it till he, who was the proper owner, appears and proves his right; but if it be not claimed within ten years, the thing becomes his property, and he may dispose of it at his will.
involve means of acquisition of claims to things. Book II formulates the means whereby allocation has been accomplished by setting forth the protections one receives to space and substance. Accession is perceived as one of these protections in the sense that protections afforded with respect to a thing may include also protections with respect to things that come in contact with it and hence the protections will be extended to the new thing as well as the old. Acquisition is attendant on existing allocation. Occupancy concerns activity whereby one acquires. The event and not previous allocation determines the recognition of new claims and occupancy is one of the several categories of events that result in the recognition of claims through altering the chain of conflict resolutions.

Immediately following occupancy in the Civil Code is the twin concept of possession. Although the two terms may seem to be used interchangeably and the physical events encompassed by the two terms may be regarded as being, for most purposes, identical; the two concepts have different roles. Occupancy involves claim creating activity. Possession is primarily a claim frustrating event.

In one signification of the term, possession refers to an event in the physical history of an object. Involved in the physical history of an object are the object itself, other objects, persons and space. The events in the physical history of the object involve changes in the object itself, connection of it to other objects, movement of the object with respect to persons, movement of persons with respect to the object, and movement of the object through space. When the object is space itself then it does not move through space or with respect to persons nor does it change. The primary events in the physical history of a given space as an object of allocation are the movement of persons or things through it. Possession as a physical event in the history of the object refers to a situation in which the object’s juxtaposition to one person is in such a fashion that if others need or demand the use of the object they must take the initiative and obtain the “possessor’s” cooperation. If the possessor is one in whose favor conflict over the object will not be resolved, the nature and the effect of the event described as “possession” is to leave the other person, the one in whose favor the conflict would be resolved, in the position of having to take the initiative and enlist the aid of the legal system’s institutions in order to compel the possessor’s cooperation.

The physical event described by possession may also be a
significant event in the legal history of the object. Article 3412, in stating, "Occupancy is a mode of acquiring property by which a thing . . . becomes the property of the person who took possession of it . . ." recognizes "possession" as a physical event and "occupancy" as a legal event in the history of the thing. As a result of the physical event having occurred a legal event is also precipitated. Upon the occurrence of the physical event, a new outcome to conflict resolution with respect to the object is brought about through the application of the doctrine of occupancy. Occupancy is therefore identified with a claim creating event. As indicated previously it does not operate to diminish claims that existed prior to the occurrence of the event. It serves to recognize a new winner in a conflict over the object in a circumstance in which it is not necessary to demote anyone from a previous position of ascendancy.

The chapter of the Civil Code on possession is descriptive of the physical event. The materials contained therein do little to delineate a legal event that might be precipitated by the physical event. The physical fact of possession by one in whose favor conflicts over the object would be resolved independently of possession adds nothing to the legal history of the object. The potential for the physical event of possession leading to a change in the legal history occurs when possession is by one in whose favor conflicts over the object would not be resolved. Possession arising in one who would lose a conflict over the object has the following effects in precipitating legal events in that it may change conflict outcome:

1—Article 3434 declares that, "possession implies a right and a fact." This suggests that the thing possessed has both a legal and a physical history and while it does not in itself effect a legal change as a result of the physical change, it does recognize that as a practical matter, stated as a presumption or otherwise, if the facts that pertain to the physical and legal history of an object in contention cannot be

9. L.A. CIVIL CODE art. 3412 (1870):
   Occupancy is a mode of acquiring property by which a thing which belongs to nobody, becomes the property of the person who took possession of it, with the intention of acquiring a right of ownership upon it.

10. L.A. CIVIL CODE art. 3434 (1870):
    Since the use of ownership is to have a thing in order to enjoy it and to dispose of it, and that it is only by possession that one can exercise this right, possession is therefore naturally linked to the ownership.

    Thus, possession implies a right and a fact; the right to enjoy annexed to the right of ownership, and the fact of the real detention of the thing that is in the hands of the master or of another for him.
demonstrated, the result will be that the possessor wins. Stated another way, where the history of the object is not revealed, the legal reality is as a practical matter the same as the physical reality.

2—Article 3453, although not aimed at bringing about a change in the way conflicts will be resolved over the thing possessed, does provide that if the possessor is in good faith the outcome of conflicts over fruits, or new things subject to allocation through accession, will be altered in favor of the possessor.

3—Article 3454 brings it about that a possessor, after the physical event has had a one year duration, will have conflicts over the thing resolved in his favor in conflicts with everyone except the person who would have been favored in conflicts prior to the event.

Essentially, possession, as distinguished from occupancy, is a physical event and has only a minor role in altering conflict outcome directly. Possession, therefore, does not of itself precipitate a legal event except insofar as possession as a physical fact triggers the claim creating doctrine of occupancy. Except in situations in which occupancy operates, that is those in which termination of pre-existing claims is not necessary, possession frustrates claims rather than establishes them. In this context possession is an event in the physical history of an object that brings about divergence between the physical reality and the legal reality concerning the object. The possessor is, by definition, the one who has access to the object to the exclusion of others. Prior to the event that is the possession under consideration there was a person in whose favor conflicts over the object would have been resolved. In other words, the legal system had protected him in his access to the object. Since possession does not of itself alter the

11. LA. CIVIL CODE art. 3453 (1870):
The rights, which are peculiar to the possessor in good faith, are:
1. The right which such a possessor has to gather for his benefit the fruits of the thing, until it is claimed by the owner, without being bound to account for them, except from the time of the claim for restitution.
2. The right which such a possessor has, in case of eviction from the thing reclaimed, to retain it until he is reimbursed the expenses he may have incurred on it.

12. LA. CIVIL CODE art. 3454 (1870):
Rights, which are common to all possessors in good or bad faith are:
1. That they are considered provisionally as owners of the thing which they possess, so long as it is not reclaimed by the true owner or person entitled to reclaim it, and, even after such reclamation, until the right of the person making it is established.
2. That every person who has possessed an estate for a year, or enjoys peaceably and without interruption a real right, and is disturbed in it, has an action against the disturber, either to be maintained in his possession, or to be restored to it, in case of eviction, whether by force or otherwise.
3. That such a possessor may, by prescription, acquire the property of the thing which he thus possesses, after a certain time, which is established by law according as he has possessed in good or bad faith.
conflict outcome, one person has access to the object while another is entitled to it. The physical reality and the legal reality will converge again when the one entitled assumes the initiative and enlists the aid of the legal system's institutions in compelling the possessor to relinquish access to the one so entitled. This compulsion, this return to equilibrium reflects an expenditure of energy by the system. There is a social cost involved.

TENSION

At this point I would like to introduce a tool of analysis which I call "tension". This concept depends upon the recognition, such as occurs in Article 496, that there exists a physical reality and a legal reality. The two realities may or may not coincide. When they do coincide the condition may be said to be one of equilibrium. When they do not coincide the condition is one of "tension."

The physical reality with respect to an object consists of where the object is in respect to persons, or where persons are in respect to the object so that a person is actually in a position where he can use and exploit the object and other persons are not. It is a matter of identifying the way things actually are among persons with respect to an object. The legal reality pertains to the result the legal system will bring about among persons with respect to things if called upon to do so. It is found in the way the legal system's institutions resolve conflicts over the object. The method of rational conflict resolution that avoids arbitrariness relates to the legal history of the object in conflict. The legal history consists of a series of legal realities with respect to the object which is the way a conflict over the object would have been resolved at each moment in time in the past. A change in conflict outcome from one moment to the next without a justifiable reason for the change would make the changed outcome arbitrary. The rational element in conflict resolution is found in the continuity and consistency of the condition of conflict resolution over each successive moment in time in the absence of an event that has general recognition as a justification for the change.

13. LA. CIVIL CODE art. 496 (1870):

The ownership and the possession of a thing are entirely distinct.
The right of ownership exists independently of the exercise of it. The owner is not less the owner because he performs no act of ownership, or because he is disabled from performing any such act, or even because another performs such acts without the knowledge or against the will of the owner.

But the owner exposes himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person for a time sufficient to enable the latter to acquire it by prescription.
It is only because the legal system will intervene in human affairs with respect to the enjoyment of a thing that there can be said to be tension. The process of intervention involves a cost in social energy. Balanced against the cost is a social gain which can be identified in terms of effective and orderly allocation of the resources that fulfill human needs and hence a measure of social equilibrium. The intervention is the means of allocation.

Resolution of tension involves an expenditure and is brought about by the person for whom the legal reality is preferable to the physical reality taking the initiative and calling on the legal system to make the physical reality conform to the legal. When the two are made to conform equilibrium with respect to the object is accomplished. On the other hand, tension that remains unresolved has its own costs. That it is generated at all by the legal system reflects recognition of a purpose to be achieved by doing so. The starting point in recognizing that tension has a purpose is in identifying it as the means of accomplishing allocation. Each time tension occurs where equilibrium existed there is some discoverable purpose being carried out. Conversely there are circumstances in which it may be said that the cost of unresolved tension is too great. Where these circumstances occur tension may be resolved by altering the legal reality to conform to the physical reality. This is accomplished by recognizing the circumstance in which the cost of maintaining tension is too great and finding in that circumstance the justification for altering the outcome of conflict resolution with respect to the thing that otherwise would be the object of tension. Accession and prescription provide two examples of doctrinal devices that identify circumstances in which maintenance of tension is too costly.

Each such problem may be analyzed by recognizing that a social interest would be served by maintaining tension. It should be further recognized that there are also interests that suffer as a result of the existence of tension. The problem then becomes one of which interest is to prevail. The Civil Code contains numerous devices that are designed to strike a balance. Prescription can be used as a model here. There is a starting point at which the person entitled to the thing in question has the thing. Tension is created by the thing passing from the control of the one entitled to a person who is not entitled to it. Maintaining tension here is the means whereby the legal system accomplishes the basic allocatory function. The one entitled to the thing could regain it and hence resolve the tension by taking the initiative and obtaining the aid of the legal system in
compelling the restoration of the thing. Until this is done there are social interests that suffer as a result of the existence of tension, one of the most apparent being those interests that are served by commerce in the thing. The establishment of a prescriptive period reflects a determination that maintenance of tension beyond the duration of that period is too costly to those interests that suffer from the existence of tension. By the same token the interests that are served by the maintenance of tension are recognized by the extent of the prescriptive period. A careful balance is struck and the expiration of the prescriptive period is recognized as an event that justifies changing the outcome of the conflict. At the end of the period the legal reality is altered to conform to the physical reality and in that way tension is resolved.

Another example is provided by the operation of the doctrine of accession in the situation in which two things to which two different persons are entitled are combined in such a fashion that their separation would involve economic waste, the combination being more valuable than the sum of the values of the two things separated. The basic allocatory function is served by maintaining the continuity of the condition of conflict resolution and allowing the person who lost control of his object to regain it. On the other hand, the economic waste that would result has been regarded as too costly and hence accession identifies an event that is a justification for altering the outcome of the conflict, that is, the placing of the thing in combination with another thing. This solution does not treat all the tension involved as too costly. It is only the economic waste that tilts the balance since conflict resolution is altered to favor the one who contributed the principal thing, not necessarily the one who is in control and hence favored by the physical reality. This device resolves tension only to the extent necessary to prevent the economic waste and no more.

Tension can be brought about in two ways:

1—From a state of equilibrium the physical reality of the object is changed without an equivalent alteration of the legal reality.
2—An event occurs which alters the legal reality but there is no accompanying equivalent change in the physical reality.

Where there is movement with respect to the object so that it passes from the control of one person to the control of another tension is recognized and maintained by the legal system in performance of the basic allocatory function. The object passed from the control of one person to another without the intervention
of an event which justifies alteration in the outcome of conflict over the object, therefore, tension is necessary if arbitrary conflict resolution is to be avoided. It can be that the movement of the thing is totally unaccompanied by an event that would alter conflict outcome therefore the physical reality changes and the legal reality remains the same. On the other hand, it is also possible that the physical change is accompanied by an event that alters the legal reality but does not alter it to the same extent as that of the physical change. In this case physical and legal changes occur together but since the extent of the two changes are not precisely equivalent a discrepancy between the physical reality and the legal reality results.

Where an event occurs that alters the legal reality but is unaccompanied by an equivalent change in the physical reality, the recognition and maintenance of tension by the legal system finds its justification in whatever interests are served in treating the event as one that alters the outcome of conflict over the object. In other words, an event occurs that justifies the alteration of the outcome of conflicts over a certain object. That event is unaccompanied by a commensurate physical change with respect to the object. Whatever policies are served to justify recognition of the event as one that alters conflict outcome by the legal system is likewise the justification for the maintenance of tension with respect to the object.

The decision or exercise of will of a person in whose favor conflicts over an object would be resolved to the effect that conflicts should no longer be resolved in his favor but in favor of another is the most frequent event that results in the alteration of the outcome of conflicts. The variety of claims on the legal system to give effect to human decisions or exercises of human will justify treating an act of will as an event that alters conflict outcome. The same interests that are served thereby are also served by the maintenance of tension.

As an example consider a sale. Before the contract of sale is perfected it may be assumed that there is equilibrium if the seller has the object of the sale and is the only person to whom the legal system will extend protection with respect to that object. During the period between the time the contract of sale is made and the delivery of the object to the buyer there is tension. The event that creates the tension is the will of the seller. In the case of the sale tension arises at the moment the legal system will take from the seller and give to the buyer the thing that is the object of the sale. At
that point the legal realities with regard to the thing cease to coincide with the physical realities. The buyer receives protection with respect to the thing. The buyer's claim to the thing can only be realized through the seller's cooperation. The creation of the buyer's claim to the thing is the result of the legal system's giving effect to the voluntary choice of the seller in this instance.

One point that should be noticed in this connection is that tension arises at the moment of sale because the legal system will take the thing itself away from the seller and give it to the buyer. This is to be distinguished from the legal system's attaching monetary consequences to the non-cooperation of the seller. In the terminology of contractual remedies the contrast is between specific performance and money damages. The moment of contractual commitment relates to the moment that the seller's non-cooperation will result in a monetary award to the buyer against the seller. Tension, on the other hand, by definition is created when the legal system is responsive to a demand with respect to the thing itself.

Analysis concerning problems of allocation, which are in their essence conflicts over things which are the objects of allocation, is aided greatly by concentrating on the notion that the struggle is over the thing. The model conflict is one in which the persons involved are struggling tooth and nail over the right to use and exploit the thing itself. Money judgments in favor of one and against the other are of secondary consideration. Allocation concerns what the legal system will do for a person with respect to a thing. Tension describes the condition of discrepancy between what the legal system will do with respect to a given thing and what is actually being done with the thing.

In the sale there is tension between the time of contracting and the time of delivery because, and only because, the legal system will intervene to take the thing away from the seller and give it to the buyer. If the legal system will not do this but rather limits the buyer to money damages there is no tension with respect to the object of the sale in an allocatory sense.

In this connection further illustration may be gained by comparing the legal system in Louisiana with common law legal systems in regard to a sale on credit. The credit sale is one in which the buyer's obligation to pay the price arises at some time after delivery. During the period of time between delivery and the payment of the price there is tension with respect to the object of the
sale in Louisiana since the seller may have the sale resolved and regain the thing. No tension exists with respect to the thing at common law during the period between delivery and payment since the seller is limited to a money judgment for the price and the legal system will not intervene to allow him to regain the thing.

Delivery reflects the physical movement of the object of the sale from one person to another. In the common law solution to post delivery conflicts no tension exists since the physical movement of the object coincides precisely with the transition in claims to the object which are a function of the effect which the legal system gives to the will of the seller. In Louisiana, however, because of the implied resolutory condition which is read into the expression of the will of the seller the physical transition brought about by the delivery of the object is greater in scope than the transition with respect to the claim to the thing. The change in the physical reality is more extensive than the change in the legal reality since the seller retains the right to regain the thing. He still has a certain amount of protection from the legal system with respect to the thing, even after delivery. As a result the two realities do not coincide and there is tension with respect to the thing.

Under the Louisiana Civil Code tension exists with respect to the object of the sale from the time the contract is perfected by agreement on the thing and the price until delivery is made and the price is paid. This reflects an idea about the content of the wills of the seller and the buyer and the value placed on giving effect to their wills. This value justifies the maintenance of tension throughout the period. The interests that are served by commerce, however, suffer from the maintenance of tension. The point at which the maintenance of tension becomes too costly are identified and recognized as justification for altering the conflict outcome. During the period between contract and delivery, Article 1922\(^4\) treats the tension as too costly when a third person purchases and takes delivery of the thing from the seller. The conflict resolution over the thing in favor of the original buyer is altered by this event and the tension is thereby relieved.

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With respect to movable effects, although, by the rule referred to in the two last preceding articles, the consent to transfer vests the ownership of the property in the obligee, yet this effect is strictly confined to the parties until actual delivery of the object. If the vendor, being in possession, should by a second contract, transfer the ownership of the property to another person, who gets the possession before the first obligee, the last transferee is considered as the owner, provided the contract be made on his part \textit{bona fide}, and without notice of the former contract.
payment of the price, Article 2561 of the Louisiana Civil Code gives the seller the right to sue for the dissolution of the sale and regain the thing, hence tension continues until the price is paid. The intervention of the interest of a third person again makes the maintenance of tension too costly and the possibility of a conflict outcome in the seller’s favor is thereby altered.

In the legal systems of the common-law states the same value is not attached to giving effect to the will. Under the Uniform Commercial Code tension is maintained from contract to delivery only where there is special justification. Tension is avoided in most sales by confining the buyer to money damages and there is no longer a need or disposition to make the intervention of the interest of a third person purchasing from the seller the event that makes maintenance of tension too costly and hence a justification for altering conflict outcome. As to the period between delivery and payment of the price there is no recognition of an implied resolutory condition, therefore, there is no post-delivery tension arising from the contract of sale itself. On the other hand post-delivery tension can be precipitated by an agreement whereby the buyer gives the seller a “security interest”. The technique of the U.C.C. is to identify certain circumstances where the tension is too costly and is resolved by the intervention of the interests of particular classes of third persons, if and only if, the tension creating transaction is not appropriately registered.

The significance of registration serves as a reminder that when the object of allocation is space there is a second physical reality and that is one of documentation and registration. This is so because of the effect the legal system gives to documentation and registration with respect to immovables. In choices made respecting the legal realities concerning immovables, consent alone often does not suffice but rather the documentation of that consent is what the legal system responds to. Furthermore, claims with respect to immoveables depend upon registration for their durability. Registration requirements dictate that existing claims may be lost if not registered. Since the documents are objects of human perception they constitute a physical reality. Since the legal

15. LA. CIVIL CODE art. 2561 as amended (1924):
If the buyer does not pay the price the seller may sue for the dissolution of the sale. This right of dissolution shall be an accessory of the credit representing the price, and if it be held dy more than one person all must join in the demand for dissolution; but if any refuse, the others by paying the amount due the parties who refuse shall become subrogated to their rights.
system attaches significance to the documents in performing the allocatory function and will operate to compel the conformity of the documentary reality to the legal reality, then there may be said to be tension when the documentary reality does not conform precisely to the legal reality. As to space and its immovable contents equilibrium can exist only where the physical reality (the position of persons with regard to the space in question), the documentary reality and the legal reality all coincide.

In the sense that a document is empirically observable it has a physical existence. It does not, however, in itself affect the way things are used and enjoyed. Unlike the true physical reality which exists independent of and in spite of the legal system, the documentary reality finds significance only in the effect which the legal system gives to the presence or absence of documents. It is possible to say there is tension with respect to a document because the legal system will respond to a demand that the documentary condition be made to conform to the condition of the legal reality. The presence of a recorded document that does not reflect the legal reality can have substantial practical effect. The absence of a recorded document that is required to reflect the legal reality can have the effect of altering the condition of conflict resolution concerning the immovable object upon the intervention of a conflicting interest. In this situation the legal reality is altered to conform to the documentary reality. Expressions of human choice with respect to the condition of conflict resolution concerning an immovable thing may not be subject to demonstration if it is not reflected in documentary reality. The result here is that an outcome decided upon by human will is ignored by the legal system because of requirements concerning the way expressions of will must be proved.

The primary objectives which make the existence of tension necessary are the carrying out of the allocatory function and the giving of effect to the human will. On the one hand, the objectives that make tension necessary must implicitly be valued in order to determine at what cost it will be sustained by the legal system. In this connection, it may be subject to demonstration that the legal system places a higher value on the allocatory objective than it does on giving effect to human will. Tension that exists as a function of the mode of allocation will usually be sustained in the face of a greater conflicting interest than will tension that exists as a result of the effect that the legal system gives to human will. Nevertheless, the legal system attaches a high value to the giving of effect to will.
Since human choices, when they are given legal effect, determine the manner in which the condition of conflict resolution will be altered, the nature of the ensuing outcome of conflict and therefore the complexity of the state of tension brought about are limited only by the limits of human wish and imagination. The legal system may impose its own limits by refusing to give effect to will insofar as it relates to the outcome of a conflict over a thing. The resolution of a conflict over a thing has its own costs apart from the intervention of other valued interests. The complexity of conflict outcome adds to the cost of sustaining the resulting tension. One solution is to regard the cost as too great in itself and therefore ignore the demand that the will be recognized with the result that no tension is created by a choice that the legal system ignores. This should be the rare case. The usual technique is to give full effect to the will with its choice of outcome of conflict over the thing until the resulting tension collides with an intervening interest of sufficient significance to require the relief of tension at the expense of defeating the will. Many of the more difficult and subtle intellectual materials that are part of the legal system relate to making the valuation at the point of collision.

Human will or the choices made by persons as it pertains to things and their allocation reflects a decision that an existing condition of conflict resolution is to be altered, and that when altered, the new outcome will be in accordance with the decision made by the person who is exercising his will. To this extent the will becomes an event in the legal history of the thing. The will also encompasses the physical reality pertaining to the thing. Movement with respect to a thing may be either in accordance with or contrary to human choice. The way in which the will encompasses both the legal and the physical significantly affects the state of tension that is brought about by the legal system's giving effect to the will. The consent of the person may be directed toward physical movement concerning the thing and hence a change in the physical reality, and it may be directed toward a change in the way conflicts over the thing will be resolved and therefore a change in legal reality. Transactions are categorized by the way in which the will is applied to both the physical change and the legal change concerning the thing.

In the theft or loss of a thing there is consent to neither the physical nor a legal transition. In the sale of a thing the will is addressed both to the physical movement of the thing and to a complete alteration of the way conflicts over the thing will be
resolved. In the loan for use or the deposit of a thing the will encompasses the physical movement of the thing but is not addressed to an alteration of the way conflicts over the thing will be resolved.

In the pledge of a thing the will is addressed to both the physical movement of the thing and to an alteration of the way conflicts over the thing will be resolved. The transition in the legal reality contemplated is not complete as it would be in the case of a sale, however, since conflicts over the thing are to continue to be resolved in favor of the pledgor subject to the happening of a condition, that is the discharge of the obligation secured by the pledge.

The mortgage of a thing, space in the mortgage of immovables, contemplates no immediate alteration in the legal reality. The mortgage does contemplate a physical change upon the happening of a condition, that is a default in the obligation secured by the mortgage. By logical necessity, a person's decision to alter conflict outcome with respect to a thing must also involve a contemplation that there will be a right to a physical change with respect to the thing. Any appearance of a choice to have it otherwise would be strongly suggestive of a simulation which means that the appearance would not be the true choice.

Tension in its simplest form involves the situation in which one person has the thing which is the subject of tension and another person is immediately and unconditionally entitled to have it. The situation is one in which, if the one favored by the legal reality took the initiative, the other would be immediately compelled to relinquish the thing and the tension with respect to the thing would thereby be relieved. The state of tension is made more complex, however, when the possibility of accomplishing a release of tension is retarded by terms or awaits the happening of an event. In other words, the person who is in the position of having to take initiative, the one whose position is one of physical disadvantage when compared to his legal advantage, cannot immediately have the other compelled to relinquish the thing but must await the happening of an uncertain event or the expiration of a term. Pledge provides an example of a right to have a thing which must await the happening of an event. The event is the discharge of the obligation secured by the pledge. The happening of this event is a suspensive condition from the point of view of the pledgor concerning his right to have the thing. It is a resolutory condition from the point of view of the pledgee concerning his right to keep the thing. The lease of a thing is an illustration of the role of term in tension concerning a
thing. The lessor’s right to have the thing is retarded until the expiration of the term of the lease. The lessee in his right to keep the thing has the benefit of the term. Where term or condition are involved the protection with regard to the use of a thing passes sequentially.

Other factors lend complexity to the state of tension concerning a thing. The alteration in conflict outcome, particularly where the object is an immovable (space), may involve two persons contemporaneously exploiting the same thing for different purposes. Servitudes are an illustration of a circumstance in which the will is given effect in this regard. In the same vein, an altered condition of conflict resolution concerning a thing may have a negative aspect. The one favored may not have the right to exploit the thing himself but merely have the right that another person not exploit the thing in a certain manner.

In the simplest form of tension one person has the entire physical advantage and the other the entire legal advantage. One has no right to keep the thing and the other may have it immediately. Tension may be relieved in two ways. The person who has the legal advantage may take the initiative and thereby have the conformity of the physical reality to the legal reality compelled. If this is not done the legal reality may be altered to conform to the physical reality. This may happen when the state of tension collides with an intervening interest which may be considered to have a value superior to that of the objectives which gave rise to the tension in the first place. This collision provides the justification for an alteration of the condition of conflict resolution. When the alteration occurs the person who was favored in the preceding outcome, but not so favored in the altered outcome, suffers a diminution of his patrimony.

Tension in its simplest form, where it is direct and immediate, has the potential of being resolved at any time that the one who benefits by the legal reality takes the initiative. Complex tension where protection with regard to the use of a thing is sequential due to the presence of condition or term must involve a period of time in which it is not subject to immediate release. In this sense complex tension may be considered more costly than simple tension and therefore may be subject to release through alteration of the legal reality upon the intervention of interests of lesser value than would be required for a similar release of simple tension.

Alteration of conflict outcome with respect to a thing is of necessity at the expense of someone’s patrimony. When tension
collides with another valued interest and the solution adopted by the legal system is to eliminate the tension by altering the legal reality to conform to the physical someone must lose. Tension, by definition, involves the situation in which one person will have the advantage of a favorable conflict resolution if he takes the initiative. By the fact that the physical reality does not afford this person all that he is entitled to with respect to the thing in question he is the person who loses if no initiative is ever taken. In this sense he may be said to be on the short end of the tension. Furthermore, he is in a vulnerable position since, in any identification of a circumstance in which the cost of maintaining tension is too high and therefore the existence of an event justifying the alteration of conflict outcome is recognized, it is the person on the short end of the tension who stands to lose. Any initiative he might take thereafter would be unavailing.

**Fruits and Accession**

Susceptibility to special movement and lack of temporal permanence are both factors in determining the method by which the legal system may initiate the legal history of a given object. It has been previously discussed how susceptibility to spatial movement affects the determination of the conditions of initial allocation of a substance. Some insight into the effect of temporal impermanence on the problem of initial allocation of a substance is also useful. The substance that epitomizes the condition of temporal impermanence while at the same time is not subject to independent spatical movement is that which is derived from plant life. The economically significant substances of this sort are trees and crops.

Of necessity vegetable matter comes into existence within a given space. The space itself is initially allocated by a specific act of sovereign will in favor of a designated person. It may be recalled that when a representative of the sovereign issues a patent to Mr. X, Mr. X receives protection from the legal system with respect to the space defined in the patent. It is also possible to say that the decision attributable to the sovereign, to initiate protection in favor of Mr. X with regard to the space was, in addition, a decision to initiate in his favor protection with regard to some of the substance then contained in the space. The trees existing within the space at the time the patent was issued to Mr. X were solid matter attached to the ground and subject to being moved only as a result of human activity carried on within Mr. X’s space. As long as those trees remain in his space the protection he received with respect to the space as a result of the patent is sufficient since, for a completely
static substance, substance protection which is in addition to space protection is redundant. It can be said that not only are conflicts over the trees resolved in Mr. X's favor simply because they are in Mr. X's space but they are resolved in his favor with respect to the trees themselves, apart from the space protection. Movement of the trees outside of the space will not in itself alter the way conflicts over the trees will be resolved. The issuance of a patent is an event that alters the condition of conflict resolution with the respect to the space. From that moment conflicts over the space will be resolved in Mr. X's favor. It is also an event that alters conflict resolution with respect to the trees in the space. From the point of view of the present it can be said that very old virgin timber was initially allocated at the same time and as a result of the same event through which the space it occupied was allocated.

This cannot be said for trees and other vegetable matter that grew after the initial private allocation of space. They could not have been allocated to Mr. X directly by the patent since they did not exist. Their initial allocation is determined by a general doctrinal provision found in Article 499.\textsuperscript{16} The effect of Article 499 is that upon such substance’s coming into existence conflicts over it are to be resolved in the same way that conflicts over the space in which it grows are resolved. Mr. X received claims to the old trees through a specific act of sovereign will; he receives claims to new vegetation through the operation of Article 499.

Article 501\textsuperscript{17} provides that newly cultivated vegetation will be allocated in the same way the space in which it grows is allocated no matter who planted and cultivated it. If someone other than Mr. X cultivated the new growth it is nevertheless allocated to Mr. X, however, Article 501 does impose on Mr. X the obligation to pay the one who cultivated the expense of cultivation. It is not clear whether this is simply an obligation to pay money imposed on Mr. X in favor of the cultivator or whether conflict resolution in Mr. X's favor over the vegetable substance is conditioned upon his payment of the obligation. In other words it is not apparent from

\textsuperscript{16} \textit{La. Civil Code} art. 499 (1870):
Fruits of the earth, whether spontaneous or cultivated; civil fruits, that is the revenues yielded by property from the operation of the law or by agreement; and the young of animals belong to the owner by right of accession.

\textsuperscript{17} \textit{La. Civil Code} art. 501 (1870):
The fruits produced by the thing belong to its owner, although they may have been produced by the work and labor of a third person, or from seeds sown by him, on the owner's reimbursing such person his expenses.
the statement of Article 501 that conflicts over vegetable substance planted and cultivated by a person other than Mr. X are to be resolved in exactly the same way that conflicts over the space are resolved. A condition in Mr. X's right to the substance could be inferred from Article 501, while there is no condition involved in resolving the conflict over the space. Given such a condition there would be tension with respect to the substance. If the cultivator is in control of the substance, it may be that Mr. X's right to an immediate favorable resolution is suspended by the non-payment of the cultivator's expenses. The other side of the coin would be that the cultivator has a present right to retain control of the substance which is subject to the resolutory condition of Mr. X's paying the money. On the other hand it may be that Mr. X's right to the substance is immediate and all the cultivator has is an action against Mr. X for the money. In that case the sole tension creating factor would be the physical control of the substance by someone other than the one legally entitled and the tension circumstances would not be complicated by the presence of a condition.

If Mr. X has control of the substance and the cultivator is the one who must take the initiative to realize that which he is entitled to, it is more probable that the extent to which Article 501 favors the cultivator is only an action against Mr. X for the expenses. In that case there would be no tension. Interpretation of Article 501 to further favor the cultivator with a claim to the substance would create tension where none would otherwise exist. The Civil Code as a whole reflects a policy of avoiding tension except where it is necessary in order to honor significant social interests. It would appear that the cultivator represents no interest of sufficient import to justify an interpretation of Article 501 that is not demanded by its direct language. To favor the cultivator in this way would have the effect of creating tension over a substance of a complex sort, resting as it does on conflicting claims which are dependent upon the happening of a condition.

The simplest and, perhaps, preferred interpretation of Article 501 is that no conflicting claims dependent on the happening of a condition are called for and Mr. X's claim to vegetable substance cultivated in his space by another is precisely equivalent to his claim to the space, while the cultivator is merely given an action against Mr. X for money. The equivalence of the claim to the substance to the claim to the space is the normal outcome of accession as an allocatory device.
The other acceptable interpretation would have application only when the cultivator was in control of the substance. There tension already exists. The cultivator's demand can be honored without creating tension but merely by adding to its complexity. If Mr. X is in control of the substance, all the cultivator would have would be his action against Mr. X for money.

The third possible interpretation is justified but not compelled by the language of Article 501. Acceptance of this interpretation would run counter to appropriate codal method in that it would attach significance to language of the article divorced from any consideration of how the solution selected from those that are possible is at odds with objectives pursued elsewhere in the code.

Article 502 deals with the situation where the new growth of vegetation occurs in a space where the space is the object of tension. The situation envisioned is one in which Mr. Y is occupying space allocated to Mr. X. Mr. X's position is one in which he could, if he took the initiative, regain the space and expel Mr. Y. As long as his condition persists there is tension with regard to the contents of the space as well as the space. If the normal accession result obtained, new plant growth during this period would be allocated in the same way the space is allocated, hence conflict resolution concerning the new substance would be in Mr. X's favor. This is the result that is reached if Mr. Y is occupying the space in "bad faith". Precise terminology of classification process would call for translating "bad faith" to "not in good faith". If on the other hand Mr. Y is in good faith Article 502 appears to effect an allocation of the new substance in his favor.

The classification process as it involves "in good faith/not in good faith" is called on for several purposes that affect the outcome of conflicts over things. The subject will be further discussed in a subsequent installment, but let it suffice here to say that for Mr. Y to qualify for the good faith category there must be a discrepancy between Mr. Y's state of mind with respect to the condition of allocation of the particular space and the legal reality with respect to that space. The errors that will so qualify Mr. Y are of a limited type as are the sources of information that led to his error. Also, the tension created by his occupying the space must not only be the tension created by his physical presence but there must be

18. LA. CIVIL CODE art. 502 (1870):
The products of the thing do not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor held it bona fide.
equivalent tension brought about by documentation and registration.

One of the primary interests to be served by resolving tension concerning vegetable substance at Mr. X’s expense is that much of the substance is likely to be put into the channels of commerce by Mr. Y. If the substance is allocated to Mr. X on growth there are no events brought about merely by placing the substance in commerce which would alter the conflict resolutions which are in Mr. X’s favor. The interests of commerce are served by making initial allocation to Mr. Y. These interests are no less if Mr. Y is in bad faith than if he is in good faith. A more likely justification for the Article 502 solution, which is an anomaly as far as initial allocations through accession go, is that Mr. X’s interest is not of sufficient import to justify maintenance of tension with regard to the substance. The plant growth was not in existence at the time tension concerning the space began therefore he is losing no substance that he had at that time. Given Mr. Y’s good faith, his condition is meritorious enough that when combined with the social cost and the commercial disadvantage of maintaining tension in Mr. X’s interest, the balance is tilted in Mr. Y’s favor.

Although Article 502 appears to allocate the new plant growth to Mr. Y, closer scrutiny makes one wonder if this is not an oversimplification. What is the condition of conflict resolution concerning new plant growth upon its coming into existence during the period of tension with regard to the space? Superficially it would seem from Article 502 that a conflict between Mr. X and Mr. Y over this substance would be resolved in Mr. Y’s favor. Article 503\(^{19}\) would seem to indicate, however, that if Mr. X initiates the conflict at the point in time when the new plant growth first comes into existence the conflict would be resolved in his favor since Mr. Y’s period of good faith would be at an end. Regarded in this light it would seem that the initial condition of conflict resolution with regard to the plant substance is in favor of Mr. X subject to a resolutory condition upon the happening of which he will not be able to obtain the substance. Mr. Y’s right to keep the substance vis-a-vis Mr. X is suspended until the happening of that condition. Tension with respect to the substance is released only

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19. L.A. CIVIL CODE art. 503 (1870):
   He is a bona fide possessor who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of. He ceases to be a bona fide possessor from the moment these defects are made known to him, or are declared to him by a suit instituted for the recovery of the thing by the owner.
upon the happening of that condition. Precisely what that condition is is not readily identifiable. It may be either the separation of the plant substance from the earth or its removal from Mr. X's space, probably the latter.

Up to this point the discussion has concerned vegetable matter that came into existence during the period of tension. What of plant matter that was in existence at the time the tension began? Is it within the reach of Article 502? The jurisprudence is neither clear nor consistent on this point, however, close analysis of the mode of allocation of the Civil Code would indicate that it is not. While the vegetable matter that grew in the space during the period of tension is allocated to Mr. X it is subject to the condition that Mr. X's claim will be terminated upon its being removed from the space by Mr. Y if he is still in good faith. Vegetable matter that already existed in the space had already been allocated to Mr. X through the force of Article 499. At the time Mr. X's claim to the substance was initiated it was not burdened with a condition that would terminate his claim. As to vegetable matter that grows during the period of tension, the initial allocation of the substance, insofar as it favors Mr. X, is made subject to a condition. It is one thing to have Mr. Y's presence in Mr. X's space limit the extent of new allocations of substance but it is quite another to have that presence alter allocations that have already been made.

In conflicts over substance other than plant matter which have been removed from a space during a period of tension those who have been in the position of Mr. Y and in good faith, have claimed the benefit of Article 502. Article 502 is not limited expressly to plant matter. It is, however, along with the other articles pertaining to the allocation of fruits through accession, limited to things that do not have a lengthy past physical history. These articles deal with the allocation of things as they come into existence. Mineral substances have physical histories that reach out millions of years. Their legal histories, in Louisiana particularly, are of recent origins. The solid mineral substances within a space were allocated along with and in addition to the space. The fact that a Mr. Y occupies the space and moves the substance out of the space does not change the existing condition of conflict resolution. The liquid and gaseous substances in a natural state have never been the object of allocation. When Mr. Y removes these substances their initial allocation occurs through occupancy and not through accession as qualified by Article 502.
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